Вестник РУДН. Серия: Юридические науки 2024 Т. 28. № 3. 651–668
RUDN JOURNAL OF LAW. ISSN 2313-2337 (print), ISSN 2408-9001 (online) http://journals.rudn.ru/law

https://doi.org/10.22363/2313-2337-2024-28-3-651-668
EDN: JJDPBD

Research Article / Научная статья

Cross-border aspects of administrative protection of intellectual property: a survey of Russian court practice

Saniyat A. Agamagomedova

Institute of State and Law of the Russian Academy of Sciences, *Moscow, Russian Federation*
✉saniyat_aga@mail.ru

Abstract. The importance of studying the protection of intellectual property rights in the face of modern challenges and threats, changes in Russia's economic paradigm, and the search for new competitive advantages in the global economy is undisputed. The article aims to analyze the selected cross-border aspects of the administrative protection of intellectual property based on a review of Russian judicial practice. In this research, the formal-legal, comparative-legal, historical methods, as well as method of system analysis of the judiciary acts are used. The analysis of judicial practice in administrative cases related to intellectual property identified by the customs authorities reveals several problem areas. These issues include the competence of customs authorities in implementing customs control of goods containing intellectual property items, the use of expert procedures, the participation of the right holder in such litigation, and the exhaustion of intellectual property rights in the context of sanctions against Russia. Regarding the competence of customs authorities in the field of administrative protection of intellectual property rights, clear limits of such competence are defined, particularly in relation to the cross-border movement of goods under customs control. It is concluded that customs protection of intellectual property is limited to part of the intellectual property during cross-border movement. The article emphasizes the significant role of expert procedures in administrative cases related to intellectual property involving customs authorities. Arguments are presented against the use of opinions issued by copyright holders, and the participation of the copyright holder in the administrative protection of exclusive rights in the cross-border movement of goods is assessed. Special attention is paid to the principle of rights exhaustion and its implementation in judicial practice, particularly in the context of strengthening the sanctions regime against Russia and the partial legalization of parallel imports. The article concludes that cross-border protection of intellectual rights is positioned as an element of the entire system of legal protection of intellectual rights.

Key words: administrative cases, intellectual property, customs authorities, exhaustion of rights, trademark, examination, copyright holder, judicial practice, competence, counterfeit

Conflict of interest. The author declares no conflict of interest.

Received: 15th September 2023
Accepted: 15th July 2024

For citation:

Agamagomedova, S.A. (2024) Cross-border aspects of administrative protection of intellectual property: a survey of Russian court practice. *RUDN Journal of Law.* 28 (3), 651–668. https://doi.org/10.22363/2313-2337-2024-28-3-651-668

Трансграничные аспекты административной защиты интеллектуальной собственности: обзор российской судебной практики

С.А. Агамагомедова

Институт государства и права Российской академии наук, *Москва, Российская Федерация*
✉saniyat_aga@mail.ru

Аннотация. Актуальность исследования вопросов защиты интеллектуальных прав в условиях современных вызовов и угроз, изменения экономической парадигмы России, поиска новых конкурентных преимуществ в контексте мировой экономики не вызывает сомнений. Целью выступает анализ выделенных трансграничных аспектов административной защиты интеллектуальной собственности на основе обзора российской судебной практики. В качестве методов исследования использовались формально-юридический, сравнительно-правовой, исторический, метод системного анализа актов судебных органов. На основе анализа судебной практики по административным делам в области интеллектуальной собственности, возбужденным таможенными органами, определены группы проблем подобной практики. К ним отнесены вопросы: компетенции таможенных органов при осуществлении таможенного контроля товаров, содержащих объекты интеллектуальной собственности; использования экспертных процедур, участия правообладателя в подобных судебных спорах, исчерпания прав на объекты интеллектуальной собственности в условиях введения санкционного режима в отношении России. Применительно к компетенции таможенных органов в области административной защиты интеллектуальных прав определены четкие пределы такой компетенции, обусловленные наличием факта трансграничного перемещения товара, то есть нахождения такого товара под таможенным контролем. Сделан вывод об ограниченности таможенной защиты интеллектуальной собственности в связи с тем, что только часть объектов интеллектуальной собственности защищается при трансграничном перемещении. Выделена важная роль экспертных процедур в судебной практике по административным делам в области интеллектуальной собственности с участием таможенных органов, приведены доводы против использования заключений, выданных правообладателями, дана оценка участию правообладателя в административной защите исключительных прав при трансграничном перемещении товаров. Особое внимание уделено принципу исчерпания прав и его реализации в судебной практике в условиях усиления санкционного режима против России и частичной легализации параллельного импорта. Сделан вывод о позиционировании трансграничной защиты интеллектуальных прав в качестве элемента всей системы правовой защиты интеллектуальных прав.

Ключевые слова: административные дела, интеллектуальная собственность, таможенные органы, исчерпание прав, товарный знак, экспертиза, правообладатель, судебная практика, компетенция, контрафакт

Конфликт интересов. Автор заявляет об отсутствии конфликта интересов.

Поступила в редакцию: 15 сентября 2023 г.
Принята к печати: 15 июля 2024 г.

Для цитирования:

Агамагомедова С.А. Трансграничные аспекты административной защиты интеллектуальной собственности: обзор российской судебной практики // RUDN Journal of Law. 2024. Т. 28. № 3. С. 651–668. https://doi.org/10.22363/2313-2337-2024-28-3-651-668

Introduction

The article delves into the analysis of judicial practice regarding cross-border administrative protection of intellectual property rights in Russia. The author sheds light on certain problematic aspects of judicial practices associated with the competence of customs authorities in enforcing customs control of goods containing intellectual property, the usage of expert procedures, the involvement of rights holders in legal proceedings, and the exhaustion of trademark rights amidst sanctions effecting Russian foreign trade.

