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COMMON ENFORCEMENT MANUAL OF INTELLECTUAL PROPERTY RIGHTS



IPRproject
Intellectual Property Rights Project

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ABBREVIATIONS

ACPO	Association of Chief Police Officers.
CDN	Content Delivery Network.
DNS	Domain Name System
EUIPO	European Union Intellectual Property Office.
GDP	Gross Domestic Product.
IEC	International Electrotechnical Commission.
IIPCIC	International IP Crime Investigators College.
IP	Internet Protocol.
IPA	Industrial Property Agency.
IPR	Intellectual Property Rights.
IPTV	Internet Protocol Television.
ISO	Internet Organisation for Standardisation.
OCRR	Office on Copyright and Related Rights.
OECD	Organisation for Economic Cooperation and Development.
OSINT	Open Source Intelligence.
SEO	Search Engine Optimisation.
TCP	Transmission Control Protocol.
TOR	The Onion Router Project.
TRIPS	Agreement on Trade Related Aspects of Intellectual Property Rights.
UNODC	United Nations Office on Drugs and Crime.
VCP	Voluntary Collaboration Practices.
VM	Virtual Machine.
VPN	Virtual Private Network.
WCO	World Customs Organisation.
WIPO	World Intellectual Property Organisation.
WHO	World Health Organisation.

INTRODUCTION

In case of a dispute with a user of your work, your invention, your trademark, your design etc. and if there is no possibility to resolve the dispute in an amical way, then you need to enforce your intellectual property rights and with the assistance of a lawyer take some action by using enforcement procedures.

Enforcement procedures permit effective action against infringement, expeditious remedies to prevent infringement, deterrence to further infringement and they should not be unreasonably complicated and costly, or with time limits that do cause unwarranted delays.

The following paragraphs summarize some of the enforcement provisions found in **Kosovo's national legislation**. They may be divided into the following categories: civil remedies; criminal sanctions; administrative sanctions; border measures; and measures, remedies and sanctions against abuses in respect of technical devices.

CIVIL REMEDIES INCLUDE:

- Evidence: production of evidence by the opposing party
- Injunctions for party to desist from infringement
- Damages must be adequate to compensate for injury
- Disposal of infringing goods from the channels of commerce
- Orders to infringers to inform about channels of distribution of infringing goods

PROVISIONAL MEASURES MUST BE AVAILABLE:

- To prevent an infringement from occurring and in particular to prevent the entry into channels of commerce of infringing goods
- To preserve relevant evidence in regard to the alleged infringement
- Must be available *inaudita altere parte* where appropriate, in particular where any delay is likely to cause irreparable harm to the right holder or where there is a demonstrable risk of evidence being destroyed.

Beneficiaries of sanctions and remedies are the original holders of intellectual property rights, licensees and successors in title, collecting societies and professional defense bodies.

Criminal sanctions are intended to punish those who carry out infringements of particular gravity, such as willful acts of piracy committed on a commercial scale, and so to deter further infringement. The purpose of punishment is achieved through fines and prison sentences consistent with the level of penalties applied for crimes of corresponding seriousness, particularly for repeat offenses. Deterrence is also served, as in civil proceedings, by orders for the seizure and destruction of infringing goods and of materials and equipment used predominantly to commit the offense.

Border measures are different from the enforcement measures described so far in that they involve action by customs authorities. Border measures allow right owners to request that customs authorities suspend the release into circulation of goods suspected of infringing copyright. This is intended to give right owners a reasonable time to commence judicial proceedings against the suspected infringer, without the risk that the alleged infringing goods will disappear into circulation after customs clearance. Typically, right owners must meet certain requirements such as to: (a) satisfy the customs authorities that there is *prima facie* evidence of infringement; (b) provide a detailed description of the goods so that they can be recognized; and (c) provide security to indemnify the importer, the owner of the goods and the customs authorities in case the goods are found to be non-infringing. Following the detention of the goods by Customs, the right holder will typically apply to the court for provisional measures to prevent the release of the goods into the market, pending a final decision on the claim of infringement.

