Recent Evolution of Intellectual Property Enforcement in Georgia

Tamar Taliashvili
Irakli Shamatava

Caucasus School of Law,
Caucasus University
Paata Saakadze 1,
Tbilisi 0102, Georgia
Email: t.taliashvili@tca.gov.ge,
ttaliashvili@hotmail.com
Email: i_shamatava@cu.edu.ge

Abstract: The article elaborates on the topic of the new wave of evolution of the protection of intellectual property in Georgia inspired by signing the EU–Georgia Association Agreement, (AA—the Association Agreement between Georgia and the EU and the Nuclear Energy Association of Europe and its Member States). The harmonization process is an impressive field of law on its own. The article deals only with particular issues, such as the role and critical characteristics of the harmonization of intellectual property protection and enforcement mechanisms in Georgia.

In this context, the article examines the legal nature of the amendments to the Civil Procedure Code of Georgia (GCPC), in particular, a new chapter of enforcement regulations, that has been introduced to the GCPC—‘Specificities in proceedings of the infringement of exclusive right of intellectual property’.

The article is predicated upon the allegation that the new legal introductions are merely of a formal character, while the enforcement mechanisms and remedies, as a significant part of Georgian civil legislation, had already been in place and Georgia had ratified major international intellectual property agreements. The article deals with the legal problem of the application of the intellectual property enforcement amendments by the judiciary and measures the practical impact.

The hypothesis of the analysis is to consider whether further developments are necessary to contribute to a consistent approach

to the adjudication of intellectual property enforcement disputes in Georgian courts and to promote the efficient implementation of the novel intellectual property enforcement mechanisms into the Georgian legal system.

The analysis of the characteristics of the impact of harmonization on intellectual property as of intangible rights proves to have wide-ranging benefits for the holders of intellectual property in Georgia or elsewhere in Europe.

Keywords: *Association Agreement, civil action, Civil Procedure Code of Georgia (GCPC), Council of Europe, enforcement, European Union, harmonization, intellectual property law, intellectual property rights, secure the claim, secure the evidence*

1. Introduction

Creativity and innovation define major events in the history of mankind. Nowadays, it is particularly striking that new technologies have a substantial effect on the agenda of the civilization. Historically, keeping up with the fast pace of creative and innovative progress was supported by the precise reformation of intellectual property law.¹

Each step towards the development of intellectual property regulations is of utmost importance for the overall progress. One of such steps is the novel regulation of intellectual property trials in the Civil Procedure Code of Georgia (GCPC).

The rights are performed only when the legislation has a strong protective level to ensure the enforcement of legal norms. *Ubi jus, ibi remedium*²—there is no right in case there is no mechanism to ensure its effective enforcement—is the leitmotif of this article.

Chapter XXIII of the GCPC (Arts. 191–199¹) regulates the claim provision with regard to civil disputes and Chapter XIV (GCPC, Arts. 109–119) regulates the evidence provision. Thus, these are norms to secure the claim

¹ 'Intellectual property' was formed as an internationally recognized term in 1967, after adoption of the Convention for the Establishment of the Intellectual Property Organization, a terminological definition of intellectual property. See Sajaia, 2014, p. 17; Harms, 2018, p. 10.

² 'Where there is a right, there is a remedy'. See Kapanadze & Kvachadze, 2008, p. 86; Nadareishvili, 2009, p. 165; Thomas, 2004.

and evidence security measures that cover intellectual property disputes, as well as other civil proceedings in relation to material and immaterial property (Jorbenadze, 1984, p. 379; see Taliashvili, 2003b, p. 23).

Two major arguments form the basis of the legislative amendments discussed in this article. The first is of practical nature. Regulatory mechanisms of intellectual property have to be in full accordance with the specificities of the subject of protection. Otherwise, the application of non-specific but common and overall mechanisms hinders the process of legal proceedings, which was the case in the Georgian practice of intellectual property litigation. The second argument is a formal one. Upon signing the association agreement, Georgia has undertaken an obligation to incorporate European legislation into Georgian law. Namely, it concerns the implementation of the Directive 2004/48/EC of the European Parliament and the European Council on the Enforcement of Intellectual Property Rights.

