

The Challenging Relationship between Contemporary Art and Intellectual Property

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Abstract

Nowadays, the contemporary concept of intellectual property rights is a challenging problem, because it includes many ideas like innovation, invention, copyright, trademark and creativity and/or others of these kind. The legislation of intellectual property right is one of the most challenging ones not only in Albania but also in the most developed countries. A successful entrepreneur (Craig Venter) thinks that it is the key for the economic development and prosperity.

The intellectual property plays a crucial role while being applied in the business, biotechnology and artificial intelligence. Its legislation is very recent and needs to be updated or modified so that countries should be able to anticipate any gaps of the legal framework that may be generated in future due to innovation and invention.

Soon, Albania is going to join the European Union, so additional to the efforts to ratify the domestic legislation with the Acquis Communautaire, the government is facing with another huge challenge. According to international reports “Mapping the Real Routes of Trade in Fake Goods”, the country has become a main path for the international transit regarding counterfeit goods. The vigilance of domestic intuitions is underperforming that are incapable to stop this phenomenon.

Key Words: *Intellectual Property, Trademark, Copy Right, Innovation, Legislations/Regulations, Business, Biotechnology and Artificial Intelligence*

Importance of Intellectual Property

The importance of the Intellectual Property is that it is one of the newest sources of law, it carries a very great legal importance to guarantee the rights of the inventor and copyright. Specifically, the law allows inventors, owners of patents, trademarks or copyrighted works to benefit from their job or to invest in scientific inventions. These rights are described in the Article 27 of the Universal Declaration of Human Rights, which provides for the right to benefit from the protection of moral and material interests resulting from the authorship of scientific, literary or artistic works.

The importance of intellectual property was first recognized in the Paris Convention for the Protection of Industrial Property (1883) and the Berne Convention for the Protection of Literary and Artistic Works (1886). Intellectual property has a very large influence on liberal democracies. First, the progress and well-being of humanity rests on its ability to create, invent and generate new works in the fields of technology and culture. Second, the legal protection of new creations further encourages the commitment of human resources by translating this into economic and cultural growth for the respective states. Third, the promotion and protection of intellectual property promotes economic growth and development as well as creates new jobs, while the development of industry sectors guarantees higher quality and satisfactory production for the society.

Intellectual property helps to create a balance between the interests of both innovators and the public, providing an environment in which creativity and invention can flourish, for the benefit of all. But this is only achieved by creating the right legal basis and the functioning of law enforcement institutions to guarantee the proper legal guarantees to inventions and creations. One of the most important international structures is the World Intellectual Property Organization “WIPO” which has the approach to study and to identify current challenges related to intellectual property, policies, information and international cooperation. This structure is funded by the United Nations, and currently has 193 member states including Albania.

Global Index of Intellectual Property Alliance 2019		
Country	Score	Global Ranking
Albania	4.546	106
Bosnia	4.419	110
Kosovo	n/a	n/a
Montenegro	4.817	92
Nord Macedonia	4.703	100
Serbia	4.785	95

Source: <https://www.internationalpropertyrightsindex.org/countries>

To ensure a proper legal system and full harmonization between states, WIPO currently administers 26 treaties, including the WIPO Convention. Actually, under the context of the evolution of intellectual property, here are some of the most important conventions:

- Paris Convention for the Protection of Industrial Property (1967);
- Berne Convention for the Protection of Literary and Artistic Works (1971);
- International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (the Rome Convention) (1961);
- Treaty on Intellectual Property in Respect of Integrated Circuits (1989)

The role of intellectual property in business development

Innovative and creative ideas stand at the heart of the most successful businesses. Ideas, however, have little value. They need to be developed, transformed into innovative outputs or services and successfully commercialized in order to enable businesses to harvest the benefits of their innovation and creativity. Every invention or creation has a very important role in business, because its performance and role translates into asset value. The higher the value of the assets the more demanding it becomes for investors or financial institutions.¹

In order to ensure a proper business development in addition to financial access, it is important to carry out the internal, but also external audit. Each audit should be carried out by professional intellectual property auditors by identifying, monitoring, and evaluating the asset, in order to have a proper strategic business development. Therefore, the business should take it into consideration in order to avoid any anomalies related to the development of the business, but also in relation to unfair competition.² Moreover, it is also important to identify and highlight the signs and elements that a product has, thus making the intellectual property relationship very much related to the field of marketing. Using of marketing in a professional way in relation to the product will allow consumers to distinguish the products or services, which the business has, against those of competitors and to associate the products or services with the desired qualities.