The final category of enforcement provisions includes measures, remedies and sanctions against abuses in respect of technical means, also referred to as technological protection measures (TPMs), which have achieved greater importance since the advent of digital technologies. In certain cases, the only practical means of preventing copying is through so-called copy-protection or copy-management systems. These use technical devices that either entirely prevent copying or make the quality of copies so poor as to be unusable. Technical means are also used to prevent the reception of encrypted commercial television programs except with the use of decoders. However, it is technically possible to manufacture devices that circumvent such copy-protection and encryption systems. These enforcement provisions are intended to prevent the manufacture, importation and distribution of such devices. The WCT includes provisions to this effect, as well as provisions to prevent the unauthorized removal or alteration of electronic rights management information and the dissemination of copies of works from which such information has been removed. Rights management information may identify the author or right owner or contain data about the terms and conditions of use of the work. Removing the information could thus hinder the detection of infringements or result in the distortion of computerized rights management or fee-distribution systems. National laws may also include exemptions from the application of these measures in certain circumstances, such as to give effect to copyright limitations and exceptions provided in the national law.

Copyright Law of Kosovo explicitly provides in Article 191 for administrative sanctions against any act of circumvention of effective technological measures of protection as well as any act or removal or alteration of electronic rights management information.

Administrative sanctions are of particular importance. Policemen are disengaged, because of the raising of the culpable character; thus, the long-lasting criminal hearing will not take place anymore. The government obtains prompt and important revenue, which is a clear public income. It discourages people to infringe IP rights, because it establishes a direct way of punishment. It motivates state authorities to take action which could reduce the piracy and counterfeiting rates.

Further administrative sanctions are foreseen in the Copyright Law of Kosovo in articles 190-193. More specifically, article 190 provides for administrative sanctions against the legal entity if within his activity or in business with others, uses a Copyright work or a subject matter of related rights without authorization. The responsible person for the legal entity who commits a misdemeanor mentioned shall be punishable.

In article 192 administrative sanctions are foreseen against **“any legal entity:**

1.1. that does not submit to the competent collective association, information about the types and number of sold or imported devices for sound or visual fixation, photocopying devices, blank carriers of sound or image, as well as information about sold photocopies, which are necessary for the calculation of the special remuneration;

*1.2. that does not submit to the competent collective association, in the manner and time limit as prescribed by this Law, the reports or information or programs, relevant for the **calculating of the respective remuneration;**”*

Finally, article 193 provides for sanctions against **“a collective association of rights, if it:**

1.1. does not keep or negligently operates records and accountancy.

1.2. does not to distribute to right holder the income, realized from royalties collected from the users of protected matter;

1.3. does not follow the request for inspection of its activity through independent auditors;

1.4. does not fulfil its obligations to the office or does not take measures ordered by the Office for the correction of its work.”

The purpose of this Manual is to raise awareness of the Kosovo Police, Kosovo Customs, Market Inspectors and Independent Media Commission about the importance of intellectual property (IP) and the very real threat to society of infringing intellectual property rights (IPR). It will also highlight the national IP system and the national legislation used to protect and enforce IPR. In addition, the Manual will outline how the above-mentioned institutions can practically enforce IPR. At the end, every institution would be able to understand the role of each other, learn from their experience and find ways to deploy synergies in their common fighting against piracy and counterfeiting.

1. THE INTELLECTUAL PROPERTY SYSTEM

1.1. INTELLECTUAL PROPERTY

IP crime is a transnational criminal activity managed by the same criminal organizations involved in other serious criminality, including narcotics trafficking, arms smuggling, people trafficking, corruption and money laundering¹.

