

Position paper:
**Measures for improving IPR structure in
Kosovo**

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2011**

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Introduction

This document was hired by the Kosovo Association of Information and Communication Technology (STIKK) based on requests of member companies, any of which create intellectual property products (software, web designs, know how etc.) The need for a position paper on measures to be taken in the IPR structure in Kosovo was also identified at the workshop “Intellectual Rights”, organized by the USAID and STIKK.

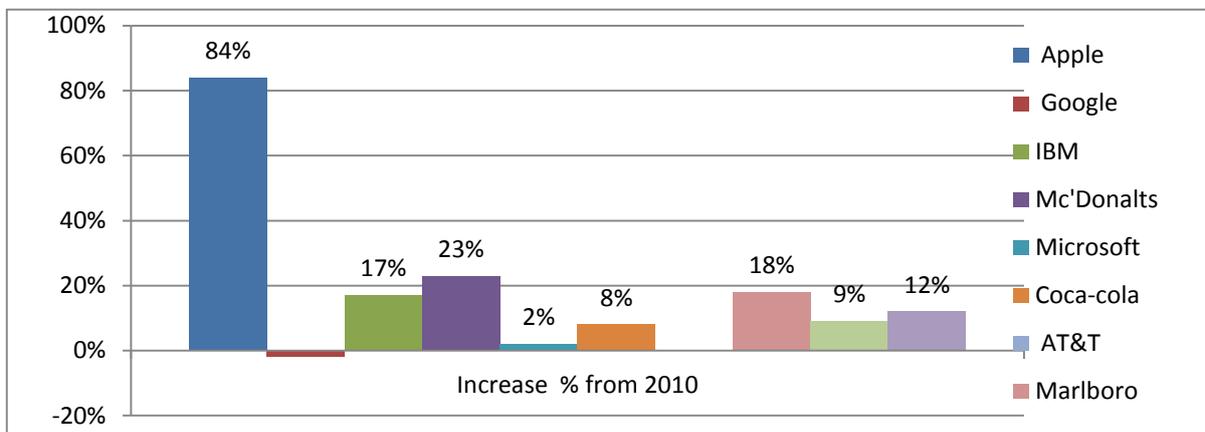
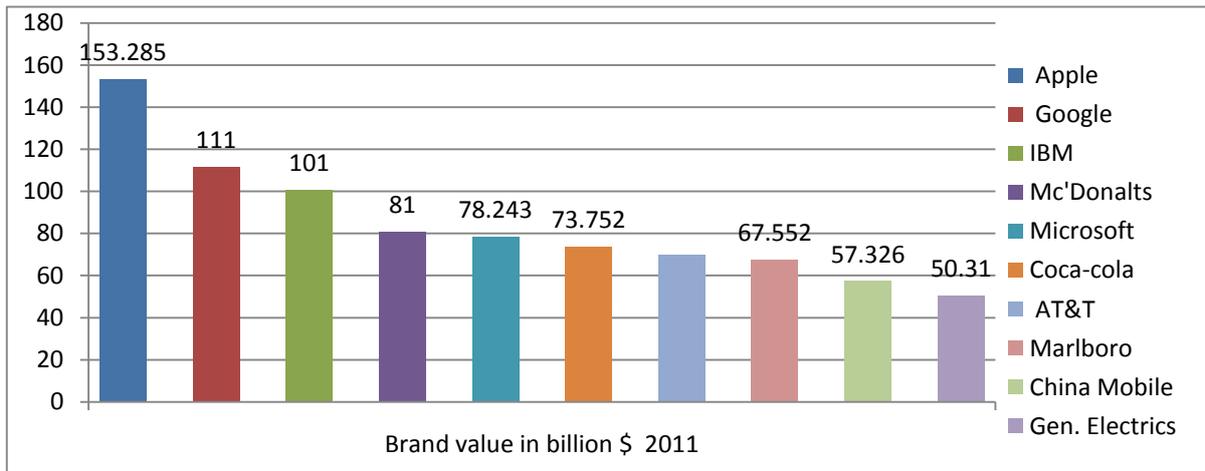
The study’s aim is to present the IPR legal structure in Kosovo, and implementing institutions. In addition the study tries to identify problems and obstacles and propose measures of the above institutions in order to implement Intellectual Property Rights in ./ Kosovo properly.

