

The executive guarantees of intellectual property rights

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ABSTRACT: Having the necessary executive guarantees such as legal and criminal is the most important issue in discussing the protection of intellectual property rights. Because without executive guarantees, possibility of support and its effectiveness is only conceivable in the world of the mind and it is impossible to ensure or guarantee the rights of owners of the intellectuals. Therefore, today, in addition to integrity and transparency having the rational and efficient executive guarantees is one of the indices of the laws evaluation. The executive guarantees can be divided into two sections, criminal and civil (legal). However, criminal executive guarantee is the most important and the most severe executive guarantee violations of intellectual property rights. In addition to supplying and guaranteeing the intellectual property rights, it also has a preventive effect. And because the civil executive guarantee cannot be enough to establish a social order, therefore, the existence of criminal executive guarantee is necessary and inevitable in the realm of intellectual property rights. And a part of this right is associated with public order. In this article, the anticipated executive guarantees are considered within domestic legislation and international instruments on intellectual property rights especially trademarks, patents, industrial designs.

Keywords: Intellectual property (IP), industrial property, literary artistic property, executive guarantees, reparation of international conventions.

INTRODUCTION

One of the important aspects of the Trips agreement with other conventions under the WIPO management is that the criminal remedies have not been predicted in any of them but in particular, Trips agreement has discussed such compensations methods and at least the cases that some of these penalties should be imposed on them is determined. Umbilical criminal compensations are not the methods of civil compensations and the court depending on the case can apply both types of compensations methods on the particular person. According to the Trips agreement, members must at least provide the Code of Procedures and criminal punishments in the case of willful trademark counterfeiting or copyright and piracy on a commercial scale; in the law of Iran it has also been paid to both criminal and civil compensations that imprisonment or monetary fine, payment of compensations, seizure, confiscation and infringing destruction of goods are the means of compensations.

International documents

1. The Paris Convention

The Convention is silent with regard to criminal executive guarantee, and according to Article 10 of the third Convention, on the exist of appropriate legal means of compensation, member states shall apply some guarantees to the nationals of other Union member countries. And in respect of civil executive guarantee has made some specific provision and in articles 9 and 10 it also refers to the issue. And violating goods seized are amount the expected measures.

2. Trips agreement

One of the distinctive aspects of the agreement with other conventions under the WIPO management is that the criminal remedies have not been predicted in any of them but in particular, Trips agreement has discussed such

compensations methods and at least the cases that some of these penalties should be imposed on them is determined. And umbilical criminal compensations are not the methods of civil compensations but sometimes civil compensation is not enough and recourse to criminal compensation will be remedial.

And the court depending on the case can apply both types of infringement methods on the particular person. According to the Article 61 of TRIPS: Members shall provide for criminal procedures and penalties to be applied at least in cases of willful trademark counterfeiting or copyright piracy on a commercial scale. Remedies available shall include imprisonment and/ or monetary fines sufficient to provide a deterrent, consistently with the level of penalties applied for crimes of a corresponding gravity. In appropriate cases, remedies available shall also include the seizure, forfeiture and destruction of the infringing goods and of any materials and implements the predominant use of which has been in the commission of the offence. Members may provide for criminal procedures and penalties to be applied in other cases of infringement of intellectual property rights, in particular where they are committed willfully and on a commercial scale.

3. Performance treaty and WIPO sound effects, and its draft

WIPO draft treaty in the field of protection of the radio and television sector organizations has obligated members of the Treaty to protect the mentioned organizations against someone who disables these plans through legal tricks. Of course, the mentioned article does not mean to the obligation or legal use of the technical means by organizations, but it means that if organizations use these tools they need to be supported, and Member States are allowed to select the amount of effective and deterrent damages due to their own rules. Membership condition is that the person who does this be aware of, or there be reasonable and logical fields for his or her science and awareness that device and service are in the field of illegal activity and violate the right. The offender focuses on the target that device or service is used to.

Treaty members are free to choose compensation and the only thing is that the compensation should be effective. Work ID contains information about each work creator such as performer, producer of sound effects, radio and TV broadcaster; and in addition, work characteristics state the terms and conditions of work use and other information about the work. According to Article 19 of performance treaty and sound effects of WIPO and the WIPO draft treaty in the field of protecting the rights of Radio and TV broadcasting organizations, the treaty parties must apply the effective remedies and must apply the law that is against persons who knowingly and deliberately follow the actions. Or with respect to civil remedies, in order to identify the creators and facilitators conceal the reasonable grounds, or provide the providers of the treaty rights violations.