IP refers to creations of the mind such as inventions, literary works, artistic works, symbols, names, images and designs used in commerce.² IP is traditionally divided into two categories:

- Industrial Property which includes trademarks, patents which are granted for inventions, industrial designs (designs), domain names, geographical indications and Protected Designations of Origin (PDO), semiconductor product topographies and new plant varieties; and
- Copyright which includes literary works (such as novels, poems and plays), films, music, artistic works (e.g., drawings, paintings, photographs and sculptures), software, and architectural design. Rights related to copyright include those of performing artists in their performances, producers of phonograms in their recordings and broadcasters in their radio and television programs.³

In order to obtain protection for an industrial property in Kosovo, with a few exceptions⁴, the creator, or owner, has to register for protection at a Government agency called the Industrial Property Agency (IPA). The copyright protection flows automatically from the act of creation and does not depend on any formality. In that respect copyright differs considerably from other forms of intellectual property protection, such as patents and trademarks.

IP rights (IPRs) are the rights granted by the legislator to the creators of works, inventions, trademarks, etc. to enable them to exploit their creations exclusively (i.e. excluding third parties who have not been authorized for such use). IPRs, due to their absolute and exclusive nature, are very similar to ownership. Their main feature and their main difference with property is that intellectual property rights (IPRs) are intangible and this is the reason they need to be treated differently than tangible property. They allow the creators, or owners, to benefit from their own work or investment in a creation. These rights are outlined in Article 27 of the Universal Declaration of Human Rights, which provides for the right to benefit from the protection of moral and material interests resulting from authorship of scientific, literary or artistic productions. Further, Article 46(5) of the **Constitution of Kosovo states “Intellectual Property is protected by Law”**.

Without IPR to reward creativity and encourage innovation it is doubtful whether inventors or creators would have the financial resources or motivation to discover new medicines, such as life-saving cancer drugs, or develop technologies which improve the quality of our lives e.g. mobile phones. Consequently, it is essential governments and law

¹ Counterfeiting. A global Spread. A Global Threat. UNICRI.

² World Intellectual Property Organisations - What is Intellectual Property? www.wipo.int

³ World Intellectual Property Organisation, What is Intellectual Property, <https://www.wipo.int/about-ip/en/>

⁴ Well-known trademarks are protected without registration, in accordance with Article 6bis of the Paris Convention.

enforcement agencies enforce IPR not only to protect the rights of owners but to facilitate the advancement of society.

IP protection is time-bound. However, this differs for each IP object. For example, copyright for individually authored works is protected for the life of the author plus 70 years. Conversely, trademarks, which are initially protected for 10 years from the time an application is submitted to the IPA, can potentially be protected indefinitely if the owner continues to submit extension applications to the IPA every 10 years.

1.2. IPR CRIME - COUNTERFEITING AND PIRACY

Counterfeiting and piracy are IPR infringements which refer to the unauthorised use of trademarks and copyright, respectively.

An entity infringes an IPR when they use an IP without the permission of the owner. The unauthorised use of an IP is potentially a serious crime. For example a Company should make sure that it is the owner of the IP that has been created by its employees or that it has acquired all necessary permissions for the use of the protected material (for example images or music used in the websites). Furthermore when a Company envisages the possibility to file an action to Court for infringement of its IPRs, it should make sure that it is indeed the rightholder of the rights otherwise it will not be entitled to file the action.

The marketing of counterfeit and pirated goods, and indeed all goods infringing intellectual property rights, does considerable damage to law-abiding manufacturers and traders and to right-holders, as well as deceiving and in some cases endangering the health and safety of consumers. Such goods should, in so far as is possible, be kept off the market and measures adopted to deal effectively with this unlawful activity without impeding the freedom of legitimate trade.

Organised criminals often smuggle counterfeit and pirate goods using the same trade routes developed for the smuggling of narcotics and weapons. Indeed, the profitability of counterfeit and pirate goods often exceeds that of other criminality, including narcotics.