In Albania, businesses can protect their intellectual property through legal guarantees as provided for by Law No. 35/2016, “On copyright and other related rights”, which applies to works of science, art and literature. Albania has ratified international conventions in the field of copyright and related rights as

¹ WIPO, Making Intellectual Property Work for Business, 2011:2

² WIPO, Intellectual Property for Business, Small and Medium-Sized Enterprises Division, 2011:7

administered by WIPO, such as the Berne Convention. Albania is also a member of the World Trade Organization and has implemented the TRIPS Agreement. Therefore, businesses that publish their work for the first time in Albania benefit from the automatic protection of copyright for all other countries that are members of these conventions. Meanwhile, Law 17/2017 “On industrial property” regulates the system of issuance and protection of patents and service models (for protection of inventions), industrial designs, trademarks and services, as well as geographical indications.

It’s an obligation for customs authorities to prevent, detect, investigate, verify and combat smuggling, infringements, illegal trafficking of prohibited or restricted goods, infringement of intellectual property rights, etc., in order to guarantee a safe trade.³ While having a very good legal infrastructure in place, the paradox lies in the fact that Albania is part of the chain of import and export of fake products to the European Union. The study “Mapping the Real Routes of Trade in Fake Goods”, referred to the general trade-related counterfeiting index by presenting the relative intensity, with which a given economy exports fake and pirate products. This study has identified that the countries of origin, which are among the largest producers (China, Tunisia, Philippines, Turkey, etc), use Albania as one of the transit countries to enter the market of the European Union. Imports to Albania are usually made by air, while exports to the European Union are made by sea.⁴ The problem is that Albania, being one of the transit countries, circulates very large quantities of fake goods and products such as, textile products, shoes, cosmetics and perfumes, medical supplies and pharmaceutical products. Therefore, this phenomenon is against the laws that protect intellectual property rights and shows anomalies in fair competition in the market.

Additionally, the European Commission 2018 report has concluded in terms of implementation, during the reporting period that General Directorate of Intellectuals Property participated in 27 court proceedings. While in 2018, 105 administrative sanctions were imposed during the inspections, thus consisting of 98 fines and seven warnings for copying. In the same period, the General Directorate of Intellectuals Property conducted a total of 336 inspections. These inspections resulted in 76 administrative sanctions (71 were warnings and five were fines). Furthermore, during the reporting period, the customs administration suspended the release of 8,334 products suspected of infringing an intellectual property right.⁵ However, the European Commission report maintains that there are still concerns about the high number of fake products in the country. Therefore, law enforcement institutions need to be more vigilant and prevent the trafficking and sale of fake products at home and abroad.

³ Law No. 102/2014, dated 31.7.2014. “The Customs Code of the Republic of Albania”, Article 10/2

⁴ “Mapping the Real Routes of Trade in Fake Goods”, 2017:56

⁵ Communication on EU Enlargement Policy, 2019:62



Currently, businesses in Albania have the right to go to the court and have access to it in cases of disputes concerning copyright or invention. Nevertheless, there is no specialized section in the court to adjudicate disputes over copyright or industrial property. The establishment of a separate section would therefore guarantee a proper and professional adjudication of intellectual property issues.

Application of biotechnology through intellectual property

Biotechnology is a sector marked by an extremely swift technological advancement. Nonetheless, return on investment in this market can be remarkably slow. It is therefore important that research organizations and enterprises safeguard the innovation they generate by resorting to an intelligent use of intellectual property rights, which provide a basis for return on investment in research and development, by endowing exclusive rights for a certain time to their owners. Biotechnology is usually divided into three sectors, namely⁶:

- Health care biotechnology, which plays an important role in the discovery of new medicines (eg insulin);
- Agricultural biotechnology used to develop new crops and increase their tolerance to diseases or climatic factors;
- Industrial biotechnology is the sector that includes the application of biotechnology-based tools in traditional industrial processes (“bioprocessing”) and the production of bio-based products (biofuels, bio-plastics and bio-based chemicals).