2. Harmonization of intellectual property protection and enforcement mechanisms

While international agreements play a key role in the protection of intellectual property, it is extremely important that major aspects of the protection of intellectual property rights are harmonized globally (Taliashvili, 1998, pp. 37–43). National legal mechanisms developed even at its maximum capacity are simply not effective enough (Taliashvili, 2003, pp. 80–81, 324; 2012; 2006) since immaterial goods enjoy the legal characteristics that cannot be found in relation to “material objects” (tangible goods). Furthermore, intellectual property is characterized by the “territoriality principle” (Lundstedt, 2016, p. 27; Günther, Zekoll & Zumbansen, 2012, pp. 189–228; Peukert, 2010, p. 4; Bradley, 1997, pp. 505, 514–515, 520; Taliashvili, 2004, pp. 179–187). Thus, the European Union is committed to getting closer to the intellectual property law of Member States. The issues of the implementation of European directives on the local level, along with the territorial limitations of the legislation, represent the key difficulties in this process (Hilty & Moscon, 2017, p. 14; see Bobek, 2017, pp. 143–176).

The objective of the European Union is to significantly reduce differences between national legal systems and strengthen harmonization with the European legislation. “Harmonization is the normative statement when the inconsistencies between two different legal systems reduce, although this

process can hardly be regarded as simple or smooth” (Samkharadze, 2015, p. 315).

Upon signing an association agreement, the issue of harmonization of regulatory norms of intellectual property with the European law became part of the agenda of the Georgian government. Despite the fact that “harmonization is the soft responsibility” (Surmava, 2012, p. 10), the state has undertaken the responsibility to implement European standards and directives in Georgian legislation which are primarily based on the decree adopted by the Parliament of Georgia on ‘Harmonization of Georgian Legislation with the EU law’ (1997), which explicitly emphasizes that all laws and normative acts passed by the Georgian parliament should be harmonized with the standards and norms established by the European Union.

Historically, “Georgian lawmakers made efforts that its nation had a harmonized law in place, which was not secluded within its own frames but at the same time was not quite absorbed in a supranational boundless space” (Zoidze, 2005, p. 29; see also Loewenheim, 1996, pp. 481–489), insofar as the “harmonization of the law assumes not only the peaceful coexistence with the external world but rather a naturally unified legal space within the country” (Zoidze, 2005, p. 39).

The process of harmonization seeks to unite two or more different elements or effect the close approximation (Fox, 1992, p. 594; Boodman, 1991, p. 699). The key characteristic of harmonization is the unification of diversity in a sole object (Samkharadze, 2015, p. 316). Harmonization does not assume that all laws are identical (Loewenheim, 1996, p. 488) neither does it mean that it should be copied from the legislation of the European Union or introduced word for word in the law of a third world state. Harmonization assumes that the key principles of the European Union are taken into consideration, and their enforcement mechanisms are ensured (Surmava, 2012, p. 62). It is important to develop the legal mechanisms within the harmonization process that will effectively regulate modern civil relationships (Kharitonashvili, 2017, p. 275). Most significantly, the harmonization of the laws remains the task to be fulfilled by EU Member States.

Evolution and implementation of the enforcement mechanisms of regulatory norms of intellectual property rights represent one of the key tasks for harmonization. Even though “sanctions and enforcement mechanisms which have always been the part of the law on intellectual property” have not

typically been regulated (Kur & Dreier, 2017, p. 478) on the international level. One of the most important international agreements, “Agreement on *Trade-Related Aspects of Intellectual Property Rights*” (TRIPS Agreement, see Yu, 2009), has been a significant step forward in the field of intellectual property law. Although, it turned out to be insufficient for the elimination of the regulatory gaps, consequently, the Directive 2004/48/EC on the Enforcement of Intellectual Property Rights was adopted in 2004 (see Corrigendum to Directive 2004/48/EC).

The abovementioned Directive represents one of the horizontal directives³, which is “focused on the procedure issues (Cook, 2015, p. 264) emerged during the legal proceeding.” It also stipulates preventive measures with regard to the protection of intellectual property rights. Directive 2004/48/EC on the Enforcement of Intellectual Property Rights provides for the fair, proportionate and equitable remedies. The Directive offers alternative measures of protection, such as an evocation of counterfeit goods from the trade network, as well as delivery up for the destruction of infringing material and means for producing it. The court might apply one of the injunctive remedies, such as prohibition of the infringing activity. In the form of alternative court measure, the Directive also stipulates imposition of the compensation to cover the damages, including lost profit. (see Directive 2004/48/EC). Also, the Directive covers the provision of evidence while protecting the rights of intellectual property (Cook, 2015, pp. 266–267).

To ensure that the objectives of justice are met, the state must ensure compliance with the relevant standards so that the unacceptable barriers are not created, at the same time the standards must fully correspond with the fundamental principles of the Enforcement Law, such as the transparency of the enforcement process, which is accessible, effective, predictable, consistent and carried out within the reasonable time frame^{4,5}(Dzlierishvili, 2018, p. 5, see the original text *Beck’sche Kurz*, 2016).