The aspects of cross-border movements of goods containing intellectual property items, as discussed in the article, are grounded in the Russian civil, administrative and customs legislation in force. The Civil Code of the Russian Federation (Part 4) serves as the foundation of civil legislations, while the Code of the Russian Federation on Administrative Offences forms the basis of administrative legislation. With regard to customs legislation, it is necessary to distinguish between two levels: the integration level (or the level of the Eurasian Economic Union (EAEU) and the national level. At the EAEU level the primary document is the EAEU Customs Code (hereinafter referred to as the EAEU CC), as well as a number of other acts (for example, the Decision of the Board of the Eurasian Economic Commission dated 06.03.2018 No. 35 On Maintaining the Unified Customs Register of Intellectual Property Items of State Members of the Eurasian Economic Union and others). At the national level, this primarily consists of Federal Law No. 289-FZ of 03.08.2018 On Customs Regulation in the Russian Federation and on Amending Certain Legislative Acts of the Russian Federation.

Customs authorities play a vital role in combating the circulation of counterfeit products crossing the customs border. While customs legislation in this area is relatively progressive and aligns with international standards, the practices of customs authorities and the courts handling administrative offenses instigated by customs authorities exhibit ambiguity and varying approaches.

Supporting prevailing judicial trends and addressing problematic issues, the article analyzes court decisions from both lower instance courts and higher courts, including the Constitutional Court of the Russian Federation. The decisions from the latter serve as precedents and influence all subsequent judicial practices in similar cases.

The uniqueness of this category of court cases and contentious issues within the realm of administrative protection of intellectual property rights lies in the pursuit of striking an optimal balance between private interests (copyright holders, businesses) and public interests (consumers, the state) by law enforcement officials. The alignment of these interests in each scenario often presents varying challenges.

The authority of Russian Customs in cross-border protection of intellectual property rights

The functions of Russian customs authorities in the realm of intellectual property rights protection were formed in the early 1990s and have since undergone active

development. Legal and procedural aspects of these functions have become more robust over the past decades.

The entry into force of the Treaty of The EAEU (Eurasian Economic Union) in 2015 and the establishment of the Eurasian Economic Union signified a new phase in the development of these customs authorities' functions. Similar to the European Union practice, the EAEU introduced the possibility of registering a single EAEU trademark.

The judicial practice in administrative cases concerning the intellectual property rights protection by customs authorities is extensive and varied. Russian customs authorities, upon detecting violations, initiate and investigate cases involving copyright and related rights violations, as well as the illegal use of trademarks or other means of product differentiation[1]. Upon the completion of administrative investigation, case materials are transferred to the court for review and determination.

In judicial disputes, questions often arise concerning the scope of powers of customs authorities and its limits. In this regard, two aspects should be highlighted: 1) issues related to the competence of customs authorities regarding the "ex officio" procedure; 2) issues related to the delimitation of the competence of customs authorities and other government agencies (intersection or coincidence of competence).

In the first case, courts determine the legality of customs authorities' actions to suspend the release of goods containing intellectual property objects not included in TROIS[2].

In the second case, customs authorities are required to prove that the goods are under customs control; otherwise, administrative procedures for protecting intellectual property rights will be deemed to exceed the customs authorities' powers[3].

In general, it is important to note the significance of administrative and legal protection of intellectual property rights within the overall system of legal protection for intellectual property rights. Scholars point out that, although civil law remedies are traditionally the primary means of protecting intellectual property rights, administrative and legal methods of combating violations in this area often prove to be more effective in combating violators in this area, with the main advantages being simplicity and speed of implementation (Sergeev, 2004:390).

In foreign literature, there are studies focusing on cross-border aspects of the turnover of certain categories of goods with intellectual property rights violations, such as tobacco (Nowak (ed.), 2021) or pharmaceutical products (Calboli, 2022).

Research on the specific area of customs authorities' activities, such as the limits of their competence in identifying and preventing administrative violations in the field of intellectual property, is practically nonexistent.

It seems that the main principle in defining this area of competence for customs authorities is the clear delineation of its boundaries, which involves the following.

Firstly, customs authorities hold jurisdiction when there is evidence of the physical presence of goods containing items of intellectual property under customs supervision, subject to cross-border movement (in the present, past or future). This distinction separates

[1] Under Part 1 of Article 7.12 and Article 14.10 of the Code of Administrative Offenses of the Russian Federation (RF CAO).

[2] Resolution of the Intellectual Property Rights Court No. C01-1018/2017 of 15.01.2018 in case No. A32-6617/2017.

[3] Resolution of the Twelfth Arbitration Court of Appeal No. 12АП-9170/2018 of 24.09.2018 in case No.A12-9361/2018.

the jurisdiction of customs authorities from that of other government entities involved in the administrative and legal protection of intellectual rights in the domestic market (such as law enforcement agencies, Rospotrebnadzor, the prosecutor's office, and antimonopoly authorities).

Secondly, since 2018, the competence of customs authorities has been expanded through the "ex officio" procedures, allowing them to take measures to protect the rights of copyright holders who have not registered their intellectual property with the Customs Intellectual Property Registy (CIPR). This does not necessarily mean that an intellectual property violation will be detected. It means that customs authorities have grounds to initiate an inspection under the procedure for suspending such goods. If signs of a violation are found, the customs authority will initiate an administrative offense case, investigate it, and, after drafting an administrative offense report, send the materials to the court. Only the court can declare goods containing intellectual property and crossing the customs border as counterfeit.