Protection of assets, art works and other Intellectual Property categories (patent, trademark, copyright, know-how etc) enables conditions for innovation in science. It is essential to technological progress, protection of investments and market competitiveness. Intellectual Property Rights are to prevent misuse of these rights and this often occurs when a third party exploits efforts, investment, labor and talent of other without permission. Protection of Intellectual Rights is essential factor for developing a fair market competition and other social and economic issues linked to the welfare of one country. The Universal Declaration of Human Rights, Article 27 states that “Article 27. (1) Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits. (2) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author. The Constitution of Kosovo supports this principle of the Declaration (see Constitution of Kosovo, Article 2).

In most developed economies (USA, Japan, EU etc) protection of Intellectual Rights plays an important role. Knowledge based economies are advanced economies going towards a greater dependence on information technology, computer networks, media, collective intelligence, manifested with growth of innovation in services. According to Isabel Verilinden and Axel Smiths (coauthors of “Mastering the Intellectual Property Life Cycle), the information technology sector in knowledge based economies employs 70% of all working people.

Kosovo and its ITC industry in general (software, hardware, and media) should have proper conditions allowing development and the key factor is protection of Intellectual Property Rights (IPR).

Financial Times (May 2011 issue) published a report on importance of IT companies. The brand value of IT companies is considerably more valuable than other companies.



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Business Week considers that three massive industries are in a course of colliding. First is the USD 1.1 trillion computer and software industry next is USD 225 billion consumer-electronics sector and the third is USD 2.2 billion communications industry. The combination of ever-more powerful computer chips, exploding bandwidth, improving flat-screen TVs and penetration of smart phone is leading to an environment where companies are more and more stepping out of their comfort zone trying to transfer success from one industry in another. In this mess the intellectual property plays an important role enabling technological progress and protecting investments poured into Research and Development (R&D). DELL for example traditionally used to produce powerhouses, however now is selling other products, GPS devices too. Relying on their powerful brands companies are licensing in technologies this how reducing time to market².

¹ Financial times-issue May 2011

² Mastering Intellectual Property Life Cycle, 2nd edition- pg. 28.

IPR and competition law in Kosovo

Free market competition in Kosovo is regulated by the Competition Law (2004/36). The law enables fair and equal opportunities to compete in a free market. Lack of sufficient implementation of the IPR laws would allow business to use the legit property of other businesses thus harming the fair competition. Article 12.1 is dedicated to the intellectual property and includes pretty much all IPR disciplines.

Problems linked to KOSOVO's membership to international IPR organizations and treaties

Kosovo is in process of building an EU based legislative structure and in general laws drafted so far are in harmony with International treaties and conventions. Part of Kosovo institution's agenda is to initiate and lobby Kosovo's membership to important international organizations and treaties, however very little or nothing was done to seek Kosovo's membership in IPR organizations and treaties. Kosovo is no member to any of the most important IPR organizations or treaties (WTO, WIPO, EPO, and EPC etc). Kosovo's admission to the World Intellectual Property Office (WIPO) is conditioned with UN membership³, therefore currently full membership to this organization perhaps should be put on hold however Kosovo institutions should seek an observatory status for Kosovo so local institutions could stay up to date with international IPR movements and events. Kosovo takes no part to any international annual IPR conference and has no bilateral IPR agreement with any country. Kosovo institutions should also seek membership to the UNESCO and prepare admission application for World Trade Organization (WTO). Accession to the WTO is not conditioned with UN membership and admission criteria are different as the WTO is not an UN body. The admission criteria states that: "Any state or customs territory having full autonomy in the conduct of its trade policies may become a member ("accede to") the WTO, but all WTO members must agree on the terms. This is done through the establishment of a working party of WTO members and through a process of negotiations"⁴. This means that Kosovo would have to prepare a negotiation team that would heavily lobby to persuade "skeptical" member states to not vote against Kosovo's admission to this organization. No matter how hard this sounds it is not impossible and the best case to prove it is Taiwan. No member of UN, Taiwan managed to become member of the WTO despite political obstacles and other problems.