³ “Direct effect may be vertical (that is, the EU legislation can be enforced against the state or an emanation of the state, such as a nationalized industry or privatized utility) or horizontal (that is, it may be enforced against another individual)”. On the effects of horizontal directives, see Lundstedt, 2016, pp. 21, 420.

⁴ On the related detailed information, see Kurdadze *et al.*, 2018, p. 7; Uitdehaag & Kurtauli, 2013, p. 101.

⁵ Section 16, Conclusion by consultative Council of European Judges (2010).

3. Novel regulations of the enforcement of intellectual property rights in GCPC

On 23 December 2017, Georgian Civil Procedure Code introduced a new chapter dedicated to the specifics of the regulation of the intellectual property claims (On amendments in the Civil Procedure Code of Georgia, 1997). In particular, Chapter VII⁵, Articles 363²⁵–363²⁹, were added to the GCPC in response to obligations under the Association Agreement within the legislative package of amendments to the Georgian legislation of the civil procedure. For the first time, new remedies were defined for the intellectual property trials such as (a) remedy to *secure the evidence*;⁶ (b) right to information;⁷ (c) *remedy to secure the claim*.⁸

A comparative analysis of the enforcement remedies in civil action and the new novel amendments reveals that the remedies to secure the claim in intellectual property cases do not represent an institutional novelty for the Georgian Civil Procedure Code. Although, legislative application of these measures specifically to the intellectual property per se is new. Prior to the legislative amendments, the plaintiff was entitled to bring a motion for securing the claim, but this procedural measure fell under the common civil action remedies, so-called “other measures”. In practice, the plaintiff would struggle to come up with comprehensive arguments for using a common remedy.

Thus, intellectual property trials were considerably delayed in time, mainly because prior to the novel amendments “it was possible for the plaintiff to request the use of the measure to secure the claim, which was included under the category of other measures and it was quite hard to substantiate the reasons for using a different kind of provision” (*Kaikatsishvili & Lawyers*, 2019).

Chapter XXIII, Articles 191–199¹ of Georgian Civil Procedure Code stipulate remedies in civil action, but according to a separate regulation in Chapter VII of the GCPC, the lawmaker concentrated particularly on intellectual property rights and thus ensured that the intellectual property rights are duly protected, the process ensures effective enforcement with no undue cost, complexity or delays, as well as protection of confidential information,

⁶ Cf. GCPC, Art. 363²⁷; Association Agreement, Art. 192.

⁷ Cf. GCPC, Art. 363²⁸; Association Agreement, Art. 193.

⁸ Cf. GCPC, Art. 363²⁹. No literal meaning is provided of the measure to secure the claim in the Association Agreement, although temporary security measures are included in Art. 194.

the discovery of evidence held by the other side, indemnification against undue enforcements are guaranteed.

In this context, the purpose of the measure to secure the claim means “to create favourable conditions for the plaintiff so that he/she enjoys the material rights” (Kurdadze & Khunashvili, 2015, p. 382; Nachkebia, 2014, p. 466).

The ability to enforce decisions and eliminate negative results are the elements to be used in the future so that the decisions are enforced and the negative results eliminated (Decision 2-4883-14). The key purpose of the security measure is to prevent the party from direct damage.

The most effective ways in which the enforcement of intellectual property rights could see significant strengthening is the introduction of the right to information, the measures to secure evidence and the procedural terms.

Through the amendments, non-disclosure and confidentiality of the obtained information were defined as an obligation to the court.⁹ The court may:

- a) Ensure sequestration of the movable/immovable property (including bank accounts and other assets) owned by the individual, related to which, based on a well-grounded assumption the individual has violated the exclusive right of a commercial scale. Obtained documents/information shall be handed over to the independent expert¹⁰ appointed by the court so that to identify the subject of sequestration;
- b) Request the bank-related, financial and/or commercial documents/information¹¹ from the assumed tortfeasor. Exclusively, the court is authorized to the disclosure of the above information, i.e. the unauthorized person shall not have access to such information;
- c) Prohibit the person who, based on the well-grounded assumption has infringed the intellectual property right by the action that violates the exclusive right; or instead of the above prohibition, request on the

⁹ Cf. GCPC, Article 1, point “A”, 363²⁹ and GCPC 363²⁸, Art. 3, para. 3; Association Agreement, Art. 192, para. 1.