Thirdly, it is necessary to clarify the list of intellectual property objects protected by customs authorities. This involves six types of intellectual property: trademarks, service marks, copyright objects, related rights objects, appellations of origin, and geographical indications. Geographical indications became a focus of administrative protection by the Russian customs authorities only in 2023, specifically on March 6, 2023[4]. Amendments to Part 2 of Article 327 and Part 3 of Article 334 of the Federal Law On Customs Regulation in the Russian Federation and on Amending Certain Legislative Acts of the Russian Federation were made to accommodate this change.

In fact, out of the 17 intellectual property items defined in Article 1225 of the Civil Code of the Russian Federation, only six are safeguarded during cross-border transactions. This reflects, in our view, the limitations of cross-border protection of intellectual rights compared to domestic market protection.

The constrained scope of customs protection for intellectual property items can be justified. Similar situations have arisen in other economic integration entities, such as the European Union where initially common means of individualization, primarily trademarks, receive protection first. Objects falling under patent law are typically included later, once a certain level of protection has been established and the single market is operating effectively.

In Russia today, the customs protection model is not only limited in terms of object categories but also with additional criteria. These may include seizures categorized by goods, copyright holders, and their nationality (ties to a specific state). Exceptions for objects, goods and copyright holders exist within the current domestic model. While previously, all copyright holders' rights were subject to customs protection, some foreign right holders are now excluded from this system.

Expert procedures in judicial practice involving customs authorities

In legal proceedings requiring specialized expertise in the fields of science, technology, art and craft, the appointment of an expert examination is necessary[5] Это

[4] Federal Law No. 488-FZ of 05.12.2022 On Amendments to Articles 327 and 334 of the Federal Law On Customs Regulation in the Russian Federation and on Amending Certain Legislative Acts of the Russian Federation. Collection of Legislation of the Russian Federation, 12.12.2022, No. 50 (Part III), item 8782.

[5] Federal Law No. 73-FZ of 31.05.2001 On State Forensic Expert Activity in the Russian Federation.

сноска 5. The same principle applies to the assignment of customs examinations. Customs examinations include research and testing conducted by customs experts and other specialists with specific scientific competence to address the issues designated to customs authorities[66]. The expert opinion holds significant weight in judicial practice as crucial evidence.

Two distinct aspects of using expert opinions in the administrative process in the cases under consideration can be identified:

1) The conduct of an examination is not mandatory, nor is it the sole evidence confirming counterfeit goods.

The determination of the illegality of the trademark use can be based on the collective evidence presented in the court records. Typically, the expert is questioned about the similarity of designations and the homogeneity of goods.

As a general rule, special knowledge is not required to establish the degree of similarity of designations and homogeneity of goods as interpreted in the acts of higher judicial authorities[7]. The court may ascertain the issues of similarity and homogeneity from the perspective of an average consumer based on collective evidence. Judicial practice shows that this is quite common[8]. The resolution whether to appoint customs examination in this category of disputes is left to judicial discretion[9].

2) Practice shows that administrative and judicial authorities commonly use expert opinions and documents prepared by copyright holders or their official representatives to determine signs of counterfeiting. Although these documents are not considered expert opinions, they are often considered by the court as evidence. Court proceedings often involve both the conclusion of an independent expert and a letter (opinion, assessment report, or other document) from the copyright holder[10] used concurrently. It is rare for case materials to contain only information on signs of counterfeiting provided by the rights holder without an expert opinion, since the rights holder is an interested party in such court cases.

Additionally, there are instances where case materials contain both the conclusion of a customs expert and a specialist conclusion prepared by the copyright holder[11].

Expert opinions are crucial in litigation within this domain, as neither the customs authority nor the court typically possesses such specialized knowledge. The sphere of intellectual rights carries significant specificities, as evidenced by the establishment of a specialized court within the arbitration justice system in Russia in 2012. This underscores the complexity and distinct nature of such court cases. In practice, situations arise where different conclusions are drawn on the same subject of examination. Issues also emerge in determining the homogeneity of goods. While experts typically prioritize assignment to a

[6] Article 388 of the Eurasian Economic Union (EAEU).

[7] Resolution of the Plenum of the Supreme Court of the Russian Federation No. 10 of 23.04.2019 On the Application of Part Four of the Civil Code of the Russian Federation.

[8] Resolution of the Intellectual Property Rights Court No. C01-796/2018 in case No. A56-11299/2018 of 26.11.2018; Resolution of the Fifth Arbitration Court of Appeal No. 05АП-7681/2020 of January 25, 2021 in case No. A51-12357/2020.

[9] Resolution of the Intellectual Property Rights Court No. C01-509/2021 in case No. A14-18330/2019 of 19.04.2021.

[10] Resolution of the Court for Intellectual Property Rights No. C01-2414/2022 dated February 1, 2023, in case No. A33-14168/2022; Resolution of the Court for Intellectual Property Rights dated January 25, 2023, No. C01-2407/2022 in case No. A51-4937/2022.

[11] Resolution of the Fifth Arbitration Court of Appeal No. 05АП-7681/2020 of January 25, 2021 in case No. A51-12357/2020.

specific class of the International Nice Classification (NCL) when determining the indication of homogeneity, the NCL class should not be the sole determining factor. Products may belong to different classes of a given classifier, but based on other criteria, they can be considered homogeneous. These criteria may include the category of consumers of goods and the conditions for the sale of goods. For instance, confectionery products belong to class 30, while marmalade belongs to class 29 of the NCL. However, from the perspective of an average consumer, these categories of goods can be considered homogeneous and cater to same buyer.

