



## Investigation of the deficiency in right of industrial property in customs rules

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**Key words:** Industrial property, Customs rules, Economy, Criminal procedure.

Article published on January 31, 2015

### Abstract

The right of industrial property is considered as an economic, technological, commercial and legal issue. Considering the wide spectrum of these arenas, this issue has a particular position and importance in inland and international contests. In Iran, general rules are not sufficient to compensate the losses to industrial property. Therefore, it is very important to support industrial property. Different performance bond are being applied to ensure this support. This bond is a consequence of laying civil liabilities applied to individuals that violate the right of industrial property, weather because of violating industrial and commercial secrets or plans. Since the right of industrial property is related to customs and applied in clearance, suspension or stopping goods, the civil liability of individuals and performance bond of industrial property has to be considered.

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## Introduction

Industrial property is a set of rights, dominances or powers on different industrial subjects such as inventions or any phenomena having industrial or commercial characteristics so that the owner is authorized to utilize it exclusively but temporarily (Emami, 1978).

Industrial property is the tool to transfer technical knowledge and technology: industrial property rights pave the way for creation of a work and transferring the innovation. It is also a useful tool to realize economic development, which can promote the condition of consumers of industrial and agricultural goods and products (Emami, 2011).

The necessity of international support for industrial property is felt when the world's inventors, designers and artisans refused to attend the 1873 Vienna International Exhibition. Being afraid that their inventions and plans would be copied and commercially utilized in other countries, they refused to present their innovations and plans in the International Exhibition of Innovations in order to prevent the secret information about the plans of designers and inventions of inventors from being revealed. This attitude went general and global and it caused them to find a serious and reliable solution to protect and support the rights of ingenious inventors and designers. After the required investigations, an international plan was initiated in accordance with this issue which led to 1883 Paris convention. At first, only representatives from 11 countries signed this convention, but by 2003, 164 countries attend the Paris Convention and its supplementary contracts. They promised to protect the industrial property of their own citizens and citizens from other countries (the members of European Union) through approving inland rules and regard equal rights for them (Safayi, 2001).

Non-technical protection in form of the right to industrial property can have a significant role in

supporting commercial products, among which trademarks and industrial designs are the most important ones. Today, a product with no particular name is rarely found in the market. On the contrary, supplying products with particular names distinguish them from products of same type in the market. Such a performance is also observed in industrial designs, for instance, two lamps are not technically different, but their design might cause them to be distinguished. These names and designs can be supported as components of industrial property (Hajsharifi, 1374).

The trademark of European Economic Community has been registered through "OHIM" which is The Office for Harmonization in the Internal Market and registers the community trademarks and industrial designs throughout the Europe. This office is located in Alicante. In this method, the owners of such trademarks ask for being supported in all European countries through consigning a single application. Use of a trademark in a European country is equal to use it in the whole Europe; therefore, it is not necessary to apply to all countries, but is not possible to choose a particular country and the support is provided in all European countries. If the trademark were voided by any reason, such as protest or revocation, the support would be fully cancelled. In such condition, the European trademark might be converted to two national or individual brands (Fathizade & Bozorgi, 2004).

Each natural and legal person can proceed to register a trademark. The application should include the name of applicant, a sample of trademark and a list of goods and services that he wants to register them under the trademark. In fact, all of the supportable goods and services would be provided under this trademark. As to the services, it should be mentioned that under this trademark, these services should be presented to a third party, therefore, it is not necessary to register a trademark to support the advertisement of personal

products, because the person's own products are being advertised (Abbasi, 2012).

*The loss caused by violating the right of industrial property and customs responsibility*

Because of the existing contest in industrial property, which is required for industrial and commercial development, moral rights are achieved through prohibition of unfair competition. Therefore, the honor of merchant's name, brand and trademark, and inventions are among the instances of moral rights in industrial and commercial property (Madani, 1995).

Import, export and transit of all goods are performed through customs. On one hand, the importing goods to the customs territory of a country or exporting them from this territory through illegal paths or without customs protocols are all considered as smuggling. On the other hand, customs protocols often require a stop in customs stores, where they can possibly be damaged. Therefore, the legislator predicts it. The following items are mentioned in definition of loss (damage).

- A) A property, which should be given to the loser by the person who has caused the financial loss.
- B) The implied damage is also considered as a loss (Jafari Langeroodi, 1993).

Temporary and discretionary actions to maintain the existing condition and prevent more right violation, or keeping the proofs and evidence of the committed crime are among the unavoidable components of the mechanism that affect the performance of this law. These actions can be taken according to the order of legal, non-legal and executive authorities. These actions are taken whether during the primary actions by the violator, during the violation or after its occurrence.

*A) Preventing the violation from being occurred*

In some cases with particular condition, a person might be aware of a possibility to violation of his

rights according to some reasons, proofs or evidence. According to the law, in such cases, he can ask the legal authorities to prevent this violation. If despite being aware of such violations, the person does not solicit legal authorities, he might be accused of contributory violation or negligence. Therefore, he might only be able to receive a part of his loss (Hekmatnia, 2005).

According to some separated but not very clear sentences in the statutory invention registration, in all supported cases, for each of the industrial designs and trademarks approved in 2007, the owner is allowed to proceed in order to prevent imminent violation of his rights. In this act, the owner of patent can complain against anyone who has done something that can lead to a violation of inventor's rights. This right is generally prescribed for all patent owners.

*B) Preventing the violation from being continued (while being committed)*

Whenever the right violator exceeds the primary actions such as providing the tools and requirements of the violation and proceeds to violate the right, one of the important performance bonds of this right is that the owner can use legal tools to prevent this violation from being continued. This prevention is performed through legal tools such as injunction or non-continuance of crimes or other legal procedures. Attribution of daily fines or double recompense to the owner of the right, to continuance of violation, is among the modern methods to prevent the right violation from being continued (Sheykhi, 2007).