¹⁰ Conclusion by consultative Council of European Judges, 2010, Section 25. It is underlined that “the search and sequestration of defendant’s assets has to be carried out effectively. But at the same time relevant provisions regarding human rights, protection of personal data, urgency for court revision”.

¹¹ See the authors’ comment on the same regulation in Kur & Dreier, 2017, p. 485: “If the violation represents a ‘commercial scale’, member states may grant the right to the national courts, based on the request by one party and under appropriate circumstances require to present bank, financial or commercial documentation, which is under the control of the opposing party and represents the confidential information.”

- person who, based on the well-grounded assumption has performed an infringing act to present the corresponding warranty;
- d) Consider the security measures in cases defined by the GCPC without an oral hearing. In the above cases, the person in relation to whom the above security measures will be carried out must be informed about it without delay, within no later than 48 hours from the moment of the above measure.¹²
 - e) Define the possible indemnification provision along with the measures to secure the claim.

Considering the requirements of the lawmaker, the court is also authorized to issue a ruling on using the measures to secure the evidence, based on the motion, to preserve evidence, in case of the danger that the evidence might be destroyed (GCPC, Art. 363²⁷). Moreover, if it is objectively impossible to secure the evidence through the abovementioned measures, the sequestration as a necessary measure shall be used in order to avoid the possible failure to enforce the decision due to the practical difficulties (Decision 2b/4597-14).

Most importantly, the court has the discretionary authority to carry out the detailed description of documentation (through taking a sample or without it) as well as sequestration,¹³ while using the measures to secure the evidence. The court can use multiple measures at the same time, and it will only depend on the specificities of the case what kind of preventive measures are required to be used in accordance with the motion.

For the purpose of effective protection and enforcement of intellectual property rights, it is obvious that the procedural law required the procedural measure to secure the evidence on the one hand and on the other hand “the guarantee to effectively enjoy the right to a fair trial” (the case of *Ltd. “Georgian Manganese” v. the Parliament of Georgia* [2017], see Decision 2/6/746).

According to the case study, these remedies in civil action represent two different procedural elements.¹⁴ If in the case of the evidence security, the purpose is to determine substantive facts, (Decision 2/7126-19). In the case of the claim security, the purpose is to ensure the enforcement of the court decision (Kazhashvili, 2016, p. 77; Dzlierishvili, 2018, p. 6). Ultimately, both measures safeguard the common requirements of the due process.

The procedural purpose of the evidence security is to fix the evidence by

¹² Cf. GCPC, Art. 363²⁷, para. 5 and GCPC 363²⁸; Association Agreement, Art. 192, Section 3.

¹³ GCPC, Art. 363²⁷; Association Agreement, Art. 192, para. 2.

¹⁴ Evidence security differs from court tasks in a qualitative way, see Decision AS-827-1190-06.

means of the “rules determined by the law for further use” (Liluashvili, 2005, p. 266) during substantial consideration of the civil case, while “the purpose of measures to secure the claim is to defend the plaintiff’s lawful interests in the case of the dishonesty of the tortfeasor” (Decision AS-538-511-2013).

There are cases in the court practice, in which none of the parties is able to present evidence in support of their request. In such a case, through a mediation of the parties, the court can request evidence from whoever owns it (Gagua, 2012, p. 26). Precisely this is the common standard for securing the evidence. Thus the importance of the introduction of this legal mechanism into the GCPC Chapter VII can not be overestimated. Insofar as “under certain circumstances, certain significant evidence might get damaged or destroyed, if not appropriately secured by the third party, or else it might be required to secure the assets” (Ostermiller & Svenson, 2014, p. 250).

To confirm the circumstances provided in the claim, it is extremely important for the party to present the evidence to the court, by means of which the party requires to substantiate the legality of the request, in the meantime the evidence should not be endangered in terms of either being demanded or destroyed. Precisely for this reason, the lawmaker has defined the procedure to secure the evidence, along with the security for the claim.

Noteworthy is that Tbilisi City Court, with regard to the case of invalidation of the trademark, reviewed the question without oral hearing concerning the use of measures to secure the evidence. In the substantiation part of the document, the court pointed out that for enforcement purposes, using procedural measures, including measures to secure the evidence has been declared as an obligation of the state according to the European Court of Human Rights. The Strasbourg Court in the case *JGK Statyba LTD and Guselnikovas v. Lithuania* [2018], defined that the order of sequestration, which was temporary and preventive, was directed at ensuring evidence enforcement and eliminating the risks which prevented from satisfying requests of the creditors (Decision of 2 March 2018 of the Tbilisi City Court).

