

UNFAIR COMPETITION IN THE USE OF INTELLECTUAL PROPERTY OBJECTS: PROBLEMS AND WAYS TO PROTECT A TRADEMARK

INTRODUCTION

Intellectual property (IP) is one of the most valuable assets of any firm. However, in a world of widespread piracy and strong trends in the illegal use of intellectual property, the registration and protection of intellectual property is of strategic importance to reduce unfair competition.



In the context of the development of global markets, it is important for rights holders to have access to effective remedies not only in their own country, but also in foreign countries. The level of intellectual property (IP) protection largely determines the decision of copyright holders to enter foreign markets and transfer technologies to other countries. The total amount of investment is reduced in those jurisdictions where intellectual property rights are protected at a lower level. Thus, the protection of intellectual property rights at the international and regional level is closely linked to the global technological and cultural development in general, the creation, dissemination and use of existing and new proprietary technologies.



Content

About GRATA International	4
• Unfair Competition in the Use of Intellectual Property Objects: Problems and Ways to Protect a Trademark in Belarus	5
• Unfair Competition in the Use of Intellectual Property Objects:	11
• Problems and ways to protect a Trademark in Mongolia	
• Brand Protection in Unfair Competition in Russia (Samara)	15
• Brand Protection in Unfair Competition in Russia (Saint Petersburg)	19
• Unfair Competition: Problems and Methods of Trademark Protection in Uzbekistan	22

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250+
professionals



20
countries of presence



6000+
clients



11000+
projects

UNFAIR COMPETITION IN THE USE OF INTELLECTUAL PROPERTY OBJECTS: PROBLEMS AND WAYS TO PROTECT A TRADEMARK IN BELARUS



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In the course of carrying out its business activities, the company may face unfair actions of a competitor. One of the common methods of unfair competition is the illegal use by a competitor of a designation that is identical or confusingly similar to the trademark of another business entity. In Belarus, the prohibition on committing such actions is established in the civil and antimonopoly legislation.

The Civil Code of the Republic of Belarus (hereinafter - the Civil Code) stipulates that all actions that can in any way cause confusion in relation to legal entities, individual entrepreneurs, goods, works, services or business activities of competitors should be recognized as unfair competition (Article 1029 of the Civil Code).

This provision is disclosed in more detail in the Law of the Republic of Belarus dated 12.12.2013 "On Counteracting Monopolistic Activities and Development of Competition" (hereinafter referred to as the Law).

Thus, Article 28 of the Law states that unfair competition related to:

- the acquisition and use of the exclusive right to the means of individualization of participants in civil circulation, goods;

- the commission by an economic entity of actions for the sale, exchange or other introduction into civil circulation of goods, if at the same time there was an illegal use of the intellectual property object.

Article 29 of the Law is devoted to the prohibition of creating confusion with the activities of another economic entity or its goods.

According to the provisions of this article, actions related to the illegal use of a designation identical to the trademark of another economic entity or similar to them to the point of confusion are prohibited:

- by placing it on goods, labels, packaging or otherwise using it in accordance with the legislation on trademarks and service marks in relation to goods that are sold or otherwise introduced into civil circulation on the territory of Belarus; as well as
- by using it in the global computer network Internet, including placement in a domain name.

A similar rule is contained in paragraph 3 of Article 3 of the Law of the Republic of Belarus dated 05.02.1993 "On Trademarks and Service Marks" (hereinafter - the Law on Trademarks), according to

which the use of a trademark or a designation similar to it is recognized as a violation of the exclusive right to a trademark to the point of confusion, without the permission of the owner of the trademark, expressed in the commission of actions provided for in paragraph 1 of Article 20 of the Law on Trademarks in relation to homogeneous goods, as well as heterogeneous goods marked with a trademark recognized as well-known in the Republic of Belarus.

As actions of a competitor that violate the right to a trademark, which are listed in Article 20 of the Law on Trademarks, the illegal use of a trademark on goods and related documentation, in the performance of work and in the provision of services, in advertising, printed publications, on signs, is recognized, when demonstrating exhibits at exhibitions and fairs and on the global computer network Internet.

The following penalties may be applied to violators of the exclusive right to a trademark on the basis of Article 29 of the Trademark Law:

- removal at the expense of the offender from counterfeit goods, labels, packaging of an illegally used trademark or designation similar to it to the point of confusion, and if it is impossible to remove them, their removal from civil circulation and destruction;
- removal, at the expense of the infringer, of a trademark or designation similar to it to the point of confusion from materials that accompany the introduction of this product into civil circulation, the performance of such work and / or the provision of such services, including from documentation, advertising, printed publications, signboards, as well as from the global computer network Internet;
- compensation for losses or payment of compensation in the amount of up to fifty thousand base units (approximately more than 570,000 US dollars), determined by the court taking into account the nature of the violation, at the choice of the person whose right has been violated.

The suppression of actions that violate the exclusive right to a trademark and constitute unfair competition can be carried out in two ways:

- administratively: by filing with the Ministry of Antimonopoly Regulation and Trade of the Republic of Belarus (hereinafter - MART) an application for violation of antimonopoly legislation in terms of unfair competition;
- in a judicial proceeding: by filing a claim to the judicial collegium for intellectual property of the Supreme Court of the Republic of Belarus (hereinafter - the judicial collegium of the Supreme Court) for the suppression of actions that violate the exclusive right to a trademark.

When considering claims for the suppression of these illegal actions, the judicial board of the Supreme Court evaluates the totality of the following facts:

- homogeneity of goods / services of subjects;
- identity of designations or their similarity to the point of confusion.

When establishing homogeneity, the attribution of goods / services to a certain class of the international classification of goods and services (ICGS) is taken into account.

Evaluation of identity or confusion of designations is made on the basis of the overall impression. In this case, the formation of a general impression can occur under the influence of any features of the designation, including the dominant verbal or graphic elements, their compositional and color performance, and so on.

For this purpose, the following is analyzed:

- phonetic similarity, including the identity of sounds;
- the semantic (semantic) meaning of the compared designations;
- graphic (visual) similarity of designations;
- the possibility of mixing designations directly by the consumer (for example, from the data of sociological studies, surveys, questionnaires, etc.).

To reduce their own labor costs, save financial and time resources, for example, on paying state duties and court costs, persons whose rights have been violated by actions that constitute unfair competition often prefer to contact MART.

At the same time, when contacting MART, the following circumstances must be taken into account:

Firstly, the limitation period for recognizing a competitor's actions as unfair competition is 3 years from the date of the relevant actions (inaction), and in case of continuing violations - 3 years from the date of detection of such actions or their termination (if the action was terminated before detection).