*The loss derived by violation of industrial property according to THE Positive law of Iran*

*The loss according to the constitution*

Whenever, an individual suffers moral or material loss as the result of a default (including waste and abuse according to the article 953, Civil Code) or error of the judge with respect to the subject matter of a case or the verdict delivered, or the application of a rule in a particular case, the defaulting judge must

stand surety for the reparation of that loss in accordance with the Islamic criteria, if it be a case of default. Otherwise, losses will be compensated for by the State. In all such cases, the repute and good standing of the accused will be restored (article 171, Constitution of the Islamic Republic of Iran).

#### *Loss according to the Civil Code*

There is no definition of loss in the Civil Code, but according to article 221, which supervises the general criteria for the impacts of transactions about the legal influence of violation of commitment by the guarantor: If any party undertakes to perform or to abstain from any act, he is responsible to pay compensation to the other party in the event of his not carrying out his undertaking provided the compensation for such losses is specified in the contract or is understood in the contract according to customary law or provided such compensation is by law regarded as guaranteed. This article clearly mentions that the loss is caused by the guarantor who has proceeded to violate it whether voluntarily or involuntarily.

#### *Loss according to the procedure code*

According to 1386 (2007) code, trademarks can be registered and supported. Today, all goods and services are introduced to the customers by a trademark. Seeing these trademarks, consumers choose and buy what they want among similar goods produces by many manufacturers. To some extent, trademarks show the quality of the supplied good. Therefore, they must be supported in order to prevent third parties from deceiving people through abusing the fame of producers, and presenting low quality products with the trademark of actual manufacturers.

#### *Civil Procedure*

The mentioned instances are repeated in a different form in the according to the article 515 of Civil Code: Through submitting a petition during the procedure or independently, the claimant has the right to demand the compensation of the loss caused by the

procedure, delay in fulfilling the commitments or its non-fulfillment as a fault of defender in regarding his rights or refusing to do so. In such cases, the court would determine the amount of loss after performing investigations and through a verdict about the original demand or a separated verdict; the convict would be obliged to pay the loss.

#### *Criminal Procedure*

A person suffering damage and loss or gaining a right such as Qisas, or being discharged from moral loss, as a result of a crime being committed, who demand it is called a private claimant or complainant. The demanded losses are:

1. Physical loss and damage caused by committed crime
2. The probable profits from which the claimant was deprived as a result of the committed crime

The complainant also can ask the court to finance his material recompense and loss. If this demand is based on acceptable reasons, the court would issue a garnishment which is certain and unobjectionable.

#### *The loss according to customs affair act*

As there are general laws such as civil code and commercial law, this act does not qualify itself to define the terms damage or loss. In articles 45 to 50, some items related to the subject are mentioned. Article 45 states that apart from cases of fire, explosion, engagement (article 45, customs code), force majeure and the loss derived by the quality of the good itself (for instance spoilable or fridge goods) (see article 64, footnote and the article 22, customs affair law and the supplementary act) or improper packaging, if while being stopped in customs stores, port or internal official transits, the good is wasted or damaged, the owner must receive the recompense which should be financed through storage income. If this income is not adequate, the loss should be

compensated through other customs earnings regarding the value recorded in purchase documents.

The article 90 of the bylaw specifies that:

1. When the loss or damage to the good is caused by natural disasters or;

2. Whenever the damage is implied during the evaluation performed through weighting, listing and sampling in presence of stewardship of the owner or his representative, or;

3. Whenever the loss occurred while the good is being transferred from the vehicles to customs places before being submitted to those in charge of transferring the goods to the customs or port;

The customs office would pay no recompense in such cases.

*The loss caused by violation of industrial property by customs affair and the way to demand it*

A right supported by law has legal performance bond. Doubtlessly, an effective legal bond for protection of industrial property is very important both for the owners and violators. Legal systems apply different strategies and plans, known as performance bonds, in order to ensure their execution. In other words, performance bond is a legal reaction to a legal violation, which is divided into different types according to its aim and the way of execution. Civil performance bond is a reaction to a violation of approved civil code, which is divided into two types:

1. The obligation to fulfill the commitment, i.e. one who refuses to perform his duty, would be obliged to do that by public forces, which is the direct form of civil penalty.

2. Relapse to original situation, i.e. if one does something to violate other's rights; the law would try to reverse the insecurity in legal position back to its original situation as far as possible (Emami, 1998).

*Physical loss*

As the base of the present discussion, physical loss can be evaluated and converted to money and its amount can easily be investigated and determined through legal criteria such as the criterion in article 46 of the customs affairs act and the footnote of article 45.

*Moral loss*

As to the capability of being evaluated or converted to money, moral loss is the opposite of physical loss. There are different types of moral loss including damaging one's personal or family reputation and prestige, harming one's commercial fame or reputation, dishonoring someone through defamation or damaging one's emotional feelings. Some of the law experts believe that:

Moral loss can be a cause for compensation by money. There are a lot of arguments between the law experts, to which the legal procedure pays no attention in most countries and they have accepted the evaluation of moral loss by money (Hoseininejad, 1998).

*Combined loss*

Whenever a single action of the committer cause both physical and moral loss to the loser, a combined loss has been incurred. For instance, a girl who has agreed to illegitimate intimacy as a result of being deceived, threatened or abused because of being in a lower position, and suffers physical loss in addition to losing her virginity, can demand both physical and moral recompense from the committer.

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#### **Acts**

1. Authors, Composers and Artists' Rights Act approved in 1969.

2. Civil Procedure Code approved in 2000.

3. Constitution of the Islamic Republic of Iran, 2006 and 2009.