In the domain of biotechnology, patents are the single the most important forms of legal guarantee. Patents are widely used to protect manufacturing and technical innovation, including the way it is made, operated and used⁷. This instrument gives the owner exclusive rights to prevent unfair competition that may take place, to use, sell or unfairly produce a work that has come to life through someone else’s creativity. Patents in the technology sector contain additional specific elements, which are: - A description of the invention with specific details and the advantages this invention brings compared to the known state of the art, completed with relevant examples; a set of claims, which determine the issue for which protection is sought. The claims in the field of biotechnology mostly take into account following aspects⁸: claims of products, justification of the importance of use, innovation of the way of technological use.

⁶ (European IPR Helpdesk), 2014:2

⁷ (European IPR Helpdesk), 2014:4

⁸ (European IPR Helpdesk), 2014:5

The European Union pays great attention to intellectual property. It has put in place a very large fund to invest in research and biotechnology innovations. Still the paradox lies in the fact that these investments, which can be given for scientific research, strictly prohibit their direct application. To understand what is patentable and non-patentable in the field of biotechnology, we can refer to the division made by the “European Patent Office”⁹ in the European Union:

What is patentable?	What is not patentable?
Nucleic acid genes and molecules. Proteins, eg: - insulin. Enzymes, e.g.: for the production of bio fuels. Antibodies, e.g.: to fight cancer. Viruses, e.g.: to fight Hepatitis C. Cells, e.g.: hematopoietic stem cells for the treatment of leukemia. Microorganisms, e.g.: yeast for food production. Variety of genetically modified plants. Variety of genetically modified animals.	Sequences from an unknown device. Genetically modified animals without a research interest in the field of medicine. Variety of genetically modified plants. Variety of genetically modified animals. The human embryo Processes that necessarily involve use and destruction of human embryos. Sexual reproductive cells Chemical experiments between humans and animals

In Albania the Law no. 17/2017 “On industrial property” provides for the definition of biotechnology and for the cases when an invention can be patented and when not; it does so by always approximating domestic law with that of the European Union. Nonetheless, the situation in Albania is chaotic due to the widespread smuggling of prohibited stimulants used on livestock and agriculture products. The inaction of customs to prevent the entry of products that cause cancer cells and genetic mutations, has led to an instability in the food safety market for livestock and agricultural products. Currently, the national institutions in charge for the inspection in the field of health safety (NFA) are not in a position to take appropriate preventive measures against agricultural pharmacies that sell biotechnologically modified stimulants. In this sector we encounter a great paradox between the law in force that prevents the patenting of products with high social and health risks, and on the other hand the existence of products (stimulants) which do not possess any regular national or international legal patents whilst loosely circulating in our country. Referring to the European Commission report on the regulation of the market of food, feed and animal by-products, a rule on the labelling of food and consumer information has been adopted. Annual waste monitoring programs covering unwanted substances including veterinary medicines, stimulants, biotoxins and heavy metals have been updated and adjusted in accordance with the available techniques and financial resources. Regarding the monitoring of pesticide residues in food on the market, there

⁹ (European law and practice for patenting biotechnological inventions), 2009:17



is still no certainty about the origin of their injections.¹⁰ The report also states that deficiencies in waste and contaminant controls in live animals and animal products have been noted due to hazardous preparations / stimulants.

Progress is still lacking with regard to the urgently needed adoption legislation on genetically modified organisms. To date no structure has been designated to cover this portfolio. Therefore, the establishment of appropriate institutions to carry out monitoring, expertise and strategies to ensure a secure market for consumers, remains one of the most important challenges in the approximation of domestic legislation with that of the European Union. The human resources for these structures need to include expert biotechnologist to ensure the implementation of policies in a professional manner. As above, based on the report of the European Commission, agricultural pharmacies should receive heavy sanctions if they are engaged in trading products modified in biotechnological ways (not enjoying industrial patent rights under applicable law), because in other words this is considered a criminal offense. Engaging in it violates human health and in the most fatal case causes death.

Artificial Intelligence (Robotics) challenging the right of intellectual property

Artificial intelligence is an increasing significant development in the field of business and technology. There is no universal definition of the artificial intelligence yet, it is considered as a discipline of the computer science that aims at development of the devices and systems that can perform assignments that require human intelligence. The right of the intellectual property has developed a big challenge of discussion with artificial intelligence with regards to the rights of the author and patents.

For the first time in 1988, United Kingdom became the first country to grant protection of property rights on artificial intelligence. The position was that when a work is created and protected by copyright but there is no physical person qualified as the author, “the producer” of the work is considered to be the author. While in America “The Office for the Protection of the Common Rights” has undertaken a diverse approach. Since at least 1973 it has applied a “policy of human authorship” that bans the protection of the author rights that are not written by the human authors.