Secondly, the fact of a violation of antimonopoly legislation in terms of unfair competition can only be established in relation to economic entities. MART does not establish the fact of the presence of these violations in the actions of individuals, with the exception of individuals registered as individual entrepreneurs or carrying out income-generating licensed activities.

Antitrust violations can be filed with MART in writing or electronically. The term for consideration of the application is 3 months from the date of its receipt, if its extension is not required. However, during the consideration of the application and before making a decision, MART has the right to issue a warning to a competitor in order to prevent illegal actions (inaction).

Based on the results of consideration of the submitted application, MART decides to establish the fact of the presence or absence of a violation of the antimonopoly legislation. On the basis of this decision, the antimonopoly authority has the right to issue an appropriate order to the violator. The decision taken by the antimonopoly body can be appealed in court within 30 calendar days from the date of its adoption.

At the same time, both when applying to the judicial collegium of the Armed Forces, and in the case of submitting an application to MART, it is necessary to collect and provide evidence confirming that a competitor has committed actions that constitute unfair competition and violate the exclusive rights to a trademark, and the better and If the evidence provided to MART is drawn up, the more chances for a positive decision on this issue are.

In accordance with the Methodological Recommendations for establishing the fact of the presence (absence) of a violation of the antimonopoly legislation in terms of unfair competition, approved by the order of MART dated September 18, 2017 No. 154, in order to establish the fact of unfair competition, it is required to prove the following set of signs:

- the presence of competitive relations in the commodity market between economic entities;
- the focus of actions on the acquisition of advantages (benefits) in entrepreneurial activity;
- the actions may cause or have caused losses to other competitors or may cause or damage their business reputation;
- contradiction of actions to the Law, other acts of antimonopoly legislation or requirements of good faith and reasonableness.

We propose to consider these signs using specific examples of decisions made by MART.

The first sign:

the presence of competitive relations in the commodity market between business entities. To establish it, it is required to determine the commodity and geographical boundaries of the market, as well as the period of time in which the entities carried out their activities.

Case 1

In the decision of MARCH No. 315 / 62-2020 dated 12/11/2020, it was established that there was no violation of antimonopoly legislation due to the fact that the person against whom the inspection was initiated and the applicant were not competitors in the same product market.

In this case, the organization "K" applied to MART with a statement of violation of antimonopoly legislation, as unidentified persons used photographs and video materials about the work of the Fitness and Yoga Center, owned by the organization "K", as an advertisement of their activities on the page on the social network Instagram.

It should be noted that all photo and video materials presented on this page have dates of placement presumably from 04/01/2019 to 03/17/2020. Moreover, the materials posted after 03/13/2020 do not contain the name of the organization "K".

During the consideration of the application, the potential belonging of this page to citizen P. was established, who in April 2020 registered as an individual entrepreneur to carry out activities in the field of physical culture and sports.

MART acknowledged the absence of competitive relations between the organization "K" and the individual entrepreneur P., since the latter began to operate on the product market of services in the field of physical culture and sports only from April 2020, and materials about the work of the Fitness and Yoga Center on its page were removed after March 13th.

Case 2

In the decision of MARCH No. 261 / 8-2020 dated 06.02.2020, it was established that there was no violation of antimonopoly legislation due to the failure to establish a set of signs of violation, including competitive relations between the entities.

According to the applicant (company "N"), limited liability company "T" (LLC "T"), service center "R", individual entrepreneur M. (IP M.), limited liability company "K" (LLC "K") violate antitrust laws in terms of unfair competition through illegal use of a designation identical to a trademark in a domain name.

The applicant in this case is a foreign organization, the owner of the trademark. The activity of the company "N" consists in the production and sale of products in the field of data processing, software-controlled switches, transmission equipment, computers. However, in Belarus the applicant himself does not carry out this activity.

MART concluded that there is no competitive relationship between the applicant and the persons in respect of whom the applications are filed, since they do not operate on the same product market.

LLC "T" carries out repairs of computers and peripheral equipment, IP M. - consulting on commercial activities and management, LLC "K" - other retail trade in specialized stores not included in other groups, as well as repairs of computers and peripheral equipment. In addition, H. does not operate on the territory of the Republic of Belarus.

Thus, the presence of competitive relations between business entities was not confirmed in the presented cases.

The second sign:

the focus of actions on the acquisition of advantages (benefits) in entrepreneurial activity.

Case 3

Consider the MART decision No. 270 / 17-2020 of March 25, 2020, in which MART established the fact of a violation of antimonopoly legislation, including the direction of a competitor's actions to acquire advantages (benefits) in entrepreneurial activity.

In this case, the private unitary enterprise "D" (PE "D") filed a complaint with MART about the violation of the antimonopoly law by the joint limited liability company "Z" (JLLC "Z") by using the designation "C" on the label of the drink "M" produced by it. Similar to the degree of confusion with the trademark registered by PE "D".

PE "D" and SOOO "Z" are business entities that operate on the same product market for the production and sale of carbonated soft drinks and are competitors.

MARCH established the fact that JLLC "Z" was using a designation similar to the point of confusion with the trademark of PE "D".

With regard to the sign of the focus of actions on the acquisition of advantages (benefits) in entrepreneurial activity, MART made the following conclusion that the focus of actions of the JLLC "Z" on the acquisition of advantages in the implementation of entrepreneurial activity was expressed in the introduction of the drink "M" into civil circulation using the designation "C", similar to the degree of confusion with the trademark PE "D" in relation to goods of 32 class MKTU, without additional costs for its promotion.

At the same time, MART drew attention to the fact that non-alcoholic carbonated drinks belong to everyday goods of a low price category and their purchase does not imply a high degree of attention and discretion on the part of buyers (including children), there is a likelihood of an unconscious or mistaken choice in favor of the product. a competitor, when a new product is mistaken for a well-known one.

The third sign:

The actions of a person violating antitrust laws may or may cause damage to other competitors, or may harm or harm their business reputation.

According to Article 14 of the Civil Code, losses are understood as expenses that a person whose right has been violated has made or will have to make to restore the violated right, loss or damage to

property (real damage), as well as lost income that this person would have received under normal conditions of civil turnover if his right had not been violated (loss of profits).

We propose to consider this sign of unfair competition using the example of the above Case 3. Thus, in the decision of MARCH No. 270 / 17-2020, the possibility of causing losses to the applicant in the form of lost profits as a result of the redistribution of consumer demand was established. MART also acknowledged that the applicant had real damage in the form of expenses incurred by him for the urgent preparation of a patent attorney's opinion to restore the violated right to the applicant's trademark.