Ultimately, expert questions are crucial in litigation within this domain, as neither the customs authority nor the court possesses such specialized knowledge. Therefore, expert opinions serve as a vital tool for administrative and judicial authorities in identifying counterfeit goods and safeguarding the rights of copyright holders. The importance of expert assistance is increasing in the context of a growing presence of goods utilizing intellectual resources in both domestic and international trade.

Participation of copyright holders in the administrative protection of exclusive rights

The participation of the copyright holders in administrative proceedings warrants particular attention. In this category of court cases, they are involved as a third party that does not make a claim[12] but as a victim.[13] However, the copyright holder may be recognized as a victim in such administrative cases[14]. This recognition as a victim is a right, and administrative and judicial bodies are not obligated to make such determination[15].

The legal status of the copyright holder in customs relations is, in our opinion, complex, since it combines civil legal status and administrative legal status. The civil law status of the copyright holder in customs relations is primary as they possess exclusive rights to certain intellectual property objects (the list of which we defined ealier); without it an individual cannot participate in the protection of their intellectual rights at all. The administrative law status is expressed in the fact that the copyright holder can participate in the protection of their intellectual rights in various ways and at different stages of customs control. The administrative law status of the rights holder in the customs sphere includes several aspects:

1. The copyright holder's activity in registering their intellectual property objects with the Customs Register of Interllectual Property Objects.

2. The copyright holder's activity in the suspension of the release of goods containing intellectual property objects by customs authorities.

3. The copyright holder's participation in the investigation of administrative offense cases in the field of intellectual property rights initiated by customs authorities.

4. The copyright holder's participation in the judicial hearing of such cases.

[12] Resolution of the Fourteenth Arbitration Appellate Court No. 14АП-4430/2022 dated July 14, 2022 in case No. A52-1056/2022.

[13] Resolution of the Court for Intellectual Property Rights, No. C01-2407/2022 dated January 25, 2023 in case No. A51-4937/2022.

[14] Paragraph 11 of the Resolution of the Plenum of the Supreme Arbitration Court of the Russian Federation No. 11 of 17.02.2011 On Some Issues of the Application of the Special Part of the Russian Federation Code of Administrative Offences.

[15] Resolution of the Eighth Arbitration Court of Appeal No. 08АП-2113/2020 of 11.06.2020 in case No. A46-23812/2019.

Within the framework of the last aspect, we can highlight several qualities of the copyright holder that are important for the effective protection of their exclusive rights during the cross-border movement of goods.

Firstly, it is the proactive engagement of the copyright holder with customs and judicial authorities, demonstrating an interest in protecting their exclusive rights. The copyright holder is entitled to use methods of protecting their rights, different from administrative law methods involving customs authorities. This refers to the possibility of seeking protection through civil law methods simultaneously or after the application of administrative and legal regulation measures, even when the violator is subject to administrative responsibility for the illegal use of a trademark or other intellectual property objects, which customs authorities are empowered to protect. This ensures that the copyright holder retains the right to claim damages or compensation for such unlawful actions in accordance with the Civil Code of the Russian Federation. Moreover, employing all means of protection (public law and private law) in a systematic relationship enhances the overall effectiveness of such protection and encourages conscientious behavior in relation to other people's intellectual property.

Secondly, copyright holders are intolerant of any attempts to illegally use their exclusive rights to intellectual property. They provide assistance to customs authorities in identifying violations, participate in administrative investigations, as well as take proactive steps to protect their exclusive rights, such as timely inclusion of an intellectual property object in the customs registry.

Lastly, authors and copyright holders have the right to unite based on common interests and establish specialized communities for self-protection. Such associations exist in Russian practice and operate successfully, as exemplified by the "Rusbrand" Association of Manufacturers of Branded Trademarks, founded in 2002[16].

We believe that formation of copyright holders associations in such unions reflects their level of awareness, professional maturity, social responsibility, and active citizenship in protecting their rights, not only among themselves but also in collaboration with the state.

The category of court cases under consideration is highly specific both in nature and in subject composition. Firstly, despite the administrative nature of the case, its foundation lies in civil grounds for acquiring an exclusive right. Secondly, the traditional dispute between the state and private business in the foreign trade sphere is complicated by the presence of a new and distinct participant, the author – a copyright holder. Instead of the usual two-part formula: "state – business," we now have a three-part formula of "state – business – copyright holder", each with independent interests that intersect. It is worth noting that the interests of business and copyright holder are not solely private, while the state is charged with balancing public interests. The special role of the state, regardless of its appearance (whether as a customs authority, court, or any of its organs), involves tending to both public and private interests. In relation to the author – copyright holder, the state should not only protect their property but also create conditions for their continued activity, encouraging the creation of new intellectual products and values. Failure to do so would render the state's activity in this area superficial and short-term.

In our situation, the long-term strategy should focus on fostering intellectual and economic activity, ensuring that copyright holders receive material gratification from the

[16] "Rusbrand" Association of Manufacturers of Branded Trademarks. Official site: http://www.rusbrand.com/page/3/ (accessed: 14.09.2023).

creation of new intellectual products, including those with market value. In each specific administrative court case, the focus should not be on an isolated incident, but on a segment of the economy as a whole, specifically, the sector of intellectual products. This sector should be perceived by the authorities not merely as a type of property, but as a potential competitive advantage. Moreover, this advantage benefits not only individual entrepreneurs but the domestic business community as a whole.