1. Unauthorized remove or modify of electronic identification of the work.
2. Importing with intent to distribute, broadcasting radio and TV, offering to the public, unauthorized available to the public of theatrical works, pages or audio works and TV or radio programs with awareness, or reason to know where about the electronic ID of work has been changed or removed without permission. Moreover, it has established these acts as punishable by criminal and civil liability in this law.
3. Any transfer or change in favor of electronic identification work license.
4. Distribution - importing in order to distribution, public transmission and supply of works, such as performances, copies of recorded performances or public works knowing that electronic identification work has been changed or moved without authorization; A prerequisite for membership is that the actions be done intentionally; that is, it be done with the knowledge of the subject and without a license. Wipo (2006) (art14-15). Moreover, the obligation of the treaty rights of the identification effects is covered in the form of electronic. And members to fulfill the substance of the articles somehow are able to limit the provision's scope in their national law, and that in terms of technically do not educate impractical situation for the broadcast of Radio-TV and other users that due to the law have qualifications. (wipo1996 diplomatic conference on certain copy right).

The use of electronic identification rights is arbitrary and the obligations of the Convention on the Rights of the effects of identification are used only in the cases where such information is given. It should be noted that the voluntary transfer or change of ID work to achieve financial goals is a subject that is placed in many countries within the criminal law scope. The draft bill in Article 29 has discussed the guarantee of the misuse implementation of the technical instruments and ID, and has regulated that the following actions are against the law and against the supported violations rights in the law:

A: Manufacturing or importing for the purpose of selling, and renting any machine or device that in some way has made possible to receive encrypted programs that have been broadcasted or have exposure to the public.

B) Manufacturing or importing for the purpose of selling, and renting any machine or device that the aim of its design or construct is only to overcome any device or tool that have been manufactured in order to prevent or restrict the reproduction of a work screen or audio tape or radio program, TV or to weaken or damage the quality of its copies.

Types of damages

Damages are classified in different ways; the nature of the material and spiritual is the most famous classification of damages (Nasser Katouzian, civil rights, guarantee obligations out of contract signing, p. 246). Now the argument is that are the damages caused by industrial property rights only include material damage or it includes spiritual damages too? There is no doubt that this includes the material and spiritual damage. In a case may be claimed only material damage, or both, if one violates the rights of others, there is no doubt that he/she has hurt the author or holder's rights. For example, person A tries to impute the other person's patents to him/herself, so he/she will harrow the feelings and emotions of the inventor and as well as causing material damage to the inventor, too. Articles 1 and 2 of the law of civil liability and Article 171 of constitution recognizes the moral losses as compensable. And we must admit that due to the defect of the owners of industrial property rights by individuals, there is the possibility of damage, both material and spiritual, but how the damages should be compensable; There were differences between the lawyers, and budget and the law of patents, industrial designs, commercial signs adopted in 2007 is not provided a specific benchmark in this regard. Even in relation to financial compensation, it is followed the traditional model, which requires the revision and reforming in this field.

The principle of full compensation of losses:

One of legal sanctions against abuses is a sentence to pay damages; compensation can only be useful when it eliminate all losses and the effects of rape (Masoud Reza Ranjbar, determining the damage caused by the breach of contract, Tehran, 2008, p. 27). So if someone is recognized as a violator of the intellectual property rights of any person in connection with an intellectual product, the Justice appropriate that all his losses, both material and moral be compensated, which refers to Articles 1 and 2, 5 and 6 of the law of civil liability would prove the same.

And according to the rule of ((Do no harm in Islam)) and guarantee, the damages should be fully compensated to the injured party, in which this is not exception in the field of intellectual property; but it includes that, too. And the definition of moral losses says:

((Damage to the non-financial and emotional benefits of person cause the damage to the dignity, reputation and emotion of the person and also make mental pain and sorrow that the person is suffering as a result of various factors.)) (Jafari Langroodi, Mohammad Jafar, terminology of law, Tehran, Ganj Danesh Publications, 1993).

However, none of the laws relating to industrial property rights in Iran is explicit in relation to intellectual compensation, but due to the following reasons the intellectual damages are also exigible.

1. Damage term is absolute in Article 61 of monitors, Article 15 of the invention and the 28 (Industrial Design) and 40 (trademark) and includes both material and spiritual losses, and there is no any reason or presumption baffle to cancel the rule from moral damage.