Case 4

Let us consider another decision of the MART, according to which the fact of infliction of losses or harm to the applicant's business reputation was not confirmed.

In decision No. 328 / 6-2021 of March 4, 2021, MART established the fact that there were no violations of antimonopoly legislation in the actions of the limited liability company "G" (LLC "G").

In the framework of this case, an individual entrepreneur K. (IE K.) filed an application with MART on the issue of unfair competition in the actions of LLC "G" on the use of several trademarks belonging to the applicant.

On the website of the LLC "G" company, goods were advertised for sale under trademarks belonging to IE K.

Earlier, a supply agreement was concluded between the applicant and LLC "G", the shipment of goods, which was carried out until July 2020.

LLC "G" explained that using its website, it sold the remains of goods marked with the trademarks of IE K., obtained under the contract concluded with him. At the same time, it was established that the website of LLC "G" posted information only about the original products marked with the trademarks of IE K.

The above circumstances were confirmed during the consideration of the application. In this regard, MART concluded that when LLC "G" sold the remnants of goods with the trademarks of IE K., purchased from him earlier, there is no reason to assert that the actions of LLC G cause losses to IE K. his business reputation.

The fourth sign:

contradiction of a competitor's actions with the Law, other acts of antimonopoly legislation, or the requirements of good faith and reasonableness. Confirmation of the presence of this feature consists in proving the fact of violation of the prohibitions on the commission of certain actions (inaction), in particular, provided for in Articles 28-29 of the Law.

So, in order to establish the fact of unfair competition in accordance with Article 29 of the Law, it is necessary to prove that there was a use of a designation that is confusingly similar to the trademark of another economic entity without its permission.

Case 5

In the decision of MARCH No. 227 / 79-2019 of August 29, 2019, it was established that there was no violation of the antimonopoly legislation, provided for in Article 29 of the Law, in terms of the implementation of unfair competition of the individual entrepreneur I. (IP I.).

The applicant Private enterprise "D" (PE "D") indicated that IE I. when selling soft drinks "A" used on their labels designations similar to the trademarks owned by PE "D".

However, this fact was refuted by a combination of the following evidence:

- an expert opinion of a patent attorney, which indicated that the designation on the label of a soft drink is not confusingly similar to the trademark "D";
- comparative analysis of the label design of the still drink "D" and the still drink "A" provided by the contractors of IP I. In particular, it was noted the difference in verbal designations in the labels phonetically, semantically and visually, as well as significant differences in the labels in the artistic and graphic design.

At the same time, the Center for the Study of Belarusian Culture, Language and Literature of the National Academy of Sciences of Belarus indicated that the trademarks "D" and "A" are similar to the point of confusion due to the similarity of color, visual elements, compositional solution, and presentation style:

- a survey of buyers, carried out by MART in retail outlets, to compare the appearance of labels of non-alcoholic drinks from the above manufacturers.

The purpose of the questionnaire was to determine the degree of difficulty in individualizing one or another image in relation to the legal entity using it, as well as the similarity to the degree of confusion between the images on the labels of drinks "D" and "A".

According to the results of the survey, it was found that 71.4% of the respondents did not confirm the fact of the similarity of the images, 81.8% of the respondents did not confirm the possibility of purchasing the drink "A" by mistake, the ability of the images on the labels of the drinks "D" and "A" to generate an idea of 60.6% of respondents do not confirm that they are goods of one manufacturer.

Taking into account the collected evidence, MART concluded that there was no similarity between the images on the labels of drinks "D" and "A" and ruled that there was no violation of antitrust laws.

The mechanisms of protection of trademark rights considered in this article by applying to MART with a statement of violation of the antimonopoly legislation in terms of unfair competition or to the judicial collegium of the Armed Forces with a claim to suppress actions that violate the exclusive right to a trademark are quite effective and make it possible to suppress any acts unfair competition from other business entities. However, in this case, the person whose right has been violated should take into account the need to confirm the totality of the circumstances included in the subject of proof with sufficient and appropriate evidence.

UNFAIR COMPETITION IN THE USE OF INTELLECTUAL PROPERTY OBJECTS: PROBLEMS AND WAYS TO PROTECT A TRADEMARK IN MONGOLIA



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Mongolia is a member of the World Intellectual Property Organization and has acceded to major treaties and conventions related to intellectual property. Also signed and ratified the World Trade Organization (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).

TRIPS require member states to provide strong protection for intellectual property rights. For example, under TRIPS:

- the copyright terms must extend at least 50 year after the death of the author;
- copyright must be granted automatically, and cannot be contingent on the completion of any formalities such as registration;
- computer programs shall be considered as objects of copyright law and shall be a subject of the same protection;
- national copyright restrictions and list of non-patent objects must be clearly limited;
- patents must be granted in all areas of technology, but exceptions can be allowed to protect the public interest. The term of protection of property rights provided by a patent must be at least 20 years;
- each state shall provide intellectual property rights protection of the citizens of TRIPS countries at the same level as its own citizens. [1]

The above-mentioned TRIPS rules are reflected in the Law on Copyright and the Law on Patents of Mongolia.

In accordance with the new Intellectual Property Law adopted by the Parliament of Mongolia on January 23, 2020, the following classification of objects of intellectual property are presented, which are divided into two groups: first, copyright and related rights, second, the industrial property right. Industrial property rights consist of the following objects:

- new invention;
- utility model;
- product design;
- trademark; and
- geographical indications.

Despite the fact that the new Intellectual Property Law has been adopted, the objects of intellectual property are regulated by separate laws, for example, the Law on Copyright and Related Rights dated January 19, 2006, the Law on Patents dated January 19, 2006 and the Law on Trademark and Geographical Indication dated June 10, 2010.

As it stated in the Law on Trademark and Geographical Indication, the trademark means

[1] Overview: the TRIPS Agreement- https://www.wto.org/english/tratop_e/trips_e/intel2_e.htm

a distinctive expression used by an individual or legal entity to distinguish their goods and services from other goods and services. Thus, the trademarks can be expressed in words, shapes, letters, numbers, 3D shapes, colors, sounds, smells, or a combination thereof.

The antimonopoly legislation of Mongolia consists of the Competition Law, the Civil Code and other laws adopted in accordance with the Competition Law.

