INTELLECTUAL PROPERTY - RUSSIA

Failed fairness: IP and competition law

April 18 2016 | Contributed by Gorodissky & Partners

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IP rights fought their way into business years ago; infringement originated concurrently. Like many phenomena, business practices have their bright and dark sides. IP rights brought a degree of order, allowing entrepreneurs to take advantage of their findings and creations – be it through patents, trademarks or other means. Infringers have been stepping on their heels ever since.

Dishonest market practices are a common problem in many countries, particularly activities associated with misappropriation of the goodwill of competitors and violation of their IP rights. Each country sets out its own measures to protect intellectual property created by businesses in order to distinguish themselves and their products, and to help them to maintain their reputation among customers.

In Russia, the Law on Protection of Competition provides a clear-cut definition of 'unfair competition'. This definition is based on Article 10*bis* of the Paris Convention and contains the following elements:

- 'Unfair competition' refers to any action of a business aimed at gaining unfair commercial advantages.
- Such actions are contrary to the law, good business practice, good faith and justice.
- Such actions may cause damage to competitors or their business reputation.

On January 5 2016 amendments to the competition law – the so-called 'Fourth Anti-monopoly Package' – entered into force. The provisions relevant to intellectual property were expanded; instead of a single article, an entirely new Chapter 2.1 was introduced. It regulates unfair competition in greater detail, with heavy reliance on practice dating from the old competition law. In particular, each form of unfair competition, previously mentioned within a single Article 14, now has its own article, as follows:

- Article 14.1 – dissemination of false information which may cause damages to business;
- Article 14.2 – misleading consumers with regard to quality of the goods, place of manufacture and their manufacturer;
- Article 14.3 – incorrect comparison;
- Article 14.4 – acquisition and use of means of individualisation. This article is used to cancel unfair trademark registrations;
- Article 14.5 – sale or other commercialisation of goods if intellectual property owned by others was unlawfully used; and
- Article 14.6 – unfair competition (copying the activity of competitors or imitating the appearance of their goods, packaging, labelling, names, colours or corporate identity as a whole).

This list is not exhaustive – other forms of unfair competition may be curtailed if unfair competitors devise other tricks.

Penalties for anti-competitive behaviour range from flat fines to turnover-based fines and damages.

The law enables businesses to fight infringement in situations where classic IP enforcement law is forceless – for example, where there are no IP rights protecting the appearance or packaging of a product, but another party offers for sale a product which looks similar to the relevant product and

consequently misleads consumers.

The Federal Anti-monopoly Service has begun to try unfair competition administrative cases. However, this does not preclude the right to seek protection in court. Hence, there are two different ways to combat unfair competition – parties may file a complaint with the Federal Anti-monopoly Service or file a civil suit with the court. Regardless of the type of proceedings, competition between the plaintiff and defendant in the same segment of the market must be proven.

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