The issue of trademark rights exhaustion and the sanctions regime (Exhaustion doctrine)

The issue of exhaustion and the sanctions regime highlights the interplay between private and public interests in safeguarding the exclusive rights of authors and other copyright holders as goods containing intellectual components cross borders. Despite the private law nature of the intellectual property institution, the processes of creating, commercializing, and otherwise using exclusive rights to a trademark are associated with the formation and defense of a range of public interests (such as those of consumers and the state).

The Eurasian Economic Union (EAEU) follows the regional principle of trademark rights exhaustion. As of the beginning of 2022, internal approval procedures for draft documents implementing the international exhaustion principle for specific categories of goods within the EAEU are being finalized[17].

In 2018-2019, interest in the exhaustion of rights matter in the EAEU was sparked by the decision of the Constitutional Court of the Russian Federation, which addressed the issue of parallel imports[18]. The Court distinctly delineated responsibility for parallel imports versus circulation of counterfeit goods. While recognizing the national principle of exhaustion of exclusive rights, as enshrined in the Civil Code of the Russian Federation, as not contradicting the Russian Constitution, the court nevertheless acknowledges the possibility of copyright holders misusing their exclusive trademark rights to restrict the introduction of goods into circulation through importation into the Russian national market. The Constitutional Court rightly recognized the potential danger of such actions within the framework of the current sanctions policy against Russia. The court may deny the copyright holder's claim in whole or in part if fulfilling their demands could pose a threat to constitutionally significant values. Moreover, the Constitutional Court established the obligation for lower courts to consider the factual circumstances of each case when determining the extent of liability for an importer introducing goods marked with a trademark into national circulation.

Professor E.P. Gavrilov underscored the importance of this resolution by the Constitutional Court, which provided guidance on the judicial interpretation of existing laws and brought about significant changes to judicial practices. He argues that "the principle of exhaustion of exclusive rights is incompletely regulated by current legislation, and there are significant gaps in it." (Gavrilov, 2018:43).

[17] Order of the Board of the Eurasian Economic Commission No. 30 of April 24, 2017 On the Draft Protocol on Amendments to the Treaty on the Eurasian Economic Union dated May 29, 2014. Available at http://eaeunion.org/ (accessed: 03.09.23).

[18] Resolution of the Constitutional Court of the Russian Federation No. 8-П of February 13, 2018 On the Case of Checking the Constitutionality of the Provisions of Paragraph 4 of Article 1252, Article 1487 and Paragraphs 1, 2 and 4 of Article 1515 of the Civil Code of the Russian Federation in Connection with the Complaint of PAG Limited Liability Company.

Subsequent constitutional practices further developed the Constitutional Court's stance on upholding the principle of justice[19].

A new wave of theoretical and practical interest in exhaustion of rights emerged with the partial legalization of parallel imports (partial adoption of the international exhaustion principle) in March 2022. The Russian Government positioned these measures as initiatives to support the domestic economy amid challenging circumstances.

Since March 30, 2022, the Russian Government Resolution No. 506 dated March 29, 2022, On Goods (Groups of Goods) for which Certain Provisions of the Civil Code of the Russian Federation on the Protection of Exclusive Rights to the Results of Intellectual Activity Expressed in Such Goods and Means of Individualization Marking Such Goods Cannot Be Applied[20], has been in effect. This document empowers the Ministry of Industry and Trade to approve a list of goods (groups of goods) for which the provisions of subparagraph 6 of Article 1359 and Article 1487 of the Civil Code do not apply. This exemption is applicable when these goods are introduced into circulation outside the territory of the Russian Federation by the copyright holders (patent holders) or with their consent.

The purpose of the measures taken was to satisfy the demand for goods containing objects of intellectual property.

Before moving on to the latest judicial practices related to parallel imports and the administrative protection of intellectual rights carried out by customs authorities, let us examine the theoretical foundations of the principle of exhaustion of rights in contemporary legal science. Leading scholars in the field of intellectual property rightly note that the lack of a solid theory regarding the principle of exhaustion of exclusive rights to the results of intellectual activity and means of individualization has a serious impact on the practical application of this principle (Gavrilov, 2020: 69).

The theory of exhaustion, originating in Germany at the end of the 19th century, has been effectively incorporated into national regulations governing the circulation of intellectual property products (Pirogova, 2008). Leading domestic researchers rightly associate the current situation with the Agreement on Trade-Related Aspects of Intellectual Property (the TRIPS Agreement)[21] (Pirogova, 2012).

In some cases, exhaustion is equated to the termination of a right and is understood as a special type of termination (Bogdanova, 2013). When considering these issues, international standards in this area, such as the 1994 GATT Agreement[22] cannot be ignored. It is observed that the Agreement does not obligate its contracting parties to adopt a specific

[19] Resolution of the Constitutional Court of the Russian Federation No. 40-П of July 24, 2020 On the Case of Checking the Constitutionality of subparagraph 2 of paragraph 4 of Article 1515 of the Civil Code of the Russian Federation in Connection with the request of the Fifteenth Arbitration Court of Appeal. Collection of Legislation of the Russian Federation, 10.08.2020, No. 32, Art. 5362.

[20] The Russian Government Resolution No. 506 dated March 29, 2022, On Goods (Groups of Goods) for which Certain Provisions of the Civil Code of the Russian Federation on the Protection of Exclusive Rights to the Results of Intellectual Activity Expressed in Such Goods and Means of Individualization Marking Such Goods Cannot Be Applied. Collection of Legislation of the Russian Federation No. 14, April 4, 2022, Article 2286.

[21] Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) (Concluded in Marrakesh on April 15, 1994) (as amended on December 6, 2005). Collection of Legislation of the Russian Federation No. 37, September 10, 2012 (Appendix, part VI), 2818–2849.