Kosovo institutions must intensively work on 'officially' signing the TRIPs (Trade Related Aspect of Intellectual Property Rights) Agreement, even though Kosovo respects it "de

³ http://www.wipo.int/members/en/#admission_criteria

⁴ http://www.wto.org/english/thewto_e/acc_e/acc_e.htm

jure”⁵. Accession to the WTO is very important because TRIPs is the only international treaty setting the minimum standard for IPR globally.

Patent application procedures in Kosovo

Patent application is posted in the Ministry of Trade and Industry website (<http://www.mti-ks.org/?cid=1,381,425>). According to Kosovo’s Patent Law only the inventor or person authorized by the inventor may file for patent.

The application offers the option of not disclosing inventors name in the patent application. This violates the general rules of patent application procedures of any International Patent Treaty. It violates Article 12, (12. 3) of Kosovo’s Patent Law too.

The law does not refer to patent attorney issues either. Kosovo Patent Law does not specify who is eligible to litigate patent cases if a patent is objected or send to court. In most of the European Union countries (including France and Germany) legal representatives in patent cases are people with technical and scientific background (engineering, physics, chemistry, biochemistry etc). Patent cases require very complex academic background. Law background is not enough as patent claims are very complex and require highly skilled legal representatives corresponding with patent claims. For example, let’s say a patent judge with technical background in physics may not be able to fairly decide on a patent having to do with biochemistry. His or her verdict may be unfair as a result of ignorance. Preparing patent lawyers may be a challenge for Kosovo institutions and they must ask for help on this matter from European Union countries, preferably Germany and France (40 % of all patent European patent cases go to Germany, 80% of them in Dusseldorf⁶). Although, it is crucial to keep patent lawyers and judges up to date because patent cases in Kosovo will be very rare (Romania on average has one patent case per year) and even most skillful lawyers will decay as result of rare cases.

Industrial Property Office (Ministry of Trade and Industry)

The Industrial Property Office (IPO) was established in 2007 within the Ministry of Trade and Industry and it is the most important IPR institution. The Office enjoys an autonomous status within the Ministry; however its status should be upgraded to a higher status level as the Office should play the essential role in organizing and monitoring implementation of all Intellectual Property Laws in Kosovo. The IPO has generated considerable income for Kosovo’s budget (half a million Euros in 2010⁷), however only recently the Office was

⁵ “Intellectual Property Strategy 2010-2014”.

⁶ VPP-Rundbrief 1/2009

⁷ IPO

authorized to receive 10 % of the income annually⁸. The office has 9 employees, 4 of which are random employees with no relevant background. The office is led by the office director who has additional responsibilities as the office lacks funds for additional employees. Other officials within the office have no IPR academic background whatsoever, however trainings and job experience has helped them a lot in their professional accomplishment.

Kosovo progressively is harmonizing laws with the European Union and aiming to sign the Stabilization and Association Agreement with the Union. The Intellectual Property laws are part of the legislation that must be harmonized and implemented rigorously. Intellectual Property Rights have been neglected due to lack of implementation and very little attention was paid to building an effective IPR legislative structure. This issue is raised in the European Union Progress Report on Kosovo too.

In general the European Union and member states in particular are determined in protecting intellectual property rights because IPRs are important and have a great impact on social, economic and political issues of the European Union. Protection of initiative, labor and investment in all sectors (pharmaceutical, biotechnology, information technology, auto industry, cinematography, music). In addition, it is crucial to protection of companies' goodwill, consumer protection, trade competition and safety of EU citizens. Thus, the Government of Kosovo and corresponding ministries (Ministry of Trade and Industry, M. of Culture and M. of Agriculture) and particular departments, stakeholders in building and implementing IPR laws should enjoy a better financial, logistical and professional support.

The IPO demands new and skilled employees in order to build new sectors within the office. The work intensity of this office is enormous. From 2007 to May 2011 the Office received twenty one thousand (21,000) applications (trademarks and patents).⁹ However, only 4500 have been processed and published in IPO's official gazette so far.

⁸ Ministry of Trade and Industry.

⁹ MTI

Year	Trademarks	Patents	Industrial designs	TOTAL
2007	87	1	1	89
2008	16200	1244	40	1784
2009	1533	294	8	1835
2010	1226	185	22	1433
May 2011	541	49	6	596
Total	19587	1773	77	21437

The office risks failing to meet goals of the “IPR strategy 2010-2014” with current capacities. The office has no clear organizational chart and lacks human resources in accomplishing its goals. Office managers in continuity asked for new people of required skills and better budget. Working space of the office is insufficient and is far from meeting any working condition required by law. All above factors have a negative impact on activities performance of the Office.