2. Articles 1, 5 and 6 of the law of civil liability, has been explicitly claimed the spiritual compensation.

The types of material damage:

Material damages are claimed against the intellectual property and has two parts.

1. Damages to the object

2. Damages to the benefit

In the first case the damage directly causes to a foreign object, for example, one destruct another one's car and caused direct damage to it, and in the second case, a person deter the use of a person from his/her own car's interests. Assuming the damage to the object is difficult as a result of violations of industrial property.

But due to this assuming, such damage is irreparable. As if due to the violation of patent, the invention sheet value has been reduced and the invention goods have not been sold, so over the time, it exempt from the tax (Loss of judgment, Katouzian, p. 42) or as a result of plurality of similar goods, the market has been reached to the saturation, and because of the impossibility of selling the products of the invention owner, his factory is closed and its Machinery Factory are worn out and invalidated. There is no doubt that both losses were realizable in the field of intellectual property and it was also exigible according to the former grounds.

The cases that are claimed in the court and damages are demanded, mostly related to the damages caused by violations of industrial property and damages to the interests, because violation of intellectual property rights generally does not damage the foreign object. But by producing the same goods of invention, plaintiff or industrial designs and trademarks would damage the interests and this includes the rules of: ((other people's property is damaged)) the sponsor and the provisions of Article 331 of the Civil Code.

The executive guarantees of the inventor rights

In the law of Iran, if a person affects the rights of patent owner, materially and morality, explicitly according to the article one of civil liability legislation enacted in 1960. Violator shall be liable for damages. In accordance with Article 61 refers to Article 15 of the Patent legislation, industrial designs and trademarks approved by 2007, in addition to compensation he or she is sentenced to pay a fine of ten million riyals up to fifty million riyals or imprisonment from 91 days to 6 months and or both of them. And also In accordance with Article 13 of the law approved by 2000 to protect authors of computer software; anyone violating the rights protected by this law; In addition to compensation, he or she is sentenced to imprisonment of 91 days to 6 months and a fine, and private plaintiff damages are compensated from personal property of the offender. Of course the above mentioned article in a way is faced with a serious vacuum and that is; in relation to the products of by the defendant under the invention, the plaintiff does not have any words so the offenses will be repeated. Of course the author as a special judge dealing with intellectual property rights in line with Article 10 of the Penal Code approved by 1991 and Article 215 of the Penal Code approved by 02.01.92 issues a rule to destruct the plaintiff's invention manufactured goods by the defendants, that this is largely filled a legal vacuum.

There is no disagreement on how to apply criminal executive guarantee. What is in dispute is the civil executive guarantee from the violation of inventor's right and in this regard, there are a lot of evidence that causes differences in judicial practice and doctrine of law.

Investigating the violation circumstances of the inventor's right

In the law of western countries, especially in England and America, the violation of the inventor's right have some conditions, that in those circumstances, if any, the violation has been realized and the inventor shall be entitled to compensation.

1- Reinforced interests of property by the violator:

One of the conditions of awarded damage to the owner of the invention is that the random interests of the inventor be denied by violator and if the patent owner does not lose any interest, in this case, he is not entitled to damages (Article 184 from the outline 35 of the United States legislation).

2. Complainant (patent owner), must prove that there were market demand for the manufactured goods under his invention and when the defective goods have been supplied to the market, it has reduced the demand for his products. In other words, according to the diagram the demand in the market has reduced to the detriment of the owner of the invention and has shifted to the left. (Analysis of the above situation according to the principles of economics, (Dolatshahi -Tahmaseb)

3- The complainant must prove that at the time of supplying the violated products by the defendant (read) there were no alternative goods in the market, and if defective goods could not be supplied to the market, because there were no alternative goods on the market so that the people could use of them, the goods of patent owner have been sold. Because, existence of alternative product is one of the factors reducing the price of a commodity. For example, if the price of butter increases in the market, people use of cheese. But if there is cheese in the market, people have to consume the high-priced butter. The inventor must prove that there were no alternative goods on the market at the time of violation and his invention goods in the market was unique but the violator has taken considerable interest from him by supplying the goods under his invention.

4- The complainant must prove that the production-possibility frontier was positive on the topic of invention, that is there were the possibility of the production of goods under his patent and would provide it to the market.