2. THE INTELLECTUAL PROPERTY SYSTEM IN KOSOVO

2.1. GOVERNMENT INSTITUTIONS

In Kosovo, combating IPR infringements, including counterfeiting and piracy, effectively requires a coordinated effort from multiple institutions, including:

- Industrial Property Agency (IPA);
- Office on Copyright and Related Rights (OCRR);
- Kosovo Customs;

- Market Inspectorate;
- Kosovo Police; and
- Prosecutorial Council; and
- Judicial Council.

Industrial Property Agency

The Industrial Property Agency (IPA) is an administrative body within the Ministry of Trade and Industry. It is based in Pristina and has the following responsibilities:

- Developing procedures for issuing patents and supplementary protection certificates;
- Developing procedures for the registration of trademarks, industrial designs, topographies of integrated circuits, designation of origin and geographic indications;
- Compiling and maintaining records prescribed by the basic Law;
- Proposing, designing and publishing the Official Bulletin of IPA, which contains information about the application and the rights granted to industrial property;
- Contributing to, developing and promoting industrial property protection;
- Initiating and proposing the ratification of international agreements in regard to the industrial property area;
- Providing information services in regard to industrial property facilities;
- Organising testing for the authorised representatives of the industrial property right area;
- Preparing proposals for approval of the legal and sub-legal acts in regard to the industrial property area;
- Cooperating with other organisations to implement legal provisions regulating industrial property; and
- Representing the Republic of Kosovo in international organisation for industrial property.

The IPA can assist police and prosecutors:

- Confirm whether an industrial property (e.g. trademark, industrial design etc) is protected in Kosovo; and
- Identify the owner of an industrial property right.

Office on Copyright and Related Rights

The Office on Copyright and Related Rights (OCRR) is a department within the Ministry of Culture, Youth and Sports. It is based in Pristina and has the following responsibilities:

- Licensing collective management organisations;
- Supervision of collective management organisations;
- Revoking licences of collective management organisations;
- Providing information to authors, right holders and the general public about copyright and related rights;
- Monitoring developments in international legislation, with respect to copyright, and subsequently making recommendations to the Government.

The OCRR can assist police and prosecutors contact collective management organisations who can:

- Confirm whether a copyright or related right is protected in Kosovo; and
- Identify the owner of a copyright or related right.

Kosovo Customs

Kosovo Customs is part of the Ministry of Economy and Finance. Their Headquarters is based in Pristina but they also have control points at:

Airport.	Merdare.	Qafa Morine.	Zubin Potok
Dheu i Bardhe.	Muqibaba.	Quafa e Prushit.	Mitrovica.
Hani i Elezit.	Mutivoda.	Vermica.	Podujeva.
Interevropa.	Peja.	Leposaviq.	Kula.
HQ Pristina	Gllloboqica		

The responsibilities of Kosovo Customs include preventing the import and export of goods, which infringe IPR.

All customs officers are authorised to act ex-officio to intercept goods which they suspect infringe an IPR and, in addition, there is a dedicated IPR Unit within the Operational Investigative Department of the Law Enforcement Directory. The IPR Unit is situated at Headquarters and its responsibilities include:

- Receiving applications for action from IPR owners;
- Distribution of accepted IPR applications for action to control points;
- IPR training for Customs officers; and
- Liaising with IP right holders.

Kosovo Customs can provide police and prosecutors with the details of shipments they have intercepted containing IPR infringing goods, including the name of the importer and/or exporter. Kosovo Customs can also check the history of shipments to addresses or entities, targeted by police and prosecutors.

Market Inspectorate

The Market Inspectorate is an executive body within the Ministry of Trade and Industry, which carries out market supervision in the territory of Kosovo. Their Headquarters is based in Pristina but they have offices across Kosovo.

Market inspection authorities have the competence and resources to:

- Inspect locations linked to commerce;
- Check business documentation;
- Inspect goods and services;
- Demand information linked to business;
- Seize evidence of an offence linked to commerce;
- Prevent the release of goods and services into the market; and
- Suspend a business from operating.