[22] 1994 General Agreement on Tariffs and Trade (GATT) (along with the Agreements Concerning Balance of Payments Provisions, Waivers, Interpretation of Articles II:1 "b", XVII, XXIV, XXVIII, Marrakesh Protocol...) (Concluded in Marrakesh on April 15, 1994). Collected Legislation of the Russian Federation. No. 37 (Appendix, part VI), September 10, 2012, 2524–2538.

trademark exhaustion doctrine, but the international trademark exhaustion doctrine seems to be more consistent with the law pertaining to the 1994 GATT Agreement (Grigoriadis, 2014). A similar perspective is supported by other scientists who believe that the international principle of exhaustion is more optimal and meets the requirements of the World Trade Organization (Ivanov & Voinikanis, (eds.), 2021:430–431).

Of interest is the position of scientists, who recognize the flexibility of Article 6 of the TRIPS Agreement and propose different solution to the exhaustion problem depending on the level of country's development. They conclude that it is advisable to allow parallel imports and benefit from parallel trade for developing countries and least developed countries (Calboli, 2022).

From the standpoint of economic integration, including the European Union, the principle of exhaustion is seen as a barrier for copyright holders to exercise control throughout the entire process of distribution and after-sales service (Steppe, 2019).

Characterizing the evolving doctrine of the exhaustion of rights, it is important to emphasize the complex and multifaceted nature of the parallel import issue, which is considered an economic-legal category (Belykh & Panova, 2023), and a tool for managing international sanctions (Tyunin, et al., 2023). Exhaustion of rights is regarded as one of the central institutions at the intersection of intellectual property law and competition law (Godt, 2023). Additionally, scholars assess the impact of the principle of exclusive rights exhaustion on the state of competition in product markets (Saidashev, 2021).

It is interesting to note that in certain instances scholars discuss the concept of parallel trade (Pathak, 2018) or the liberalization of parallel imports (Shalimova, 2017:213–216), with judicial practices utilizing the term "rules of law on parallel imports"[23].

Furthermore, the differentiation of parallel import issues across various dimensions such as intellectual property objects, economic sectors, and spatial criteria, including rights exhaustion in a free trade zone (Yang & Song, 2023) warrants attention. Different jurisdictions engage in varying discussions regarding the application of TRIPS provisions to dispute resolution procedures. Particularly acute is the question of whether Article 6 of this Agreement excludes the issue of the exhaustion from the scope of the agreement as a whole or whether it applies only to dispute settlement procedures (Celli & Hyzik, 2001).

A review of current judicial practice in administrative cases initiated by customs authorities for violations of intellectual property rights (mostly for the illegal use of trademarks) indicates that the procedure for identifying such violations has undergone minimal change. One minor procedural novelty observed is the defense tactic employed by violators, claiming grounds for applying parallel imports laws to their actions[24]. These arguments are typically dismissed by the court as they are based on incorrect interpretations of substantive law. Notably, customs authorities now effectively distinguish between pre- (by electromic customs)[25] and post-release detections of such violations[26] (Dorofeev & Glushchenko, 2021).

[23] Resolution of the Intellectual Property Court No. C01-2414/2022 of February 1, 2023, in case No. A33-14168/2022.
[24] Resolution of the Intellectual Property Court No. C01-2414/2022 of February 1, 2023, in case No. A33-14168/2022.
[25] Resolution of the Intellectual Property Court No. C01-2414/2022 of February 1, 2023, in case No. A33-14168/2022.
[26] Resolution of the Intellectual Property Rights Court No. C01-521/2019 of 09.06.2022 in case No. A73-7537/2018.

Contemporary judicial practice involving customs authorities highlights several issues, such as determining counterfeit status (goods deemed counterfeit in the sense of the provisions of Article 1252 of the Russian Civil Code), the relationship between the protection of intellectual property rights and false declaration of goods (Article 16.2 of the Code of Administrative Offenses), distinguishing parallel imports from the actions covered by Article 14.10 of the Code of Administrative Offenses, the possibility of denying trademark protection based on copyright holders being residents of countries deemed unfriendly to the Russian Federation, and considering the provisions of the Presidential Decree of the Russian Federation No. 79 dated February 28, 2022, On the Application of Special Economic Measures in Connection with Unfriendly Actions of the United States of America and Allied Foreign States and International Organizations when reviewing cases, including decisions and actions taken before its adoption, among others[26].

Rejecting the arguments of the parties regarding the necessity of applying the provisions of the regulatory package related to the partial legalization of parallel imports (in particular, Federal Law No. 46-FZ dated March 8, 2022, On Amendments to Certain Legislative Acts of the Russian Federation, Government Resolution No. 506 dated March 29, 2022, On Goods (Groups of Goods) for which Certain Provisions of the Civil Code of the Russian Federation on the Protection of Exclusive Rights to the Results of Intellectual Activity Expressed in Such Goods and Means of Individualization Marking Such Goods Cannot Be Applied, and Order No. 1532 of the Ministry of Industry and Trade of the Russian Federation dated April 19, 2022, On Approval of the List of Goods (Groups of Goods) for which the Provisions of Subparagraph 6 of Article 1359 and Article 1487 of the Civil Code of the Russian Federation Do Not Apply, Provided that These Goods (Groups of Goods) Are Introduced into Circulation Outside the Territory of the Russian Federation by the Rights Holders (Patent Holders) or with Their Consent, the courts provide their own definition of parallel import. It runs as follows: "parallel import is importation into the territory of the Russian Federation of original foreign goods that have been lawfully introduced into civil circulation abroad without the consent of the copyright holders[27]" or "circulation of original goods marked with the trademark of the copyright holder, but without their permission[28]".