But despite this ability, defendant using the violated actions and supplying goods under the complainant's invention has led the market to the saturation and the complainant has been lost.

Production-possibility frontier

This means that the inventor must prove that at the time of the violation; has been in place A and had a better situation.

5. The inventor must be able to prove that due to the committer act, his interest has been low. The inventor must prove that due to his sales decline, his profits have been decreased. It is clear from the above formula, if the value of sales be reduced; as a result the total income has been also declined and thus the total interests also decreases. Despite the 5 mentioned conditions, the inventor is entitled to claim damages but under the Iranian law in Article 60 of the Observers to Articles 14 and 15, the Law (Law on patents, industrial designs, and trade signs approved in 2007) has not attended to this situation. Despite the complainant merely invented sheet and regardless of the violation of other conditions, the culpability is issued to the defendant and is claimed in court. The action has very negative effects on the economic and legal system and we seriously need to reform the law. Then using mentioned indicators, if it is proved that the interests of the patent owner have been strengthened; with the appeal of official judicature expert, they can sentence the defendant to pay for the damages. In general, the following factors are involved in assessing the extent of damage.

- A) Sales interest of lost property.
- B) Reducing the price of sold goods due to the importing the incomplete competitor products into the market.
- C) Increasing the cost of sales, including advertising costs, storage and maintenance costs.
- D) Losing of the capital profits: This means that when the value of the goods is low, the sale of related products is also decreased. As a result capital profits will be reduced, too.

Therefore, official expert by considering these factors will investigate the damages to the inventor and will announce his ideas. Unfortunately, Iranian courts do not consider to this affairs due to the legal vacuum. Criteria reinforced interests of industrial property right's holder in violation (Lost profits).

The most important criteria to determine the damage caused by industrial property rights (patents, industrial designs, trademarks) is the criteria of reinforced interests rates from the owner of the invention or the owner of the industrial design and trademark owner. If the right holder wants to charge the reinforced interests, in the case of authenticating these five conditions, he/she will have the right to demand that all profits obtained by the violator. It is reaffirmed that only strengthen of the owner interest is not enough and the said conditions must be proven that America and Britain precedent courts are the same but there has been little attention to the situation in Iranian courts and it causes losses to other party. It should be noted that the causality relation should be established between the acts of violation and the strengthened interest. And proving the relationship is assigned to the complainant (demand). If this does not be proven, the court cannot sentence the defendant (violator) to compensation and there is no such rule in industrial property rights of Iran. But on the basis of civil liability it is inferable from the general rules of law. Obviously, if each of the five conditions is ruled out; consequently, the causal relationship also will be canceled.

Criteria of the reinforced interest in Iran's law

Iran's domestic laws show that there is no specific criterion for compensation. Even treaties and international conventions that Iran has joined them have no any criteria for how compensation is provided. Trips agreement is the only agreement that enjoys the comprehensive in this regard. But Iran has not acceded to the Trips and therefore it is not effective in the votes of Iran's courts. Articles 60 and 61 of the Patent Act, Industrial Designs and commercial signs, approved in 2007, have merely referred to the compensation. Not only it has not provided any standards for compensation of the interests but also it even without clear has also mentioned the recoupable of damage to the interest.

Therefore, in the case of compensation we should act in accordance with the general rules of civil liability. The result is that civil sanctions that are in relation to the inventor rights violations, there are different ways in different countries regarding how to compensate the incurred loss and its amount. That include:

1. The amount of incurred compensation be calculated based on financial losses that has incurred as a result of violation of the owner sheet of the invention (Mir-Hosseini, patent rights, p. 334)
2. The amount of damages is equal to interest that has been awarded from the rape to the violator.
3. The damage is compensated by paying reasonable money consistent with the operation of a violation. (pervious reference)

Temporary and precautionary measures

Existence of appropriate provisional measures is the indispensable component of any effective mechanism for the implementation of intellectual property rights. The purpose of these measures is the consolidation of maintaining the status in the same way that exists at the time of issuing these measures order. In particular, the measures will follow two goals: One is the prevention of crime or continue to commit it, and the other is to preserve evidence related to the nature, scope, location and source of the alleged defect or identifying persons who are suspected of committing these acts. Such provisional measures shall be executed before the verified guilty against the party that has been claimed against it. (Tarom, Seri, Masoud, 1996, the requirements of the agreement about the trade-related aspects of

intellectual property rights in the national conference examining intellectual property rights). In the Trips agreement, the temporary and border measures have been approved and in accordance with this Agreement, each State Party shall ensure that its judicial measures enjoy from this options, that in order to prevent the violator's activity, order immediate and effective provisional measures which can be prevented from entering goods including imported goods into commercial channels or preserve evidence related to the alleged defect. If necessary, the authorities should be able to adopt provisional measures without listening to previous statements made by the party who is entitled to such measures. Especially, when any delay is likely to cause irreparable harm there is affirmative risk about the loss of evidence.