Prohibitions on arbitrary use of other's trademarks, labels, brand names, quality assurance of goods, assigned names copy and goods packaging, it is included in prohibited activities aimed at the restriction of the competition, as it's stated in Competition. For a protection of the trademark it is recommended to register a trademark in General Authority of Intellectual property of Mongolia, because trademark registration provides legitimate protection (especially in the event of a conflict between identical or similar trademarks) under the relevant laws.

Trademark registration

Trademark protection in Mongolia occurs only from the moment of state registration in the General Authority of Intellectual property. By registration, an individual or legal entity protects its trademark from unlawful use of the trademark by others. This rule also applies to foreign goods and services. To register the trademark the applicant shall submit required documents to the Intellectual Property Authority, then the Authority, based on the conclusion of the examination, shall make a decision on whether to register a trademark within 9 months from the date of submitting of the application, if necessary this period may be extended for up to 6 months. Monopoly or exclusive right to use the trademark is officially established, upon receipt of a trademark certificate. Registration and certification of a trademark creates the exclusive right to use the trademark in the territory of Mongolia. In other words, a trademark similar to the registered trademark shall not be used by another person without a written permission. Trademarks are registered for 10 years. It can be extended for another 10 years upon expiration.

Exclusive rights

The trademark holder shall have the following exclusive rights:

- 1.to own the registered trademark;
- 2.to allow to use the registered trademark by a third party;
- 3.to transfer the registered trademark to a third party;
- 4.to demand cessation of registered trademark use without permission;
- 5.to demand cessation of similar trademark use by a third party which misleads the customers;
- 6.to demand payment for incurred loss due to action stated in (4) and(5).

The only allowed use of the registered trademark under the law is a Licensing agreement. In accordance with the Licensing agreement, trademark holder may allow use of the trademark by a third party. As outlined by the law, the Licensing agreement shall be registered with the Intellectual property authority and only then the agreement shall be considered as valid.

Intellectual Property Authority

The Intellectual Property Authority of Mongolia is the main government agency in charge of intellectual property in Mongolia. The Intellectual Property Authority is responsible for the management of intellectual property, the granting of intellectual property rights, support for their commercialization, and the protection of intellectual property rights from infringement. In addition, government agencies such as the General Department of Taxation, General Department of Customs, Communication Regulatory Commission, Authority for Fair Competition and Consumer Protection, and the Economic Crimes Division of the General Police Department play an important role in protecting intellectual property rights.

Enforcement action by Intellectual property authority: In case of trademark infringement, the trademark holder may file a complaint to the supervisory department of Intellectual property authority. The claim shall be supported by the evidence of trademark infringement. The assigned State Inspector will work on trademark infringement. The inspection shall start within 3 days from submission of the complaint.

The inspection shall be carried out within 14 days and can be extended for 30 days, if necessary.

The State inspector can impose following sanctions to the trademark infringement case:

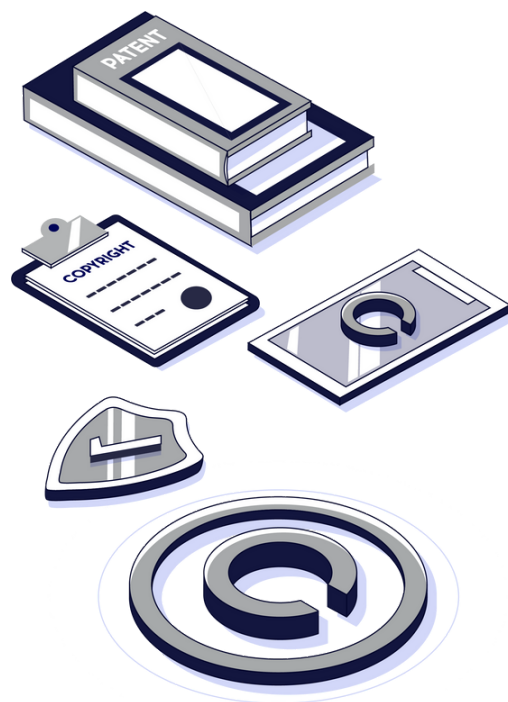
- oblige to cease the use of trademark and undertake corrective action or cease action within defined term;
- oblige to cease sell of product or destroy product; and
- impose a penalty specified in the Law of Offence.

In case the State inspector's action is not satisfactory to the claimant, he/she can file a claim to the Senior inspector and court.

Enforcement action by the Customs authority: For protecting or fighting with fake products to be supplied and sold in the market, the trademark holder or its authorized entity or individual under the licensing agreement can register the trademark at customs authority on the basis of the registered trademark certificate at its registry. The customs authority shall not clear fake products with registered trademarks through the customs if there is any complaint. The trademark holder can file a claim on ceasing to clear the products by the customs if there is an infringement of its trademark rights and cleared products through the customs illegally, or there are solid grounds that illegal or fake products are under the customs inspection to the Customs authority. The claim shall contain information about trademark holders, intellectual property and detailed description of the products which cleared the customs illegally and defining terms for measures which will be undertaken by the customs authority. The state inspector of the Customs authority is authorized to impose the same sanctions to a trademark infringer.

Enforcement action by courts

A) If the State inspector and its senior inspector have not performed their duties satisfactory to the trademark holder's claims for protecting its exclusive rights, the trademark holder may file a claim to the court.



B) If trademark infringement caused a loss in the form of monetary or non-monetary such as damage to the business reputation etc, the trademark holder is entitled to file a claim for compensation of caused loss to the court. However, the caused loss shall be proved by evidence in order to claim the caused loss.

C) The criminal sanction will be imposed on the defaulted entity and individual by the court. In this case, if a defaulted party has manufactured, supplied, sold and stored fake products with the registered trademark; the criminal sanction will be imposed. Trademark infringement shall be classified as an offence or a crime under the relevant law.

Authority for Fair Competition and Consumer Protection

Authority for Fair Competition and Consumer Protection- it is the main authority, which is monitoring the implementation of Competition Law.

Authority is responsible to conduct supervision on the following grounds:

- complaints submitted by legal entities, organizations and citizens;
- information published in the media;
- on its own initiative;
- other grounds provided by law.

The state inspector shall conduct the inspection within 60 days, and if it is not possible to complete the inspection within this period, the period may be extended by the head of the Authority for Fair Competition and Consumer Protection for up to 30 days.

Violation of the legislation shall be investigated and punished in accordance with the procedures set forth in the Law on Violations or a Criminal Code of Mongolia.