The review of judicial practice indicates that customs authorities initiate cases under Part 1[29] and Part 2[30] of Article 14.10 of the Code of Administrative Offenses of the Russian Federation when they detect facts of illegal use of a trademark.

In addition, it should be noted that after the partial introduction of the international principle of exhaustion of rights in Russia, many cases have emerged in judicial practice related to the termination of contractual relationships. For example, situations where a court grants a request to terminate a contract due to the impossibility of performance resulting from a substantial change in circumstances (Article 451 of the Civil Code), related to the

[27] Resolution of the Court of Intellectual Rights No. C01-2407/2022 of 25.01.2023 in case No. A51-4937/2022.
[28] Resolution of the Fourteenth Arbitration Court of Appeal No. 14АП-4430/2023 of July 14, 2023, in case No. A52-1056/2022.
[29] Resolution of the Fifth Arbitration Appeal Court dated January 25, 2021, No. 05АП-7681/2020 in case No. A51-12357/2020.
[30] Resolution of the Fourteenth Arbitration Appeal Court dated July 14, 2022, No. 14АП-4430/2022 in case No. A52-1056/2022.

strengthening of the sanctions regime[31]. Although these cases do not fall under the category of administrative cases, they are closely related to the latter in terms of the presence in the contract of requirements for performing customs operations and aspects of protecting rights to intellectual property objects.

The protection of the rights of authors and owners can be implemented through various methods, including regulation through both private and public law means, as well as law enforcement through administrative and judicial channels. While all of these factors are important, their relative significance can vary over time. Administrative and judicial practice is a crucial but not entirely stable aspect of defense, as it is difficult to influence and not easily predictable. It appears that regulatory measures of an administrative nature are more effective for promptly responding to changes in the situation. They have a more definite impact on the economy, are more predictable, sustainable, and are able to meet the legitimate stakeholders' expectations. Moreover, in the mechanisms under study, it is increasingly challenging to distinguish between private law and public law elements as they are inextricably linked. The introduction of exceptions from the exhaustion principle introduced in 2022 shows a unique blend of private and public law elements, with exceptions established through administrative acts, a subordinate act adopted by the supreme executive authority and detailed by the federal executive authority. Thus, the order of operation of private law norms is established through a public (administrative) means of management. And this, in our opinion, is not a paradox, but rather a specificity of relationships in the field of intellectual resources. We believe that among the available roles, the state chooses the role that best suits the current political and economic situation. Among the roles of state-regulator, state-observer, state-controller, and state-protector, in Russia today, the authorities opt for the last option in relation to domestic entities.

It must be acknowledged that the distinctions between these state statuses are quite arbitrary and indefinite. The current version of exemptions from the national exhaustion principle has been in effect since November 2023. It is believed that these are not the final adjustments to the mechanism formulated by the government. Based on the review of regulatory standards and law enforcement practice, the following conclusions can be drawn.

Firstly, the mechanism of exhaustion of rights held the potential to safeguard the economic interests of both the state and economic entities. This mechanism can be used through judicial practice and judicial discretion to protect the rights of domestic economic entities. Another option for utilizing this mechanism is the administrative resource of power, which entirely or partially alters the principle of exhaustion. The Russian government opted for the latter (the former being cautiously demonstrated during the preceding period of sanctions pressure, i.e., until 2022). During severe sanctions pressure, the public authorities employed this potential to safeguard domestic producers as well as the national economy overall.

Secondly, the transformation of the parallel import mechanism entails the utmost convergence of methods of private and public law protection of the exclusive rights of copyright holders. Public legal protection measures are initiated by the state from above, while private legal measures are contingent on the economic activity and sustainability of rights holders.

[31] Resolution of the Thirteenth Arbitration Court of Appeal No. 14АП-4430/2023 of May 2, 2023, in case No. A56-106859/2022. The document was not published. Available from Consultant Plus Reference Legal System.

Thirdly, the use of the mechanism of exhaustion of exclusive rights in modern Russian conditions is aimed at prioritizing the protection of public interests and the interests of an indefinite number of individuals, rather than those of copyrights holders, who in this case are the weaker, less protected party. Moreover, this concerns not all copyright holders, but specifically those from unfriendly countries.

Fourthly, since the introduction of partial legalization of parallel imports, we have observed a situation where protectionism, the protection of domestic economic entities, and the economy as a whole prevail over competition and natural economic rivalry, primarily at the expense of the results of intellectual activity and means of individualization.

Fifthly, in the situation of partial legalization of parallel imports, universal international standards are not violated, as they do not contain rigid frameworks for the national resolution of this issue. At the same time, the norms of the integration level are not observed.

At the EAEU level, a regional principle of exhaustion of rights has been established; however, in modern-day Russia, it is partly not observed. The specific situation amends the direction of employing the principle of exhaustion of rights. Within the EAEU, exceptions from the regional principle were planned in order to support certain sectors of the economy. In March 2022, these exemptions were implemented to protect the national economy subject to sanctions. An economic response with a political sampling criterion was provided to sanctions (essentially political) decisions. The anti-sanctions agenda has become more significant and crucial for economic security than the integration agenda.

On the one hand, this is linked to the general trend of diminishing the relevance of globalization in the world. Presently, national, including legal, identity plays an increasingly important role. The trend of globalization and economic integration is, to some extent, receding into the background. National interests dominate in all aspects: in the economy, in politics, in the regulation of various facets of social life. In the area we are considering, which amalgamates economic interests and the rights of individuals to creativity, science, and creation of new intellectual products, national tasks and priorities also take precedence. It is believed that the hierarchy of values to be ensured by the national government is undergoing alteration. The set of values is preserved, but their place in the hierarchy of values changes, highlighting the significance and specific weight of values while the priority order of their protection by the state are repositioned.