In addition, if the trial does not begin within a certain period, the termination of the temporary measures to order of the judicial authorities will be canceled. (Trips agreement art 50)

In addition to the temporary measures in the country, in some cases, it may be necessary to take measures at the borders to prevent the entry of infringing goods of intellectual property rights. Because in some cases, the violator's activities have international dimension. For example, large quantities of infringing goods of an intellectual property rights are generated in one country and shipped to another country. Such actions, severely undermines legitimate business activity. That's why the existence of options to halt the flow of importing of these goods to the market of another country has a vital aspect, and the presence of provisions in this regard is a key feature in the implementation of intellectual property rights. Trips agreement provides certain procedures related to about the implementation of border measures in this direction. The right holder who has valid reasons to suspect that importing trademark or counterfeit goods or related goods using clandestine and illegal proliferation of someone else may happen, and request to suspend the release of goods to the customs authorities to bring up his arguments.

Based on Trips, provisional and border measures should not be used as a means to undermine legitimate trade. For this reason, on issues such as providing collateral securing the transaction by applicant, period of the customs clearance suspension by customs officials until next step immediate notification to parties affected has been noticed by this action and the right of immediate appeal and compensation in the case of closure of a place where goods are damaged. In any case, the importer should be able to perform for their discharge, within 10 to 20 days after the suspension of customs clearance, by posting bail to the sufficient amount to protect the right to charge for any defect, unless temporary release is allowed.

Performances and sound Treaty of WIPO obliges the Members, so that according to its legal system adopt the tools necessary to ensure the implementation of this treaty. In addition, Members shall ensure that in this treaty there are practices in order to allow effective enforcement action against any defect in their laws. This includes guarantees of rapid and immediate implementation in order to prevent rights violations and compensation that includes a guarantee of deterrent performance to prevent more defects Rights. (Wipo performances and phonograms are 23).

In America Copyright law has granted competent to the issue temporary orders to the court (Temporary restraining orders) to maintain the position of the members during the hearings. Based on this law, when a lawsuit is waiting for a judgment, the court can command an arrest (record) to all copies of audio that has been claimed they have been made or used by the copyright owner's exclusive rights violations and for all pages of examples and templates, tapes, film negatives and other items that can be reproduced with such copies or audio books under a reasonable condition. Rule 48 in Articles 29 has referred to the provisional measures and provides that the courts while dealing with private plaintiffs to prevent the publication and distribution of complaints and its recording, can command to the court of justice, too.

In the draft Law for the Protection of Intellectual Property, interim and precautionary measures in more detail have been investigated and have been mentioned that the competent court in accordance with the rules of civil procedure or criminal is allowed. Article 26 issues the temporary order banning any action or to prevent the continuation of any action that violate to the rights protected by law.

2. It seems that commanding the seizure of copies of works protected by the law has been produced or imported or are producing and entering into the country without the permission of the owner of the rights protected in the legislation. And issue just in the case of the acquisition is subject to the manufacture and import of these versions, and also issues the seizure of packages, parts, and tools to make copies of the documents, accounts or business papers relating to such copies.

In addition, it provides civil and criminal procedure regulations relating to search and seizure of property regarding to the rights abuses of the law and regulations relating to suspend customs clearance of goods that it is suspected that it have been imported illegally, and will be enforced in the case of materials and equipment supported in this law.

It doesn't state anything in relation to the provisional measures and precautions of Law on Patents, Industrial Designs and Trademarks approved in 2007, but in its executive regulations (Article 183) this option is given to the judicial authorities so that in the case of having sufficient evidence issue to confiscate and collect the violated goods. Judicial procedures in the Engelab Court of Tehran is (District 19) based on the grounds that in the case of

having sufficient evidence issue to confiscate the violated goods including violating goods, trademarks, patents, industrial designs. This procedure has largely filled gaps in the law. In the case of the classes:

1-1043 / 920978

2-2 / sh / a 29 11 92

3-1043 / 921061 (the second branch of prosecutors)

4-9209972120200387

In the first branch of investigation and second prosecutors of court of district 19 of Tehran, ordering a halt were issued to goods of the plaintiff's trademark infringement or violating the rights of inventors. This is in addition to complying with regulations Executive, but it is also in accordance with Article 10 of the Penal Code adopted in 1991 and Section 215 of the Penal Code adopted in 02/01/92, because it is the subject of the crime.