Violation and punishment

According to a Criminal Code of Mongolia, mislead consumers by using other entities trademarks or geographical indications and caused more than a small amount of damage due to the production, storage, transportation, sale or import of counterfeit goods and products across the state border shall be punished by a fine of 2 700 000/app 947 USD/ to 5 400 000 MNT /app 1894 USD/, or 240 hours to 720 hours of community service, or restriction of the right to travel for a 6 months up to 1 year, or imprisonment for 6 months to 1 year.

Small amount of damage, as defined in Criminal Code means damage in the amount of 300 000 MNT /app 105 USD/ or less.



UNFAIR COMPETITION IN USE OF TRADEMARKS. PROBLEMS AND WAYS TO PROTECT A TRADEMARK. RUSSIA (SAMARA)



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As you know, the main tasks of trademarks are to individualize the goods of legal entities or individual entrepreneurs, attract a consumer and, accordingly, increase the income of the copyright holder, and for the consumer - to ensure a certain quality of the product.

In the context of the development of business relations and, in particular, the use of trademarks by business entities, unfair competition appears in the use of these intellectual property objects.

Today, the most common violation of the rights of a bona fide business entity - the owner of a trademark and other means of individualization, is the acquisition by the infringer of rights to a trademark not for the purpose of its further use in economic activity, but for the purpose of using the established reputation and misleading the consumer.

Federal Law No. 135-FZ of July 26, 2006 "On Protection of Competition" (hereinafter - the Law on Protection of Competition) imposes a direct prohibition on this type of unfair competition, while the legislation of the Russian Federation does not disclose a specific list of those actions that could be recognized as an act of this unfair behavior, limited to the recognition and indication of such signs.

Considering the general provisions of Art. 4 of the Law on Competition, in order to establish an act of unfair competition, it is necessary that the actions of an economic entity contain all the signs of unfair competition established in paragraph 9 of Article 4 of the Law on Protection of Competition, namely, the implementation of actions by an economic entity - a competitor, the focus of actions of an economic entity to obtain advantages in the implementation of entrepreneurial activity, the contradiction of these actions with the provisions of the current legislation, business customs, the requirements of integrity, reasonableness and fairness, causing or the ability to cause losses by these actions to another economic entity-competitor, or damage to its business reputation. Failure to prove at least one of the above signs excludes the recognition of the actions of an economic entity as an act of unfair competition.

Based on the systemic interpretation of Art. 14.4 of the Law on the Protection of Competition and Clause 17 of the Resolution of the Plenum of the Supreme Arbitration Court of the Russian Federation of February 17, 2011 N 11 "On some issues of application of the Special Part of the Code of Administrative Offenses of the Russian Federation" an important criterion for determining these actions as unfair competition is their purpose, nature and orientation of actions.

The purpose of the actions in this case is to use the existing positive business reputation of a bona fide business entity that has proven itself among competitors.

At the same time, an approach has been formed in judicial practice according to which, when assessing the conscientiousness of the behavior of an economic entity, it is necessary to investigate both the circumstances of the direct acquisition of an exclusive right and the subsequent behavior of the copyright holder in terms of the use of the trademark.

According to the position of the Intellectual Property Rights Court, the applicant's bad faith should be established at the stage of filing an application for registration of a designation as a trademark, since it is at this moment that the intention of an unfair competitor is realized, and the subsequent behavior of the copyright holder can only confirm or deny the fact that upon acquisition exclusive rights to a trademark he acted in bad faith.

Based on the generalization of the judicial practice set out in the letter of the FAS Russia dated August 26, 2019 No. AK / 74286/19, in order to recognize the acquisition and use of the exclusive right to a trademark as an act of unfair competition, the Intellectual Property Rights Court (hereinafter referred to as IPC) establishes the following:

- the controversial designation was used by other persons before the defendant (the right holder of the trademark) filed an application for registration of this designation as a trademark;
- the defendant knew that other persons were using the designation before it applied to register it as a trademark;
- at the time of submission by the defendant of the said application, there was a competitive relationship between him and the plaintiff;
- the defendant had the intention (purpose) by acquiring the exclusive right to such a designation (acquiring a monopoly on it) to harm the plaintiff, push him out of the product market by making demands aimed at preventing the use of the controversial designation, or to obtain unjustified advantages through the use of the designation, known to the consumer earlier in connection with the activities of the plaintiff;

- the plaintiff suffered harm or there was a likelihood of causing harm to the plaintiff by filing claims to terminate the use of the disputed designation.

The IPC indicated that it is necessary to establish the totality of the above circumstances. If at least one of the elements of the composition is not proven, the actions of the person are not recognized as an act of unfair competition, while the antimonopoly body refers to judicial practice: No. IPC-131/2017, IPC-501/2017, IPC-522/2017, IPC-754 / 2018 and others.

Thus, with the totality of all the factors of an offense, a subject who finds himself in a situation of violation of his rights, described above, has the right to demand the restoration of his rights by contacting the bodies of the Federal Antimonopoly Service of Russia.

Another, a manifestation of unfair competition, which a bona fide entity may face, and which is directly prohibited by the legislator, is the commission by an economic entity of actions (inaction) that can cause confusion with the activities of a competing business entity or with goods or services introduced by a competing business entity into civil circulation in the territory of the Russian Federation. Including the illegal use of a designation that is identical to the means of individualization of a competing entity or similar to them to the point of confusion, by placing it on goods, labels, packaging or otherwise using it in relation to goods, and copying or imitating the appearance of the goods (Article 14.6 of the Law on the protection of competition).

At the same time, it should be noted that the legislator provides for a violation both in the case of the subject's actions and in the event of his inaction, that is, even passive behavior may contain signs of violation of competition protection legislation, which, if detected, will mean the occurrence of negative consequences for persons who allowed such behavior.

With the development of high technologies, an increasingly widespread manifestation of this type of unfair competition has become the use of other people's means of individualization on the Internet by unscrupulous subjects by using means of

individualization, including trademarks, as keywords and the qualification of such actions from the standpoint of unfair competition.

Clause 172 of the Decree of April 23, 2019 No. 10 "On the application of part four of the Civil Code of the Russian Federation" states that the use by an advertiser when placing contextual advertising on the Internet as a criterion for displaying an advertisement of keywords (phrases), identical or similar to the extent of confusion with a means of individualization belonging to another person, taking into account the purpose of such use, it may be recognized as an act of unfair competition.

However, taking into account this position of the Supreme Court, the FAS Russia provides the following clarifications (Letter of the FAS Russia dated October 21, 2019 No. AK / 91352/19 "On the use of means of individualization as keywords"). Proving the existence of a competitive relationship between the applicant-copyright holder and the alleged infringer will require documentary evidence that the goods (services) of these persons are interchangeable within the meaning of paragraph 3 of Article 4 of the Law on the Protection of Competition and are introduced into civil circulation within coinciding geographical boundaries.