The responsibilities of the Market Inspectorate include ensuring that goods and services which are manufactured or used in commerce, in Kosovo, do not infringe IPR.

The Market Inspectorate can assist the police and prosecutors investigate businesses they suspect are manufacturing, importing, exporting or selling goods or services which infringe an IPR.

Kosovo Police

Kosovo Police is part of the Ministry of Internal Affairs. Their Headquarters is situated in Pristina but they also have a presence in every municipality.

All police officers can act ex-officio to prevent IPR infringements. However, complaints concerning tangible goods, that require investigation, should be brought to the attention of the Unit for Economic Crimes, in the Economic Crimes and Corruption Directory. Conversely, complaints concerning IPR infringements involving the Internet should be brought to the attention of the Cybercrime Unit.

State Prosecutor

The State Prosecutor is an independent institution with the authority and responsibility for the prosecution of persons charged with committing criminal acts or other acts as specified by law. It includes the:

- Basic Prosecution Office;
- Appellate Prosecution Office;
- Special Prosecution Office; and
- Office of the Chief State Prosecutor.

The State Prosecutor does not have a dedicated IPR Unit however, all prosecutors are competent to investigate and prosecute IPR crimes, either ex-officio or on complaint.

2.2. COOPERATION

State Intellectual Property Council

In the majority of countries there are multiple institutions charged with the protection of IPR. Frequently these institutions have overlapping responsibilities. Consequently, it is incumbent on the Government and institutions to develop a cooperation model that will ensure the efficient and effective protection of IPR.

In Kosovo, the Government has established the State Intellectual Property Council to improve cooperation between institutions involved in the protection and enforcement of IPR.

The Council delivers advice and assistance to the Government and other stakeholders involved in the protection and enforcement of IPR.

The Council includes representatives from the institutions discussed under the heading 2.1 Government Institutions, specifically:

- Industrial Property Agency (IPA);
- Office on Copyright and Related Rights (OCRR);
- Kosovo Customs;
- Market Inspectorate;
- Kosovo Police;
- Prosecutorial Council; and
- Judicial Council.

In addition, representatives from the following institutions are also associate members of the Council:

- Drug and Medical Product Agency, for advice on falsified, including counterfeit, medicines and medical devices;
- Veterinary and Food Agency, for advice on counterfeit food and drink;
- Agency for Environment Protection, for advice on environmental issues; and
- Agency for Managing of Sequestered or Confiscated Assets for advice on confiscation of assets from IPR criminals.

Task Force against Piracy and Counterfeiting

On October 4th, 2012, the Government adopted a Strategy Against Piracy and Counterfeiting, covering the period from 2012 to 2016. The Strategy was drafted by the OCRR in cooperation with other institutions responsible for the enforcement of IPR. The Strategy aimed to create mechanisms for combating counterfeiting and piracy to improve **Kosovo's image and economy**.

The Strategy established a Task Force with the following mission:

- Promote effective cooperation between public authorities and social and economic organisations in the field of copyright protection;
- Ensure and coordinate the implementation of the Strategy and the action plan against piracy and forgery;
- Develop and implement public awareness programs and campaigns; and
- Prepare and deliver proposals for drafting legislation related to copyright enforcement

The Task Force includes the following permanent members:

- Director of OCRR;
- Chief Inspector of Market Inspectorate;
- Director of IPA;
- Head of Intellectual Property Sector, Customs;
- Head of Economic Crimes Investigation Sector, Police;
- Head of Cybercrime Investigation Sector, Police;
- Representative of State Prosecutor; and
- Chief of Agency for Managing of Sequestered or Confiscated Assets, Ministry of Justice.