Copyright Office- Ministry of Culture

Meeting with Mr. Skënder Boshtrakaj, Copyright Office director, Ministry of Culture, happened during the time when Copyright Law was being amended. Nevertheless, the Law wasn't fully amended. Only some articles dealing with responsibilities of the Office were amended. Initially was suggested that Office takes the responsibility of registering eligible copyright works. The idea was refused and with a good reason. First of all, this service is not offered in any of the EU member states except for Benelux states. The i-DEPOT allows one to prove that one particular creation already existed on a certain date. That may be quite useful: if somebody else claims the creation is his or hers, your i-DEPOT will allow you to disprove that claim¹⁰. However, the institution offers no Intellectual Property Right and its important is limited.

Amendments made to the Copyright law make the Copyright Office in Kosovo responsible to license and advice collecting societies that present copyright owners, (*for example- the*

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https://www.boip.int/wps/portal/site/ideas/lut/p/c4/04_SB8K8xLLM9MSSzPy8xBz9CP0os3jnlCdPRydDRwMDXydzA09fRy9vPx8_YwsfQ_2CbEdFABaP2Z8!/

Association of Authors would be in charge of managing literary works; cinematography association would be in charge of managing and representing filmmakers and so on). In our case the Kosovo Association of Information and Communication (STIKK) could represent the ICT companies.

Another major problem linked to the Copyright Office being a depository office would be the registration of works and their maintenance. Because copyrights by law last 70 years after authors death it becomes complicated and very hard to manage works of art deposited in different forms of medium. For example songs or films deposited in CD, VHS or any other form may not last very long and they would have to be transferred to new forms of storage which may be in the future. It raises questions like who would guarantee that during the transfer, songs, films or other forms or registered art works may not be harmed, deleted or destroyed completely? Most of the technological storage means have a very limited lifespan and offer no quality guaranty that works of art will not lose quality over time. Technological progress represents another challenge. Transfers and restoration of art works deposited during time would require highly skilled professionals and huge financial funds. Thus, collecting societies would manage and represent copyright owners better and more efficiently. Collecting societies would play an important role in managing disputes among their members making copyrights easy to manage and less costly.

On the other hand, the Copyright Office is recently established and has two employees. The Office's capacity is expected to double as the Office plans to employ another two employees with IPR background. IPR and Copyright trainings are very much needed as the managing staff of the Office lacks experience and knowledge in this field.

It is obvious Kosovo's isolation and lack of participation in forums and conferences on Copyright issues and IPR in general.

Kosovo Customs IPR sector

The Sector was established on February 1st 2009 within the Kosovo Customs and has 4 employees. Most of the employees have no academic background on IPR; however they have been trained by numerous organizations and projects like EUKTA, SNB-react, EUAPO etc. According to Mrs. Sadije Topjani, IPR sector director, the Office needs more trainings on IPR in order to increase its professional capacities. According to her learning experiences from an EU member state would be very helpful. Mrs. Topjani indicated that Slovenia would be the best case as it has similar characteristics with Kosovo and used to share common experiences in the past.

The sector acts according to the law L-170/2010- Custom Measures for Protecting Intellectual Property. The office lacks legal experts able to interpret lawful responsibilities of the sector in general. Sector performance is directly linked to the IPO. The Customs Sector

mainly acts upon request of property owners, who find it very hard to get an official registration document issued by the IPO, necessary for initiating sopping procedures for infringed good at the border. The IPO is not always ready to issue such document due to large number of unprocessed trademark applications. Nevertheless, the Customs IPR Sector has considerably a larger number of interventions compared to regional countries. According to the Customs IPR Sector since its establishment they intervened in 32 cases, 30 of which based on request filed by the property rights owners' (2 other cases were ex-officio)¹¹.

Until now the Sector has destroyed 790 thousand Euros worth of goods (230 000 units). The Sector will soon sign the Memorandum of Understanding with the IPO and Copyright Office. People working at the Sector are enthusiastic and hardworking; however they suffer from consequences of insufficient funds of the IPO.