The acquisition of advantages over competitors is possible if, as a result of the actions of the alleged violator on the use of controversial designations as keywords in contextual advertising, there is a change in the structure of consumer demand, namely, an increase in demand for the products (services) of an unscrupulous person. This gives such an economic entity the opportunity to increase the volume of sales of such products and, accordingly, increase the profit received.

In addition, in order to qualify the actions of economic entities as violating the prohibition established by Article 14.6 of the Law on the Protection of Competition, it is necessary to establish a real possibility for consumers to mix the applicant's goods and the goods of the person in respect of whom the application is filed as a result of the latter's actions.

Analyzing the latest judicial practice on the application of Article 14.6 of the Law on the Protection of Competition, which was made taking into account the clarifications of the Supreme Court of the Russian Federation set out in the Resolution of the Plenum of the Supreme Court of the Russian Federation of April 23, 2019 No. 10, we can see a positive trend in the protection of fair business entities from unfair competition.

Thus, in the ruling of the Intellectual Property Rights Court dated 07.04.2021 No. C01-1860 / 2020 in case No. A56-110340 / 2019, the court satisfied the requirement to declare illegal and terminate actions on the use of trademarks, to recover compensation for violation of exclusive rights to trademarks, since The use by the defendant in the title and text of advertisements of verbal designations that are confusingly similar to the disputed trademarks constitutes a violation of the plaintiff's exclusive rights to means of individualization.

Or, in the decision of the Intellectual Property Rights Court dated 11/23/2020 in case No. IPC-276/2020, the court partially satisfied the requirement to recognize actions to acquire exclusive rights to trademarks as unfair competition, since the homogeneity of the services provided by the parties, the existence of competitive relations between them, were established, similarity to the extent of confusion between the trademarks of the parties, the defendant, when applying to Rospatent with applications for registration of designations as trademarks, could not fail to know that designations similar to those declared by him were used by the plaintiff to individualize the services rendered by him.

It should be noted that according to Art. 14.5 of the Law on the Protection of Competition, unfair competition is not allowed by an economic entity performing actions for the sale, exchange or other introduction of goods into circulation, if the results of intellectual activity were illegally used, with the exception of means of individualization belonging to a competing economic entity.



Despite the unambiguity of this rule, in practice there are cases, based on the results of which the courts make decisions, where the specified rule is applied in conjunction with Article 14.6 of the Law on the Protection of Competition.

Thus, in case No.A35-5996 / 2017, the actions of Importtrade LLC on the introduction of liquid nails glue and Megasil silicone sealant into circulation on the territory of the Russian Federation were found to violate the provisions of Art. 14.5 and clause 2 of Art. 14.6 of the Law on the Protection of Competition in Connection with the Illegal Use of the Results of Intellectual Activity of Henkel Rus LLC in the form of processing of packaging design products for glue and silicone sealant, as well as with the introduction into circulation of goods whose packaging is similar to the degree of mixing due to imitation of the appearance of glue and sealant.

The above article describes the main types of unfair competition in the field of violation of rights to means of individualization, in particular to trademarks, however, in the Russian Federation there is a system of protection of bona fide business entities, and with the combination of all factors, the subject whose rights have been violated has the right to claim for their restoration by contacting the bodies of the Federal Antimonopoly Service of Russia.

Note also that the subject's appeal to the Antimonopoly Service does not exclude his right to go to court with a claim for damages, or compensation for the illegal use of his means of individualization.

BRAND PROTECTION IN UNFAIR COMPETITION IN RUSSIA (SAINT PETERSBURG)



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In a market economy, the issues of effective protection of rights to various results of intellectual activity and methods of their protection are increasingly of interest to market participants. The exclusive right to a trademark is a valuable intangible asset, in the acquisition of which an increasing number of business representatives are interested. All this is an excellent basis for the formation of mechanisms and methods of counteracting unfair competition associated with the acquisition and use of these rights.

A trademark is a designation that serves to individualize the goods of legal entities or individual entrepreneurs, to which an exclusive right is recognized.

Unfair competition is defined in clause 9 of Art. 4 of the Federal Law "On Protection of Competition" as any actions of economic entities (groups of persons) that:

- are aimed at obtaining benefits in the implementation of entrepreneurial activities;
- contradict the legislation of the Russian Federation, business customs, requirements of integrity, reasonableness and fairness;
- caused or may cause losses to other business entities - competitors or caused or may harm their business reputation.

The Presidium of the FAS Russia notes that in order to establish an act of unfair competition, it is necessary to have all the signs of unfair competition provided for in paragraph 9 of Art. 4 of the Federal Law "On Protection of Competition", in conjunction with special signs of the composition of the violation provided for by Art. 14.4 of the Federal Law "On Protection of Competition".

In order to prove a violation of the exclusive right to a trademark, it is enough to establish the existence of a hazard, and not a real confusion of designations in the eyes of the consumer. Moreover, in order to establish the existence of a risk of violation of the rights of the copyright holder, the court does not need to carry out an appropriate examination, but it is enough to resolve the issue from the standpoint of an ordinary consumer, since the issue of mixing controversial designations is a matter of fact.

To qualify the actions of an economic entity as violating the prohibition established by Part 1 of Art. 14.4. Federal Law "On Protection of Competition", it is necessary to establish a set of actions:

- by purchase;
- the use of exclusive rights to means of individualization.

Separately, the acquisition of the right or use does not constitute a violation under Art. 14.4 of the Federal Law "On Protection of Competition".

The main signs of unfair competition established in the Federal Law "On Protection of Competition" are:

- implementation of actions by an economic entity - a competitor;
- the focus of the business entity's actions on obtaining benefits in the implementation of entrepreneurial activities;
- conflict of these actions with the provisions of the current legislation, business customs, the requirements of integrity, reasonableness and fairness;
- causing or the ability to inflict losses on another economic entity-competitor or damage to its business reputation by the said actions.

The copyright holder under Russian law has the right to:

- use your trademark on the Internet and offline;
- prohibit third parties from using your designations;
- claim compensation in the amount of up to 5 million rubles for the use of your trademark (and similar options) without permission.