Civil procedure law took into consideration, along with the remedies to secure the claim and evidence, guarantee, sequestration, prohibition, ensuring possible indemnification provisions (GCMP, Art. 363²⁹, Section 4). If the court considers that applying the measure to secure the claim might harm the person towards whom there is a well-grounded assumption, that he/she has infringed intellectual property rights, it can use the measure to secure the claim and, at the same time request of the plaintiff, to compensate for

the expected damage. Upon claim, the court may as well use the security warranty.

The Chamber of Civil Cases of the Tbilisi Court of Appeal considers that there is a need for ensuring indemnification provisions and guarantees for the damaged party in case the Court has a substantiated doubt that the security measure might not be justified, moreover, the damage due to the security measure caused to the defendant is evident, or there is the possibility of such damage (Decision 2b/5617-14).

It is important to note that according to the second part of Article 199 of the GCPC, an amendment from 4 April 2018, expected compensation for the damage would be secured within the procedural terms defined by the court which should not exceed 30 days (Dzlierishvili, 2018, p. 16).

After the analysis of the legal nature of the new amendments and its placement in the context of the general principles of the civil procedure system, let us consider the consistency of their application through the judiciary. Since 23 December 2017, any intellectual property court dispute in Georgia falls under the special articles of the Georgian Civil Procedure Code. On the one hand, that very decision underscored the limits of tort law.

In the very first case after the novel amendments, the court deciding on the trademark infringement case on 2 March 2018 (Decision of Tbilisi City Court of March 2, 2018), referred to the cases of *Apostol v. Georgia* and *JGK Statyba Ltd. and Guselnikovas v. Lithuania* in reasoning the dispute but bypassed the GCPC Chapter on ‘Specificities in proceedings of the infringement of exclusive right of intellectual property’. The cases soon followed, leaving the special intellectual property enforcement regulation out of the court decision-making (Decisions of Tbilisi City Court of 31 May 2018 and 25 March 2019).

Only on 8 April 2019, the court deciding on the case of an infringement of the well-known trademark by the local fashion manufacturer conveyed the claimant enforcement remedies to the claimant by referring to the special intellectual property articles. This very decision sets the application of GCPC Chapter on ‘Specificities in proceedings of the infringement of exclusive right of intellectual property’ on the right track and promotes reasoned decisionmaking.

Here let us refer to the very recent statement of the IPEC (Intellectual Property Enforcement Coordinator), that:

In Georgia, the protection and enforcement of IPR are critical as the country moves to increase opportunities for creativity, innovation, and investment. Training for judges that handle IP cases has become increasingly important since much of the judiciary remains unfamiliar with IP law despite an increase in the number of IP infringement cases being heard in the courts. (IPEC, 2020, p. 10)

At the same time, the role of doctrine, legal research and discussion should not be underestimated, while these contribute vastly to a more consistent approach to the adjudication of legal trials.

4. Conclusion

In the final analysis, the introduction of the new amendments into the GCPC follows the sound tradition of the harmonization process of Georgian intellectual property law with European law. At the same time, the article has overthrown the assumption that the amendments merely fulfil the formal harmonization goals driven from the EU–Georgia Association Agreement, but not any of practical nature. The analysis of the legal norms and case study has demonstrated how the regulations strengthen the position of the claimant. Also, these regulations have enhanced the satisfaction of the parties in equal conditions. Further, by imposing procedural terms court proceedings gained in time efficiency. The conducted case study has exhibited that the judicial judgements diverge from each other in what concerns the application of the novel GCPC amendments in intellectual property claims. Because of the lacking experience of Georgian judiciary in intellectual property infringement disputes, the novelty of intellectual property law amendments has heightened the risk of their contrasting adjudication.

Active doctrinal research and discussion on the topic shall provide judiciary and legal practitioners with analytical material as bases for their reasoning and will promote a consistent approach to the adjudication of intellectual property claims. Accurate implementation of the harmonized IP enforcement mechanisms is critical, as one of the crucial goals of the harmonization of Georgian intellectual property law is to prove the reliability of the country's IP system for intellectual property owners and innovative investors globally.

Tamar Taliashvili is professor of law at the Caucasus University, Ivane Javakhishvili Tbilisi State University, Chair of the Committee of Education and Culture, majoritarian member of Tbilisi City Assembly, vice-president of the Congress of Local and Regional Authorities of the Council of Europe.

Irakli Shamatava is a PhD candidate, visiting lecturer at the Caucasus University, a lawyer in civil and administrative law, member of the Association of Authors' Rights and Georgian Bar Association, chief specialist at the Committee of Education and Culture, Tbilisi City Assembly.

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