And such cases that are considered in the court; the court in addition to determine whether the penalty of imprisonment or a fine it also in order to the latter mentioned article issue verdict on the destruction of manufactured goods under the invention of the plaintiff and the plaintiff's products under the industrial designs. And in relation to trademarks verdict on the destruction of trademarks belonging to plaintiff that have been used by the defendant, and restitution of goods is issued to the defendant. The judgment in the numbers of:

1-9209972191801108 (trademarks)

2- 9209972191801164 (General Court of the Criminal Branch 1043 of Tehran) (industrial design)

3. 9209972191801294 (Criminal Court Branch 1043 of Tehran) (trademark)

4- 9209972191801213 (Criminal Court Branch 1043 of Tehran) (trademark)

5- 9209972191801354 (trademark)

6- 9209972191801356 (The geographical - trademark)

This evidence suggests and in the author believes the special judge offenses are due to intellectual property; this is an important step toward eliminating legal gaps. It is appropriate that the Islamic Consultative Assembly in retrospect of the law take steps in order to address these gaps and other problems.

d) Criminal executive guarantee of violation of the software rights as patent in cyberspace:

Software as a patent, are not supported in cyberspace. In fact the inventions, in accordance with the relevant conventions have not been advised to members to impose criminal sanctions to combat with inventor copyright infringement in cyberspace. Trips can be considered the only relevant convention that the members are advised to impose criminal executive guarantee for violation of intellectual property rights, that the government can use it and make it to impose criminal sanctions for patent infringement in cyberspace. Since most violation of the software rights comes to action in cyberspace and the Internet, but because the vast majority of lawyers and legal systems know it under the support of the author, to punish violations of the software rights the criminalization has not been done in virtual space as the invention.

In Iranian law, in the law of e-commerce despite the criminalization of literary and artistic property on the message data breaches soft wares, regarding inventive software any article is not assigned to criminalize and declare the Punishment. That it can be considered as a major legal vacuum. Because the law of Iran has taken independent law with the aim of special supporting (Sui Generis) from the software and software major violations comes to action in cyberspace and the Internet which is considered as a big threat for the software law owners in virtual space.

Criminal executive guarantee for violation of the software rights as patents in real space:

In Article 13 of protecting the rights of creator's law of computer software adopted in 2000, Iran is prescribed: "Whoever violates the law protected by this Act, in addition to compensation will be charged for imprisonment of ninety- one days to six months and a fine of ten million to fifty million dollars.

According to Article 12 of the law that recognizing the software has not been ruled out by the patents and is referred to the Patents Act, in the case of the software patent infringement, we should refer to the law of patents, industrial designs, and commercial signs. Under Article (61) of the Act, the same penalty is required namely imprisonment of ninety-one days up to six months or a fine of ten million dollars up to fifty million dollars. Explaining that according to Article 22 of Regulation of the law, one application from the date of registration as an invention for 20 years will be supported by invention system, and after 10 years will be under the auspices of the software approved in 2000.

e) Civil executive guarantee of software rights violations as the invention of the real and virtual space:

If the software is known as a patent and violated in the real or virtual space and its owner does not seek to the criminal executive guarantee or the committer does not be traceable by any reason or the injured party is seeking to claim damages as a result of criminal proceedings, we can get help from the foundations of civil liability.

In the field of civil damages claim (only in cyberspace), proving the fault of the perpetrator is not the condition, because if we resort to the waste rule once due to the perpetrator act, a benefit of the owner, is gone, the perpetrator will be required to restitution.