The following are the most relevant situations and opportunities that copyright holders have in case of making a decision to actively protect their violated rights:

- in a situation where an intruder introduces a website with a domain name (address) that is confusingly similar to yours or differs from yours by just a couple of characters, it may turn out that your customers may confuse the site with yours and make a purchase from a competitor ... In this case, the copyright holder has the opportunity to achieve cancellation of the counterparty's trademark, and can also obtain rights to similar domains;
- if your trademark is used in someone else's advertisement, makes a profit from your reputation, then you can stop displaying advertisements by contacting the technical support of information systems;
- if you have established the fact of selling goods under your brand in marketplaces or in retail stores, then you have the opportunity to prevent further sales, as well as destroy counterfeit goods;
- if you notice your trademark on someone else's sign, then you can get this sign removed;

- if in the Internet space you have recorded the fact of using your trademark to promote or sell products, goods and services similar to yours, then you can request from the information intermediary to block groups, transfer you administration rights, stop displaying advertising posts.

It seems that the most effective and convenient is the following algorithm of actions of a person whose rights have been violated by the trademark right holder who has committed unfair competition:

- filing an application directly with the court;
- an appeal to Rospatent after a court has made a decision in order to invalidate the legal protection of a trademark on the basis of sub. 6 p. 2 art. 1512 of the Civil Code of the Russian Federation.

So, in the case of an initial appeal to the antitrust authority, the consideration of the case increases to the stage of the administrative order, since the right holder can in any case declare to the Intellectual Property Rights Court about invalidating the decision of the antitrust authority.

If there are no signs of unfair competition in the actions of a person, but there are grounds for reporting an abuse of the right, the person should:

- apply to Rospatent with an objection to the granting of legal protection to a trademark on the grounds set out in clause 2 of Art. 1512 of the Civil Code of the Russian Federation (except for subparagraph 6 of clause 2 of article 1512 of the Civil Code of the Russian Federation, since the actions of the copyright holder have not yet been recognized in the established manner as an abuse of the right or unfair competition);
- in case of refusal to satisfy the objections, apply to the Intellectual Property Court with a statement to invalidate the decision of the Federal Service for Intellectual Property to refuse to satisfy the objection and, within the framework of the consideration of the case, based on the arguments of the objection, declare abuse of the right by the right holder.

It should also be noted that due to the development of the Internet space and the gradual transition of the activity of doing business online, the administrations of social networks, marketplaces are increasingly going to productive cooperation with copyright holders, thereby reducing the time and labor costs to suppress illegal actions aimed at violating the rights of copyright holders. Such cooperation has a positive effect on reducing the number of violations of trademark rights, including.

Thus, today there are several ways to protect a person whose right has been violated by registering a trademark. Depending on the actual circumstances, this or that method may have advantages in terms of a faster and more efficient dispute resolution.



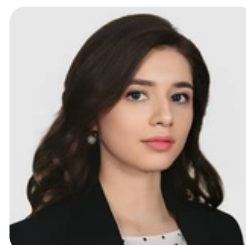
UNFAIR COMPETITION: PROBLEMS AND METHODS OF TRADEMARK PROTECTION IN UZBEKISTAN



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As of this date, cases of unfair competition are increasing not only in Uzbekistan, but all over the world which, in turn, affect both producers and consumers. As we can notice, the range of counterfeit products is not limited only to high-consumption goods; in the Uzbek market, they can also be found among famous brands of clothing, food products, infant formula, medicines and software.

Thus, the issue of protecting intellectual property rights is becoming a matter of current interest in our country. Trademark owners, both citizens of Uzbekistan and foreign citizens, are actively trying to protect the results of their work.

The trademark owner, who has protected his trademark by registering the intellectual property object with the Agency on Intellectual Property under the Ministry of Justice of the Republic of Uzbekistan (the "Agency"), or having an international registration with the territory of validity in the Republic of Uzbekistan in accordance with the Protocol to the Madrid Agreement Concerning the International Registration of Marks dated 27 June 1989, acquires exclusive rights to these objects and, thus, can protect "his object" from using it by third parties without his consent.

Unfortunately, "unfair competitors" intentionally use the names and logos of well-known brands, copy and imitate the appearance and design of the owner's products, thereby misleading consumers and easily enriching themselves through the work of an owner in good faith. Sometimes, the reason for this is the legal illiteracy of the violator, who does not realize the fact of violation of the rights of the trademark owner, not to mention the subsequent consequences, the losses that the owner will suffer, as well as the responsibility that the violator himself may bear.

As stipulated in Article 4 of the Law of the Republic of Uzbekistan "On Competition" No.3PY-319 dated 6 January 2012 (the "Law on Competition"), *unfair competition means the actions of a business entity or a group of persons aimed at acquiring advantages in the implementation of economic activities, which contradict the legislation, business customs and cause or may cause losses to other business entities (competitors) or cause or may damage their business reputation.*

Unfair competitors produce and sell counterfeit goods, thereby violating the rights of the owners. As stipulated in the Law of the Republic of Uzbekistan "On Trademarks, Service Marks and Appellations of Origin" No.267-II dated 30 August 2001, *counterfeit goods are goods, labels, packages of goods on which a trademark or a designation that is confusingly similar is illegally used.*

1. Pre-trial dispute settlement.

It should be noted that one of the most effective methods to combat unfair competition is pre-trial settlement of disputes. Commonly, a letter of claim is sent to the violator, the purpose of which is the voluntary elimination of infringements by the violator. Experience has proven that serious conflict situations can be resolved by sending a letter of claim to the violator, as a result of which the revealed infringements are eliminated and there is no need to appeal to the courts.

2. Antimonopoly Committee of the Republic of Uzbekistan.

In case of unfair competition in the domestic market of Uzbekistan, trademark owner also has the right to file a complaint with the Antimonopoly Committee of the Republic of Uzbekistan (the "Antimonopoly Committee"), which in accordance with the Competition Law, along with other authorities, is authorized to identify violations of competition law; initiate and consider cases, make a decision in a case on violation of competition law in accordance with the procedure established by law, including, the decision on the dispensation of income (profit) from business entities, unreasonably obtained as a result of anticompetitive actions; also, send materials to the relevant authorities to resolve the issue of initiating a criminal case on the basis of crimes related to violation of competition law.

On the basis of the decision of the Antimonopoly Committee in case of violation of Competition Law, an order is issued to the person in respect of whom the decision has been made. The orders of the Antimonopoly Committee are subject to fulfillment within the prescribed time limits and the failure to fulfill them on time entails liability.

Moreover, it should be noted that in order to further improve the system of consumer protection and ensure the implementation of a unified State policy, there has been created

the Consumer Protection Agency under the Antimonopoly Committee. When counterfeit products are detected, consumers can report on the helpline of the Consumer Protection

Agency, which will facilitate the monitoring and detection of violations in the field of competition law.