In addition to the permanent members, the following bodies can be invited to attend meetings:

- Executive Chief of Independent Media Commission;
- **Chairman of Directors' Board of Regulatory Authority for Postal and Electronic Communications;** and
- Other independent Institutions and organisations.

It is also pertinent to note that the following international organisations have dedicated IP units that may be able to assist with capacity building and cross border investigations:

- Europol;
- Interpol;
- European Commission (Director General Taxation and Customs Union);
- World Customs Organisation (WCO); and
- EUIPO Observatory on Infringements of IPR.

3. INVESTIGATION OF IPR CRIMES BY THE POLICE

3.1 EX-OFFICIO OR COMPLAINT

Ex-Officio

The Kosovo Police can act ex-officio if they identify a potential IPR infringement.

Right Holder Complaint

If a right holder or their representative suspects their IPR has been infringed, they can make a complaint to the Kosovo Police.

The complaint should contain the following information:

- Evidence of ownership;
- Power of Attorney, where applicable;
- Location of suspected infringement;
- Name of suspected infringer (if known);
- How to tell the difference between a genuine and fake; and
- Any test buys performed by the right holder or their representative.

Other Sources of Complaint

The suspected infringement of an IPR may also be brought to the attention of the Kosovo Police through a number of other sources, including:

- Information from consumers;
- Information from another Government institution (e.g. Kosovo Customs and Market Inspectorate);
- Information from a foreign organisation (e.g. Interpol); and
- The unforeseen result of another investigation (e.g. counterfeit medicines located during a narcotics raid).

Regardless of the source of information, if the right holder has not made the complaint, the Kosovo Police should endeavour to verify that an IPR has been infringed in Kosovo by:

- Identifying the IPR which is alleged to be infringed;
- Liaising with IPA and/or OCRR to confirm the IPR is protected in Kosovo;
- If the IPR is protected in Kosovo, liaising with IPA and/or OCRR to confirm the identity of the right holder; and
- Liaising with the right holder to confirm their IPR has been infringed.

All complaints should be taken seriously and the information recorded, analysed and subjected to some form of an intelligence analysis process.

The intelligence analysis process should assess the information source, the information itself and include some form of risk assessment.

3.2. CONFIRMATION IPR IS PROTECTED

Whether an enquiry is initiated as result of an ex-officio procedure or complaint, the first step is to ascertain if the IPR alleged to have been infringed is protected in Kosovo.

In respect of industrial property, such as trademarks and industrial designs, the **investigator can contact IPA or access IPA's IP object databases directly**. In respect of copyright, the investigator should contact the OCRR.

If the IPR alleged to have been infringed is confirmed to be protected in Kosovo and the investigation was not initiated by either the right holder or right holder representative, the investigator will need to locate the right holder to obtain evidence of the IPR infringement. IPA and OCRR will be able to assist the investigator locate the right holder.

Only the right holder can verify whether their IPR has been infringed. This can either be done by the right holder physical examining the suspected goods or the right holder reviewing a photograph of the suspected goods.

If verification on the basis of a photograph is necessary, the photograph should be taken with a digital camera, be clear and include images of any logos, brands, labels or tags e.g fibre content labels et al.

Contact with a right holder during the early stages of an investigation is essential. An early dialogue with a right holder can save time and resources.

Test purchasing is an ideal method of obtaining samples of suspected counterfeit or pirate goods covertly. In this way, evidence of the possession and sale of counterfeit or pirate goods can be obtained without arousing suspicion, allowing enforcement action to be undertaken at a later time.

Test purchases can be made by both enforcement officers and right holders. If a right holder is tasked with making a test purchase, care must be exercised in order to protect the integrity of the evidence that is obtained.

In practice, Kosovo Police must avoid:

- Offering inducements to a trader to supply a counterfeit or pirate item (agent provocateur); and/or
- Pressurising a trader to sell counterfeit or pirate goods.