According to Mrs. Topjani another challenge they are faced with on daily basis is malfunction of databases.

Note: Above pictures show various counterfeit and illegal goods destroyed by the Kosovo Customs.



IPO initiative is to establish the IPR National Council part of which is going to be Kosovo Customs IPR Sector too.



¹¹ Kosovo Customs

The Sector needs a proper infrastructure required by law for destroying infringed and counterfeit goods safely and environmentally friendly. Such infrastructure could be built in cooperation with the Ministry of Environment and Agriculture, Food and Veterinary Agency in particular. The infrastructure could be used for multiple purposes. The IPR Sector cooperates very closely and Veterinary Agency which is present at border points. There was at least one confirmed case where both agencies had to intervene at the same time. There was a case with imported goods which resulted counterfeit and hazardous to public health.

Independent Media Commission (IMC)

The Independent Media Commission (IMC) is an independent broadcast regulator in the Republic of Kosovo, determined by the Article 131 of the Constitution of the Republic of Kosovo and is established by the Law No.02/L-15 on Independent Media Commission and Broadcasting. . The IMC is to allocate and license frequencies of audio and visual broadcasters in Kosovo. This institution deals with contest resolution whenever is necessary and serves as a “disciplinary” council for violating broadcasters. The IMC necessarily deals with copyrights and related rights which are very often violated and neglected by broadcasters. According to Mrs. Naile Selimaj, Chief Executive of IMC, the Commission has received numerous complaints which were processed based on 2009/03 Regulation on Compliance with Copyright Obligations. The Commission has played a constructive role in commenting the amendment of the Copyright Law.

The IMC was not included in the IPR 2010-2014 strategy despite the fact it is directly involved in copyrights and related rights issues. It remains unclear the role of IMC in the future IPR developments in Kosovo. The Commission has ex-officio acted in many copyright dispute cases and many other cases were sent to the court where the IMC has been called by courts to assist in copyright cases. Nevertheless, the IMC needs to establish an IPR department which will deal specifically with IPR issues in media.

Ministry of Agriculture –Geographic Indication (GI) products

Countries like USA, Japan and Australia protect their GIs with the Trademark law. However, the European Union and many other European states protect GIs with *sui generis* legislation. Kosovo did not draft the GI Law and very little has been done on this issue so far. Since Kosovo is determined to move towards EU integrations the starting point in drafting the new GI law should be the Lisbon Agreement¹². The Agreement gives a special status to products which correspond to a specific geographical location or origin.

According to the Ministry of Trade and Ministry of Agriculture the law is being prepared but no details were given on what stage they are. Even though GIs and IT sector have very little in common, STIKK has got the expertise and offered to the working committees of the GI law, however no invitation to join the committees was received so far.

In conclusion, the law has to be drafted and harmonized with the EU Directive 2081/92, 2082/92 and TRIPS Agreement (especially Article 22).

¹² <http://www.wipo.int/lisbon/en/general/>

Courts

Courts and court responsibilities are regulated by the No.03/L-99 Law. The Law does not say which courts are competent on legal matters, such as patent, trademark or copyright cases. However, the old law of 1978 on Kosovo's Courts (Law 20/77) is very specific in this matter.

Since IPR cases mostly correlate to economic cases, economic courts in Republic of Kosovo are organized as follows:

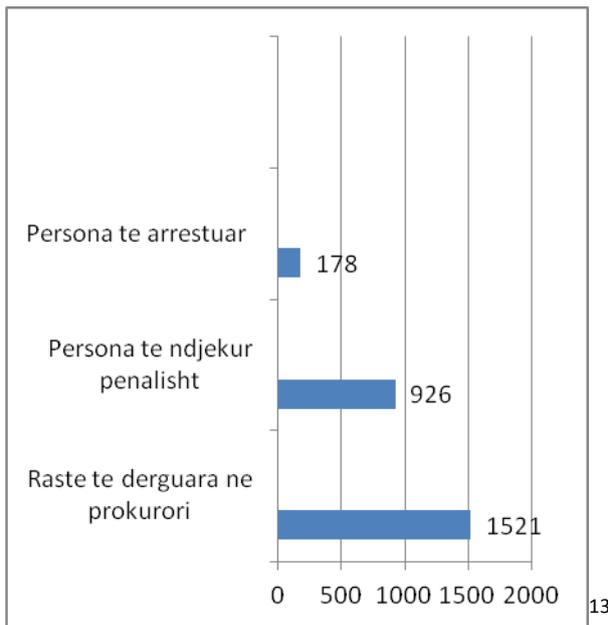
- First Degree Court;
- Second Degree Court or Court of Appeals;
- Supreme Court.