Conclusion

The analysis of Russian judicial practice in the administrative protection of intellectual property indicates the ambiguity in understanding and application by the courts of the issues of customs authorities' competence in protecting intellectual rights, expediency of using expertise and involving the rights holder in judicial proceedings, and the application of the principle of exhaustion of rights to a trademark.

1. With regard to the competence of customs authorities, it is necessary to standardize the scope of powers of customs authorities in different member states of the Eurasian Economic Union (EAEU), as well as to clearly delineate such powers at the national level.

2. It is necessary to actively involve rights holders in adjudication of such cases and extensively use expert opinions prepared by non-copyrights holders.

3. The contemporary interpretation of the principle of exhaustion of rights by Russian courts is being transformed under the influence of the sanctions policy towards Russia and upholds the interests of Russian businesses, thereby safeguarding national interests.

4. The partial legalization of parallel imports in Russia in response to heightened sanctions pressure did not significantly alter the trend in the judicial practice of customs authorities in administrative cases. The authority of the customs officials is and continues to be confined to the identification of only counterfeit goods. A relatively recent element development in this practice is the emergence of considerations related to the legalization of parallel imports, presented as an argument by foreign trade businesses. The issues of correlating administrative and civil liability for violations of intellectual property rights, as well as defining the concept of counterfeit goods being transported across the customs border, continue to remain relevant.

5. The cross-border aspects of administrative protection of intellectual property are an integral part of the overall safeguarding of such rights today. They are influenced by legislative development and academic doctrine and are reflected in law enforcement practices. The latter also shapes and optimizes the existing system of intellectual rights protection in a specific manner. Taking into account the trends in judicial practice will enhance the effectiveness of such protection and ensure an optimal balance of interests among copyright holders, consumers, and the state. The balance of these interests is unique in each specific situation of an actual or potential infringement of intellectual property rights.

It is plausible that the exhaustion pattern in Russia may subsequently change. The active global use of this mechanism demonstrates its adaptability, efficiency, and capacity to influence various relation groups, including those related to scientific, technical, and other forms of creativity, competition, economic security, production, trade, and consumer protection. The issue of post-sale service for a product circulated without the involvement of the copyright holder is also pertinent. Judicial practice may emerge to address such contentious matters, and time will reveal the relevance of this problem.

The cross-border aspect of intellectual rights protection has gained significant importance in the system of measures aimed at safeguarding the domestic economy. The administrative measures providing exceptions to the exhaustion of rights principle, as well as trends in judicial practice aimed at protecting Russian business entities, are noteworthy in this context. While the disputed issues of judicial practice in the previous period were the aspects of customs authorities' competence and how it relates to the powers of other authorities (antimonopoly authorities, police authorities, and others), the current period of judicial protection development is characterized by the vector of defending domestic businesses which are facing challenging sanction conditions.

In previous years, judicial practice in cases related to the cross-border movement of goods containing objects of intellectual property utilized expert and other procedures to protect both public and private interests. Private interests were represented by the interests of any category of authors and other rights holders. Presently, there is a fundamental differentiation in terms of copyright holders (based on residence) and goods (based on their demand in the domestic market, availability, and national production conditions).

In this context, judicial practice serves as an additional, auxiliary factor in protecting national economic interests. The main measures have been adimistrative decisions on the partial legalization of parallel imports, which have become a logical, to a certain extent "mirror' response of the Russian economy to the tightening of sanction pressure.

While judicial practice reflects the will of the court and the judiciary and is part of the broader public authority, its influence is contingent upon the alignment of efforts among all branches of government. The legislative branch establishes rules, the executive branch enforces them, and the judicial branch reflects the collective government's stance through justice and resolution of specific disputes. Alignment among all branches of government enhances state regulatory effectiveness within a specific domain of relations.

The resolution of administrative disputes by court is significant in terms of judicial oversight over the actions of administrative bodies, such as customs authorities in this case. These unique bodies, tasked with fiscal, regulatory, protective, stimulating, and preventive roles, is of a paramount importance in safeguarding intellectual resources. Customs authorities are responsible for balancing private and public interest while addressing financial aspects like incorporating various license fees into the customs value of goods.

At he same time, the responsibility of customs authorities in ensuring economic and other security and facilitating foreign trade activities significantly increases. Customs authorities remain a barrier against counterfeit products entering national circulation, which could jeopardize the health and quality of life of Russian citizens. The functionality of the Russian customs authorities has become more complex due to additional criteria for identifying goods containing intellectual property. The efficacy of measures proposed and implemented by the Russian government to shield the national economy heavily relies on administrative and judicial practices.

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About the author:

Saniyat A. Agamagomedova – Candidate of Legal Sciences, Associate Professor, Sector of Administrative Law and Administrative Procedure, Institute of State and Law, Russian Academy of Sciences; 10 Znamenka str., Moscow, 119019, Russian Federation

ORCID ID: 0000-0002-8265-2971

e-mail: saniyat_aga@mail.ru

Сведения об авторе:

Агамагомедова Саният Абдулганиевна – кандидат юридических наук, доцент, сектор административного права и административного процесса, Институт государства и права Российской академии наук; 119019, Российская Федерация, г. Москва, ул. Знаменка, д. 10

ORCID ID: 0000-0002-8265-2971

e-mail: saniyat_aga@mail.ru