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Intellectual property protection in the period of COVID-19 pandemia



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The global spread of the COVID-19 definitely resulted in considerable changes in all areas of our lives and in this article I would like to dwell upon protection of intellectual property rights in Kazakhstan in the current situation. Functioning of organizations of various forms of ownership has been suspended or significantly complicated for more than a month. In this challenging situation in Kazakhstan, as in many other countries there is uncertainty in the implementation of procedures, compliance with the deadlines, procedures for the provision and issuance of documents somehow related to the protection of intellectual property.

One of the most important criteria for applicants is the priority of the submitted application related to arising of rights to industrial property. Presently in the result of global and local restrictions, many foreign and national applicants fear losing their rights to these priorities. Some applicants are put in a position when it is difficult to provide responses to the expert requests on time, filing oppositions to preliminary conclusions and making payments of state fees at various stages of considering applications.

During the emergency situation the National Institute of Intellectual Property of the Ministry of Justice of the Republic of Kazakhstan (“NIIP”) which is an expert organization entitled to review applications for registration of intellectual property continues processing of applications pending consideration.

In general, the statistics of applications shall be reviewed in order to

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determine the extent to which the spread of the COVID-19 virus affected the capabilities of applicants and NIIS, namely the restrictive measures introduced in the world and in the territory of the Republic of Kazakhstan related to self-isolation.

However, it should be mentioned that in order to undergo the registration procedures for obtaining rights to intellectual property objects it is not required to submit applications in hard copies or to use postal services. Since the second half of 2019, state services related to intellectual property protection are fully provided in electronic form through the e-government web portal: www.egov.kz.

In the current circumstances the electronic format is the most effective way of filing applications and maintaining previous activity in the registration of rights to intellectual property. It is possible that applicants' activity in the use of electronic systems shall continue even after the improvement of the situation with COVID-19.

The following question should be also answered: "To what extent current situation in the world can affect the results of people's creative activity?" In the field of patenting the invention of the most effective vaccine with a 100% result perhaps is the most anticipated scenario by society and governments of all countries. Currently, the potential of scientists around the world is relied upon by all without exception. In this case, if the expected result is achieved, one of the important issues shall be maintaining a balance between intellectual rights and the public interest in the issues related to affordable treatment.

Alexandra Samsonova, associate of Bolotov & Partners LLP in her article [1] noted that experts practicing in the field of protection intellectual property observe the following trend in the field of trademarks. "Since mid-February of this year, several hundred of trademark applications were filed around the world related to COVID-19 subject..."

We do not exclude the possibility of filing similar applications in the territory of the Republic of Kazakhstan. Of course it is impossible to conclude about the position of NIIP on the registration of such trademarks, without conducting an examination and analyzing the designations for compliance with the provisions set by the Articles 6 and 7 of the Law of the Republic of Kazakhstan On Trademarks, Service Marks and Appellations of Origin of Goods ("Trademarks Law".. However, it should be understood that monopolizing the words: coronavirus, COVID-19 and various combinations using these elements (phrases, addition of an image, letters or numbers), we risk to contradict the public interest which is prohibited

by the Article 6.3.4 of the Trademarks Law, which establishes that contradiction to the public order is a definite ground to refuse trademark registration.

In addition, trademarks, inventions, utility models, industrial designs and geographical indications belong to industrial property objects in accordance with the provisions of the Paris Convention for the Protection of Industrial Property of March 20, 1883. Pursuant to the Article 961 of the Civil Code of the Republic of Kazakhstan, a trademark is a means of individualization refers to objects of intellectual property rights.

The legislation of the Republic of Kazakhstan prohibits using a protected trademark without the consent of its owner (provisions of the Civil Code of the Republic of Kazakhstan, the Criminal Code of the Republic of Kazakhstan, the Code on Administrative Offenses and the Trademarks Law). Consequently the above tendency to register the word elements “coronavirus” and “COVID-19” as trademarks may result in disputes related to possible violations of trademark rights, and this could negatively affect the interests of public and the state.