Article 11, point 3 of this Law appoints the First Degree Court of Prishtina as competent for all economic cases in Kosovo. The Court of Appeals in Prishtina is also competent for the whole territory. Article 13 of the Law defines court competences in Republic of Kosovo but says nothing regarding the IPR cases.

It remains unclear what should be the background or experience of judges which will handle patent, trademark or copyright cases. In Act 1, Article 25, point 2.2 indicates that economic court judge is required to have worked as a judge at least six years and has dealt with economic and administrative issues. This condition is very vague, unclear and represents a very low threshold for judges in general. IPR cases are very specific and complex, hence this law needs to be amended in order to include and properly treat IPR issues.

Police -Economic Crime Unit

Economic Crime Unit (ECU) was established in 2009 and currently is led by Mr. Agron Nezaj. According to him there are five people working in this unit. The ECU did not get involved in any IPR related crime, nonetheless they meet on regular basis with the IPO and are aware of IPR developments in Kosovo. The capacity of the ECU is limited, lacking funds and human resources. On the other hand, results achieved by the unit are impressive. According to Mr. Nezaj the Unit froze 27.9 million Euros worth of assets since its establishment.



Above statistics look promising since the Unit is recent and lacks experience. The Penal Code of Republic of Kosovo calls for protection of IPR making Kosovo Institutions (ECU) responsible for taking actions against IPR related crime. Specifically, Article 240 and 241 of the Penal Code call for protection against encroachment of Patent, Trademark and other IP Rights. Currently in Kosovo there is a massive established industry of counterfeit and infringed goods. Shops and shopping centers offer counterfeit and infringed goods everywhere. Plenty CD shops offer latest pirated movies, music and software for only 1 Euro per piece. There seems to be little if any activity from Kosovo institutions to stop this unlawful activity.

Mr. Nezaj says that employees of the Unit are discouraged because of the low income they receive and level of life hazard. According to him the Unit employees work under life threatening conditions because of the nature of their profession, however they are categorized the same with other units (for example Border Units-where life hazard level is very low).

There is a need for setting up procedures of asset sequestration. One must have in mind the presence of the legal representatives of owners' rights, registration of assets upon sequestration, adequate transportation and storage. Sequestered goods must be kept in proper conditions until legal procedures are finished.

Anyhow, the ECU shows enthusiasm in cooperating with the representatives of the IPO and there are healthy relations being set up by these two institutions. The position paper recommends adding other positions with IPR skilled employees ready to take responsibilities as the ECU is preparing to tackle piracy and counterfeit goods.

¹³ Kosovo Police

Information and Communication Technology (ICT) Sector in Kosovo

STIKK represents the quantity and quality of ICT companies representing 85 % of the ICT market in Kosovo. Different members have different opinion on IPR regime and concept. Members like FLOSSK are against public institutions purchase of licenses for closed code software. FLOSSK represents interests of open source (code). They have criticized public institutions of Kosovo for buying Microsoft licenses worth millions of Euros. On the other hand, other member companies (Cactus, Expik) are authorized distributors of Microsoft licenses. FLOSK promotes the idea of open source ICT solutions for public institutions. They believe in offering alternative solutions and bringing the European Union trend of open source software and their use in public solutions. In fact there is a European Commission strategy for internal use of Open Source Software (OSS)¹⁴, which calls member states for use of OSS in public institutions. The e-government unit in the United Kingdom has approved policies that call public institutions to use OSS in public bids¹⁵. Use of OSS is proving to be more economic in UK and saved money is used to finance R&Ds.