3. Agency on Intellectual Property under the Ministry of Justice of the Republic of Uzbekistan.

This body also takes measures to ensure the legal protection of intellectual property objects.

According to the Resolution of the Cabinet of Ministers No.609 dated 20 July 2019, one of the main objectives of the Agency is to interact with law enforcement, tax and other State bodies to identify and suppress infringements in the field of intellectual property.

In addition, the Department for Monitoring the Compliance of Intellectual Property Rights

(the "Monitoring Department") deals with cases of illegal use of intellectual property and interacts with law enforcement, customs, tax and other State bodies to identify and suppress intellectual property violations, to take measures against the import and circulation of counterfeit products on the territory of the Republic of Uzbekistan.

Recently, the Monitoring Department has been actively detecting cases of infringement of rights to intellectual property objects. For example, the officers of the Monitoring Department discovered a violation in the use of a well-known public catering trademark without the consent of the owner. Accordingly, explanatory work was carried out and a fine was collected from the violator by court.

4. State Customs Committee.

Another State body that is working to combat counterfeit products is the State Customs Committee of the Republic of Uzbekistan (the "Customs Committee").

The Customs Committee plays an important role in combating counterfeit products. In accordance with the Customs Code, in order to ensure the protection of intellectual property rights imported into the customs territory and under customs control, the customs authorities may suspend the release of goods containing signs of infringement

of intellectual property rights and cancel the decision to suspend the release of goods containing objects of intellectual property.

The system of the Customs Register of Intellectual Property Objects (the “Customs Register”) has been introduced. The inclusion of intellectual property objects in the Customs Register will provide owners with an additional measure to prevent illegal use of intellectual property objects on the territory of Uzbekistan. To include objects in the Customs Register, the owner or his authorized representative files an application with the Customs Committee with the attachment of copies of documents confirming the existence and ownership of rights to the intellectual property object, certified by the owner. The application is considered by the Customs Committee within 10 days from the date of its receipt and a decision is made to include or refuse to include intellectual property objects in the Customs Register.

After the objects are included in the Customs Register, the owner or his authorized representative has the right to apply to the customs authorities for the protection of intellectual property rights to take measures to suspend the release of goods under customs control. At the same time, the application must necessarily contain:
description of the goods, information about the manufacturer, exporter, importer or consignee, the possible place and date of movement of goods across the customs border, the peculiarities of transportation and the type of packaging, the location of the goods or the planned destination.

After considering the application, the Customs Committee takes measures to protect intellectual property rights and may decide to suspend the import of goods for a period not exceeding 10 business days. This makes it possible for the owner to apply to the judicial bodies, and, further, transfer the court decision for consideration to the customs authorities. If during this period a court decision on the seizure of goods, the imposition of seizure or the application of other measures to enforce the court decision is made, the receipt of the goods is suspended.

It is necessary to note that violation of customs legislation, namely, the movement of goods across the customs border of the Republic of Uzbekistan or with concealment from customs control or with fraudulent use of documents or means of customs identification, or associated with non-declaration or declaration by a different name, entails administrative and criminal liability.

5. State Tax Committee of the Republic of Uzbekistan.

The responsible authority for taking measures to prevent the sale of adulterated and counterfeit goods in retail outlets is the State Tax Committee. It should be noted that one of the new tools introduced in 2020 was the launch of the mobile application “Soliq”, which records the appeal and sends it to the State tax service authorities for conducting tax audits in the prescribed manner.

6. Legal procedure.

Appeal to the authorized courts with a statement of claim for the establishment of a ban, production, sale of counterfeit products on the territory of the Republic of Uzbekistan.

Moreover, other mechanisms to combat unfair competition are being developed.

For instance, in order to fundamentally improve mechanisms for preventing cases of illegal import into the Republic of Uzbekistan, production and sale of products and ensuring the legal circulation of certain types of products, the Cabinet of Ministers adopted a Resolution “On the introduction of a mandatory digital marking system for certain types of goods” No.737 dated 20 November 2020 (the “Resolution No.737”). According to this document, a list of goods for which a requirement for mandatory digital marking with identification means in 2021-2022, as well as a “Roadmap” for the effective implementation of a mandatory labeling system for certain types of goods have been approved.

In accordance with the Resolution No.737, starting from 1 March 2021 the import of non-labelled alcohol and tobacco products into the territory of the Republic of Uzbekistan is prohibited, and a mechanism of public control over the production and sale of non-labelled products



is implemented by introducing information products and mobile applications that allow real-time notification of authorized bodies on violations of legislation in the field of mandatory digital labeling of products. Since July 2021 in Uzbekistan, a new stage of the project, labeling of medicines, has been initiated, and in the near future it is planned to establish this process in the production and import of soft drinks and household appliances. It should be noted that the responsibility for labeling goods is assigned to manufacturers and importers.

In addition, in order to improve the system of protection of intellectual property objects, the Presidential Resolution "On measures to improve the system of protection of intellectual property objects" No.ПП-4965 dated 28 February 2021 was adopted (the "Resolution No.ПП-4965"). According to the Resolution No.ПП-4965, in order to improve the system of public administration in the field of intellectual property and ensure the target orientation of the work conducted in the structure of the Intellectual Property Agency,

Centers for the Protection of Intellectual Property are being created, the main objectives of which will be to take direct part in the fight against the production and circulation of counterfeit products and infringement of intellectual property rights. In addition, under the Resolution No.ПП-4965, there was approved the "Road Map", which provides for real mechanisms to suppress the sale of counterfeit products.

It is worth to note that there are other mechanisms for combating unfair competition and the methods of protection are not limited to the methods mentioned in this article. Control by State authorities is also being intensified day by day and the position of the trademark owner is being strengthened at the legislative level. The legal consciousness of violators is increasing, which is due to the fact that the number of entrepreneurs, who initially correctly structure their business is growing, and, of course, before using "someone else's" objects of intellectual property, they take the consent of the owner or come to a single decision with him on a contractual basis.

Local Knowledge for Global business

Global Presence



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Belarus
Minsk

Georgia
Tbilisi

Kazakhstan
Aktau
Almaty
Atyrau
Nur-Sultan, etc.

Kyrgyzstan
Bishkek

Moldova
Chisinau

Mongolia
Ulaanbaatar

Russia
Moscow
Rostov-on-Don
St. Petersburg

Tajikistan
Dushanbe

Ukraine
Kyiv

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Switzerland
Zurich

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