Test purchased goods must be retained for evidential purposes. There must be a clear chain of continuity between the seller, the location of sale and the examination of the goods. In some cases, the continuity chain may be challenged in court and Kosovo Police may need to demonstrate to a court that the goods being exhibited are the same goods that were originally purchased and have not been tampered with in any way.

Important: test purchasing best practice includes:

- Recording all relevant details as soon as possible;
- Record date, time and location of the purchase;
- Make a description of the goods;
- Photograph the goods;
- If possible, make a covert film during the purchase of the goods;
- Label the goods with a unique evidence number;

- The label should include the name and signature of the responsible Investigation Department officer;
- **'bag and tag' the goods, they should be placed in a clear plastic bag and sealed with a tamper evident seal;**
- The labelled goods should be stored in a secure evidence store;
- The evidence store should have controlled access;
- Evidence control records or log books tracking the movement of the goods should be maintained;
- The goods, or samples of the goods, may need to be sent to third parties if so clear instructions should be given on handling, storage and return of the goods; and
- Goods should be returned to the evidence store as soon as possible.

3.3. PRODUCT IDENTIFICATION

In the majority of cases it is relatively easy to distinguish between legitimate goods and goods that infringe IPR by applying common sense. However, the following general indicators, will assist an investigator decide whether a product is legal or infringing:

- Examine the quality of the product. The quality of infringing goods is often lower than that of the originals;
- Be wary of unusually low prices. Although not all fakes are sold at a lower price than the originals, a suspiciously low price is still a good indicator. If it looks too good to be true, then it probably is;
- Location. Luxury brands, cosmetics, pharmaceuticals, car parts etc are not sold by hawkers on the street or in markets. If such goods are offered for sale from these types of locations, then this is an indicator that the good maybe counterfeit and/or pirate;
- Inspect the packaging carefully. The packaging of infringing goods is often dodgy and does not indicate the address of the manufacturer and the importer. Furthermore, many right holders mark their products with holograms, control numbers and/or other security measures. Those can help you understand whether the product is original or not;
- Check if logos and trademarks are displayed correctly. At first glance, an infringing product may appear identical to the genuine one. On a closer look, however, you may be able to identify some differences. For example, logos may be badly reproduced and trademarks deliberately or accidentally misspelled;
- Check the instructions manual. Normally it should be in the official languages of Kosovo and should not contain grammar or spelling mistakes; and
- When in doubt, contact or check out the website of the manufacturer of the genuine product. Many right holders have information on their websites to help customers detect fakes, including pictures and descriptions of the originals.

Right holders can assist the police and/or identify infringing goods and, in addition, some of the more active right holders publish identification guides to help the police distinguish between genuine and infringing goods. If you need such a guide, contact the right holder directly or speak to the IP crime units at Europol and Interpol.

3.4. INITIAL STEPS BY POLICE

If the IPR infringement is confirmed, in accordance with Article 70 of the Criminal Procedure Code, the police shall take all necessary steps to locate the perpetrator and collect information that may be of use in criminal proceedings. This can include:

- Gathering information from persons;
- Performing provisional inspections of vehicles, passengers and their luggage;
- Restricting movement in a specific area for the time this action is urgently necessary;
- Taking the necessary steps to establish the identity of persons and objects;
- Organizing a search to locate an individual or an object being sought by sending out a search circular;
- Searching specific buildings and premises of public entities in the presence of a responsible person and to examine specific documentation belonging to them;
- Confiscating contraband or objects which may serve as evidence in criminal proceedings, unless doing so would require an order from a judge;
- Providing for a physical examination of the injured party;
- Detecting, collecting and preserving evidence from the scene of the incident a suspected criminal offence and to order forensic testing of that evidence by the forensic laboratory;
- To interview witnesses or possible suspects;
- To take steps necessary to prevent an emergent danger to the public;
- To undertake other necessary steps and actions provided for by the law.

The police shall make a record, photograph or official note of the actions they take and of the facts and circumstances, which are established by their investigation.