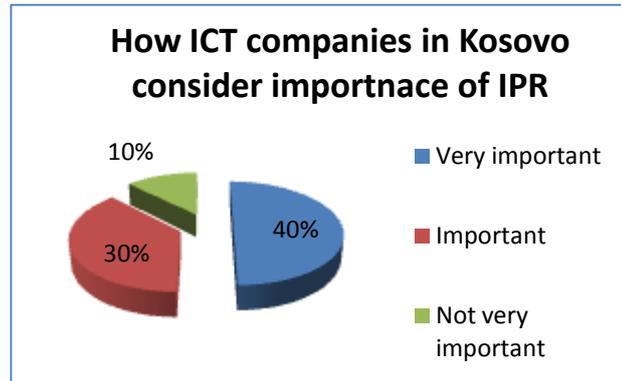
Other member companies (especially software developing companies) have insisted that the Ministry of Culture, respectively Copyright Office should initiate procedures for protection of custom made software. However STIKK has individually explained the copyright law and competences of the Copyright office. In general most of the companies had the idea that the Copyright office should initiate legal actions against infringes. Due to this fact STIKK has arranged meetings separate meetings with companies and explained Copyright law and discussed other IPR issues they deal with.

Currently there is no association for managing collective rights of software developers, however this should be the initiative of software of developers. Known companies like "Expic", "Rrota" and "Cactus" seem to be more informed as they had cases of copyright disputes in the past. Dome of these companies have had employees which worked as software developers and had full access to software codes and other technical tool which of

¹⁴ http://ec.europa.eu/dgs/informatics/oss_tech/index_en.htm

¹⁵ "OPEN SOURCE SOFTWARE -Use within UK Government" 2004- E Government Unit –faqe 5

sensitive nature. Some of these employees quit working for these companies but copied the



code and continued to work elsewhere.

These companies are concerned about protection of their IPR and want to know how to act in cases where their IPR is misused. In most of the cases disputes were ended with negotiations and cases never reached courts. They also feel skeptical on taking IPR cases to court mainly because courts are time consuming and lack technical expertise.

In general, visited companies during this study showed interest to know more on IPR.

Recommendations

In order for the protection of intellectual property to be a successful mission to the country and community, the government should consider taking action on these points:

- ❖ Delivery and strict implementation of intellectual property rights for all (domestic or foreign).
- ❖ Improving access to domestic and international systems of Intellectual Property by keeping low cost of the benefit, maintenance and enforcement of these rights.
- ❖ Harmonization of Intellectual Property legislation with the European Union and internationally.
- ❖ Cooperation with relevant international institutions in order to reduce the cost for people that wish to extend their rights in other countries through Kosovo.
- ❖ Make sure that IPR institutions are efficient and well funded.

- ❖ Support intellectual property policies and management with a good infrastructure in areas such as education, science, technology, culture, taxation, investment policies, innovative initiatives, technological production, trade and competition.
- ❖ Education of local communities, businesses and the public regarding the potential benefits from the system of intellectual property protection.
- ❖ Provide support to the inventors/manufacturers/ how to use intellectual property protection for their benefit and support of stakeholders in this field.
- ❖ Create bridges among academic institutions (universities), research institutes and business or other financial institutions could finance projects in various fields of technology, biotechnology, technology, medicine, etc.
- ❖ Taking measures against counterfeit products, services and piracy. This may be achieved if priority is creating a legal framework that ensures effective implementation of measures against misuse or theft of intellectual property rights.
- ❖ Amend the patent application form. In particular, disable the possibility of leaving the inventor anonymous. Anonymity of inventor violates the Patent Law (section 12.3).
- ❖ Accommodate in relevant institutions new people with IPR academic background. (Many Kosovan students have completed postgraduate studies in various countries of the EU as part of the European Commission-Joint EU Commission-Government of Kosovo "EU Scholarship Scheme")
- ❖ Amend the Law on Courts 03/L-99, respectively add IPR legal competences to the Economic Court in Pristina (Department of economic affairs).
- ❖ Implement the Penal Code of Kosovo, specifically Section 240 and 241.
- ❖ The amended Article 26 of Law on the Court, or qualifications of judges for Economic Affairs (for those judges who will adjudicate on matters of intellectual property). The qualification criteria should be taken from any EU member state.

- ❖ Set up a group within the Ministry of Trade and Industry responsible to negotiate Kosovo's admission to international organizations like WTO, EPO and WIPO.
- ❖ Draft the Geographic Indications Law and set up a commission within the Ministry of Agriculture, able to identify potential GI products.