As for the protection of intellectual property rights from illegal use by the third parties, thanks to the introduction of the emergency situation in Kazakhstan there is a slight decrease in the number of offenses, which may be associated with the suspension of business entities, additional restrictions on the movement of people and goods, and a general decrease in demand for many types of goods.

In general, the main types of illegal use of intellectual property objects are the circulation of counterfeit products (including production, import or sale only), parallel import (import and sale of original products containing intellectual property objects, however without the consent of the right owners), use of intellectual property in promotional products and the Internet.

Currently in the world market faked goods related to the fight and prevention of coronavirus infection are revealed. These are antiseptics [2], and medical masks [3], and many other similar products.

At the same time, the turnover of other types of counterfeit products, although overall decreased, but still did not stop, and moved more to the sphere of Internet trade. It should be noted that this type of trade in faked products is especially dangerous, since when advertising counterfeit goods, a seller can use photographs and illustrations of the original product, which misleads a consumer about the producer. It may also be difficult to identify

a seller of such products after their delivery to a customer.

How, then, can right owners protect their intellectual property rights? Protection of intellectual property rights from various kinds of illegal use includes civil, administrative and criminal measures. So, right owners have the right to file lawsuits in courts to bring infringers to civil liability, to justice bodies, state revenues and competition protection bodies in order to bring infringers to administrative responsibility, as well as to internal affairs bodies and economic investigation bodies in order to bring infringers to criminal responsibility.

Currently all of the above methods of protecting rights have significantly regressed due to the introduction of a number of restrictive measures. Since the courts are switched to online processing format, which, unfortunately, does not accelerate and even slows down their work; administrative inspections in the field of intellectual property were reduced to zero in the result of quarantine, and criminal law protection, which was not popular among right owners for a number of grounds has now been minimized due to the absence of major market infringers.

The right owners and experts in the field of intellectual property protection, note that the largest numbers of offenses in this area are committed by small and micro-businesses. In total such entities inflict enormous damage on intellectual property owners, however the damage divided per each of them in practice does not reach the category of a criminal offense.

In this connection, the most relevant way to protect intellectual property rights is the administrative-legal method, which consists in bringing infringers to administrative responsibility in the result of checks by the relevant administrative authorities, in practice they are most often the justice authorities. It should be noted that even before the introduction of the emergency situation, this tool for protecting trademark rights was significantly limited due to the termination of inspections of small and micro-businesses.

The Decree of the President of the Republic of Kazakhstan No. 229 provided for a moratorium on conducting inspections of small and micro-businesses from 01 January, 2020 to 01 January, 2023 [4]. At the same time, checks on issues related to the protection of intellectual property rights also fell under this moratorium, and currently the list of tools available for protecting intellectual property rights have been significantly reduced.

Consequently, it can be stated that effective work related to protection of intellectual property rights, extending terms of protection of such rights continues through electronic document management during the pandemic in Kazakhstan. It is expected that applicants and intellectual property rights owners shall be given an opportunity to restore different deadlines for submitting certain responses and statements, requests and oppositions if the terms were missed due to the emergency situation in the country.

At the same time, the protection of intellectual property rights is largely impeded, and although the total number of violations has decreased, consumers are still advised to be careful when making online purchases, as right owners and producers of original products are currently limited in their ability to protect their goods market from all sorts of infringements.

[1]<https://www.zakon.kz/5016238-monopoliya-na-covid-19-aleksandra.html>

[2]<https://informburo.kz/novosti/poddelnye-antiseptiki-dlya-ruk-obnaruzhili-v-poliklinikah-temirtau.html>

[3]<https://www.nur.kz/1842816-poltory-tysaci-celovek-zaderzali-v-kitae-za-poddelnye-medicinskie-maski.html>

[4]<https://www.zakon.kz/5005641-vstupil-v-silu-moratoriy-na-proverka.html>

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