So if the perpetrator claims that the notion that software infringement, the software is open source and access and the public use from it was free and it has been used and supplied. While the source software was not open, but the invention software belongs to another, again, will be exempt from the liability and the owner will be required to compensation. (Open source)

There is one thing about patents that according to Article 61 of the Law of Patents in the civil suit of the owner of patent rights violations; where the invention is the process of acquiring a product, in the case of the following conditions, the responsibility to prove that the products are not made by the process is the duty of the defendant. Then in the case of court documents, the legitimate interests of the defendant of non-disclosure claims a violation of his secrets and commercial production will be considered:

1- The products are new

2. There is a strong possibility that products are made by using the process and the owner of a patent right, despite reasonable efforts, is unable to determine the process that is really used. That way, if the process has been recorded, the burden of proof that the application has not invented the process called the lawsuit will claim creator software, in this case, legislators claim that the burden of proof is reversed, and in this case the defendant is responsible to prove it.

The executive guarantees violations of industrial designs

With regard to industrial designs, almost all issues that were in connection with the invention were reigned. In terms of criminal executive guarantee the punishment is the same as in Article 61 of the Law of Patents, Industrial Designs and Trademarks approved in 2007 of pursuant to Article 28 of the same law has been stated. From 91 days to six months imprisonment and a fine from 10 million dollars to fifty million dollars, or both of them can be considered as criminal penalties. And in terms of compensation claim of the same patent issues here are followed, especially the northern and current law states that the provisions of Article 23 (5) and (9) and paragraph (c) (11) and (15) patents on designs industrial are applicable.

Trademark executive guarantee

A- Criminal

Unlike patents, trademarks have the backgrounds of criminalization of criminal law rights in Iran and in terms of public involvement, the penal legislator mind in Iran are mostly toward this way.

1. The Penal Code adopted in 1925

The first legislative action was formed to prevent Iran misrepresentations mark or abuse in Article 249 Penal Code. Then reform Article 249 was announced:

Everyone falsify the trademark or by having the knowledge of its falsification use it or use the trademark without permission of the owner of the sign, will be charged from three months to three years and a financial fine.

2. The sanctions law, passed in 1983

According to Articles 122 to 124 of the Act, counterfeiting a registered trademark as well as using it with the knowledge of its falsification will be a crime and the offender will be sentenced to punishment of up to 74 lashes.

3. The Penal Code, approved in 1996

In this Code, according to the legislator's mental background a criminal policy is defined, so it was due to prevent the abuse of trademarks and for him a very heavy penalty is considered from one to ten years. (Paragraph 2 of Article 525 of the Penal Code 375)

Even legislator to support private holders of trademarks in addition to the said Article, adopted Article 529 that this article says:

Everyone falsify the stamp or punch or sign of one of the private company or one of the firm set up by law, or with the knowledge of the counterfeiting try to use it, in addition to compensation will be sentence from three months to two years in prison. That this law, until the approving of the legislation of 2007 partly could be efficient to protect the holders of trademarks, but due to the lack of examples of violations and violations measures, the judgment respectively was in order to match with the ((crime Counterfeiting)). And if the violations measures of the committer

were outside of the definition of counterfeiting, he is not known to be prosecuted and punished. Therefore, most of the cases filed, regarding trademarks were closed by the non-prosecution or innocence. The new law was adopted in order to solve this problem that we refer to it.

4. The law of Patents of industrial designs and trademarks approved in 2007:

This law adopted in the judiciary according to their own time and within the new penal policies. And unlike the two previous Acts, the criminal penalties consider the trademarks holder's rights of violators to be very light. Its punishment is 91 days to 6 months imprisonment or a fine of ten million dollars to fifty million dollars, which does not seem to have a positive performance.

5. Law on Electronic Commerce approved in 2004.1.7

According to this law, the use of another trade mark is considered as a crime ((domain)) and the committer is sentenced to one up to three years imprisonment.

(B) Civil executive guarantees

1. Customs executive guarantee

In connection with goods under the brand name of a particular person, which enter to the country without authorization, the Customs Department is the first leverage to deal with this violation. Because the Customs Department based on the information or the private complainant can close or prevent the entry of such goods into the country. As in accordance with articles 89-90 of trademarks law approved in 1994 in England, relevant authorities can prevent entering of violation goods into the England. Such a law in France has also seen (7-716 L -8-716 L French Intellectual Property law), but this is clearly not happening in Iran Customs law but in limited cases it is accepted and it was given at the request of the judicial authorities. It seems to be the first legal action of the government and parliament to design of customs laws and regulations to protect the intellectual property, especially commercial signs. It is a historical necessity.