The contemporary debate states that if artificial intelligence generates or creates a new product to whom will the right of the author belong?! Certainly no computer network would replace a patent. The contemporary debate does suggest

¹⁰ Communication on EU Enlargement Policy, 2019:68

this and yet there exist no arguments convincing enough to admit this fact. The systems generated by artificial intelligence lack the legal and moral rights as well as the capability to own the property.¹¹ Furthermore, it would have considerable cost and would not have obvious benefits for the changing of laws to allow the ownership of the artificial intelligence.

Guarantees of fair trial for Intellectual Property proceedings of ECHR

In addition to the material guarantees, the ECHR foresees several protection procedural measures which focus on the right for a fair judgment. The right to have access at the court plays an important role with regards to the right of intellectual property determined by the European Court of Human Rights relevant to provisions, complaint procedures, issues of jurisdiction, legal cost and unjustly extended procedures.

Thus, the procedure in the ECHR works in the frame of these principles:

- Res judicata;
- Independence and Impartiality;
- Equality of arms and adversarial procedures
- Administration of evidence;
- Reasonable Deadline;
- Enforcement of the judicial final decisions.

As well the execution of the judicial decisions within legal determined deadlines, would guarantee a regular legal process. All parties in the process will face their rights and obligations as a result of the process. In this way the plaintiff party would guarantee the claim of rights and the conflict would be avoided in any case and abusive process with regards to the intellectual ownership.

Conclusions

There is imbalance and no fair relationship between law and practice, as a result of the application of contemporary art of innovation and technology;

Taking into account the application of intellectual property boosts growth, prosperity and R&D of business by increasing its turnover and by improving its services as well as ameliorating quality of production;

¹¹ (Maria Iglesias) 2019:6



Albania has another additional challenge, except the approximation of the domestic legislation with that of the European Union, to improve and to update the IP Regulations;

The customs control is inadequate in making the necessary verifications against the counterfeit goods or the smuggled products;

The role of institutions in Albania is very passive regarding the business sanctions that trade and/or produce unauthorized products while violating fair competition in the market;

International laws give huge advantages in case of applying IP rights to conduct research (R&D) and/or to invent something new at any fields including biotechnology. Meantime, international laws apply restriction and sanctions in case of violations. Albanian government should increase fines and restrictions for such cases (violation of trademarks, copy rights, IPs, etc...);

Currently in Albania, there are circulating biotechnological products not associated with a legal patent;

Artificial intelligence goods/products suffer the most since its legal gap in Albania is larger due to its specific challenges.

Recommendations

Albanian Institutions should guarantee the prevention of trafficking of artefacts, copyright theft, unauthorized usage of counterfeit items or reproduction by third parties, so its consequence is that the state budget and financial institutions allocate less taxes. It is another explanation why there is a low economic growth and progress in Albania;

Government must be vigilant to adapt quickly the IP laws regarding innovation and invention in order to anticipate any possible legal handicap that can affect mostly businesses in Albania;

It is important to increase investments associated with intellectual property and innovation that ensure a large and sustainable economic development for the domestic market. In particular, the Albanian government should undertake policies to facilitate and to subsidize investments and investors who are involved in the intellectual property. For example, for all the companies that have patents, trademarks, IPs, etc..., the government should provide subsidies, lower the taxes for Start-Ups, offer credits at low interest rates, etc...;

Applying sanctions to all entities that produce and/or sell counterfeit goods or illegal products and ensure fair competition is the key of success in Albania. It is the only way for attracting serious inventors and for encouraging authors, businesses and academic institutions to conduct more innovation, research and development;

Banning of counterfeit goods, which are produced (and/or sold) by local businesses in Albania, is very important. Its continuation would cultivate among staffs and entrepreneurs laziness, spoils fair competition within domestic and/or between regional/international markets, so consequently it will lower desire of R&D and Innovation as a main drive of prosperity;

Non-applying of the international IPs standards decreases the fair competition in Albania compared to the rest of the Western Balkans. Automatically, it would impact in the reputation of Albanian businesses to be seen as non-serious and incapable to face with innovation.

Improving the IP Index (Global and/or Regional ranking) of Albania is crucial, since it is placed the second last compared to our neighboring non-EU countries in the Western Balkans (Best Montenegro).

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