2. The application for cancellation of the registration of the mark:

If an individual apply to register a sign, while the same or similar mark is already registered in the name of a certain person, that person would be in line with articles 30, 32 and 41 of law Patents and Industrial Designs and commercial signs approved in 2007 and the implementing regulations to make a request for cancellation of registration. That this is the most serious action steps to support the former owner of the registered trademark; of course, this will include patents and industrial designs.

3. Objection to the application at the patent office:

If one makes an application to register a sign and this sign or its similar sign has already been registered in the name of another person, or in the future the new demand may lead to mislead and deceive the customers in diagnosis of the origin of the two sign, the beneficiary individual (holder of the main sign) can protest to the demand in line with Article 37 to the law Industrial Property Office. And the Agency is required to address his objection. The sanction is followed in relation to the industrial design and invention.

4. Defendant obligation (legal commercial violator) to pay damages:

Although the determination and assessment of damage is not mentioned in the Iranian law, the most important aspect of the criminal sanction, however, is the defendant obligation to pay damages. However, all the losses, both material (the object or benefit) and moral is on demand. This is referred to as compensation in Article 61 of the Patent law and Articles 1 and 2 of the law of civil liability, especially with regard to legal aspects of the case are chargeable. Which this is subject to conditions that include:

A) Unfairly interests by defendant

To prove the defendant responsibility, some benefit costs should be transferred from compliant to defendant, which is capable of immediately. And the source is the unauthorized use of the complaint's trademark. The complaint is not entitled to those benefits.

B) Proving the defendant's fault

As stated in Article 61 of the Trademark Law: Whoever knowingly and deliberately commits an act that according to the article (15) and (28) and (40) be considered as a violation of the rights. In addition to compensation the offender

issentenced to pay a fine of ten million dollars to fifty million dollars or imprisonment of ninety-one days to six months. It is understood that the violator's awareness and knowledge to the rights of the trademark holder are essential. And if the ((knowingly and deliberately)) is not proved the defendant does not have any responsibility.

C) Establishing a causal relationship between the defendant's interests with his fault (defendant's fault):

Without explaining the legal petition seeking admission requirements is that he can prove that the defendant's use from the trademark of the complaint without his consent, and knowing that this sign belongs to another one and he has damaged to his interests. And this demand has not been caused by the procedure itself. So that the complaint has become weak (financial weakness), and the defendant has become rich and there is no legitimate legal. (Abdul Razak Ahmad Sanhoury, mediator in the civil explain the new law, c 8, folder 2, Beirut, Lebanon, al-Halabi Publications, 1998, p. 1989), despite these conditions, the court order the requiring defendant to pay the damages caused by the violation of the rights of the trademark owner. That the judgment in No.:

1-2010.5.16-118 (Third Law branch of Tehran)

2- 2004.3.26-689/3 (Third Law branch of Tehran)

3- 1043/921001 (Criminal Court Branch 1043 of Tehran)

4- 921076 (Criminal Court Branch 1043 of Tehran)

As evidence, this article is proof of this.

CONCLUSION

Along with the development of intellectual property rights, especially in the leading countries in this field, how to support them is also discussed, that the best and most effective way to support them, is to protect the intellectual property rights system that the system must in its text forecast the support tools and the necessary executive guarantees. In Iran's legal system, particularly the criminal executive guarantees foreseen in Article 61 of the patent law, industrial designs, and ineffective and convenient trade signs are not deterrent from powerful features, and international Trips agreements that are comprehensive enough in terms of criminal and civil executive guarantee, Iran has not acceded to it. Iran's accession seems necessary. The five conditions for entitlement of the defendant to strengthen interests of the defendant goes by the inventor's rights is a very important factor that in the review of law patents, and trademarks it should be addressed. Reforming of the Customs laws in order to prevent the defective goods and is a very serious action to protect intellectual rights.

REFERENCES

- Emami N. 1971. The inventor right, Collection of Comparative Law, No. 6.
Jafari Langroodi, M.J. 1992. terminology rights, Tehran, Ganjine Danesh Publication.
Katoozian N. 1995. civil rights era, Requirements out-of-contract, C-2, confiscation and demanding, Tehran University Press.
Mir-Hosseini SH. 2008. patent rights, Tehran, Mizan Publication, autumn.
Sadeghi M. 2005. supporting the rights of creators of computer software in Trips and Iran right, November.
Shakeri Z and Habiba S. 2013. sharing of literary and artistic, opportunities and challenges of the civil rights.
Zarkalam S. 2009. literary and artistic property rights, Samt Publication, second edition Tehran, Winter.