As soon as the police obtain a reasonable suspicion that a criminal offence prosecuted *ex officio* has been committed, the police have a duty to provide a police criminal report within twenty-four (24) hours to the competent state prosecutor.

According to Article 81 of the Criminal Procedure Code, the police criminal report should set out the evidence discovered to date including objects, sketches, photographs, statements, records of actions undertaken and official notes.

If, after submitting the police criminal report, the police learn of new facts, they should submit a supplementary report immediately to the state prosecutor.

Note, that even if there is no evidence of a criminal offence, the police are still obligated to send a report, summarising the evidence, to the state prosecutor.

According to Article 82 of the Criminal Procedure Code, the state prosecutor shall issue a decision dismissing a criminal report received from the police or another source within thirty days if it is evident from the report that:

- There is no reasonable suspicion that a criminal offence has been committed;
- The period of statutory limitation for criminal prosecution has expired;
- The criminal offence is covered by an amnesty or pardon;
- The suspect is protected by immunity and a waiver is not possible or not granted by the appropriate authority; or
- There are other circumstances that preclude prosecution.

The state prosecutor shall immediately deliver a copy of his decision to the police and notify the right holder within eight days.

According to Article 83 of the Criminal Procedure Code, if from the criminal report itself the state prosecutor is unable to conclude whether the allegations contained in it are probable, or if information in the report does not provide a sufficient basis for an investigation to be initiated or if the state prosecutor has only heard a rumor that a criminal offence was committed, the state prosecutor, if he or she is unable to do so on his own, shall request that the police gather the necessary information. The police are bound to **follow the state prosecutor's lawful requests.**

The state prosecutor may also gather such information on his or her own, or from other public entities, including by speaking to witnesses and injured parties, and their legal counsel. The state prosecutor may participate with the police in any examination of the defendant while he or she must respect the rights of suspects under the provisions of the Criminal Procedure Code.

3.5. GATHERING INFORMATION

If it is decided to use criminal legislation, the police and state prosecutor should always endeavor to move up the supply chain to identify the source of the IPR infringement then arrest the manufacturers and / or wholesale distributors to have the maximum impact on the illicit trade.

To move up the supply chain, the police should consider using covert or technical investigative measures.

According to Article 84 of the Criminal Procedure Code, if the state prosecutor has grounded suspicion that a criminal offence has been committed, is being committed or will soon be committed, the state prosecutor may authorize or request the pretrial judge to authorize covert or technical investigative measures, which according to Article 87 of the Criminal Procedure Code, includes:

- Covert photographic or video surveillance;
- Covert monitoring of conversations;
- Search of postal items;
- Interception of telecommunications and use of an International Mobile Service **Identification “IMSI” Catcher**;
- Interception of communications by a computer network;
- Controlled delivery of postal items;
- Use of tracking or positioning devices;
- A simulated purchase of an item;
- A simulation of a corruption offence;
- An undercover investigation;
- Metering of telephone-calls; and
- Disclosure of financial data.

Article 90 of the Criminal Procedure Code states that covert or technical investigative measures can only be used to investigate specific criminal offences or criminal offences that are punishable by a minimum of five years imprisonment.

Unfortunately, none of the IPR offences are included in the specific criminal offences listed in Article 90 but it should be noted that if a person is suspected of infringing a copyright **obtained for himself or for another person at least ten thousand Euro (€10,000) but less than fifty thousand Euro (€50,000), he or she can be sentenced to five years imprisonment.** Furthermore, if they obtained for himself or for another person more than fifty thousand Euro (€50,000), **he or she can be sentenced to eight years imprisonment.**

Consequently, covert or technical investigative measures can potentially be used to investigate copyright infringements. In addition, IPR offences may involve organized crime or be linked to other criminality that does allow the use of covert or technical measures, such as money laundering.

Article 91 of the Criminal Procedure Code reveals that a state prosecutor may issue a provisional order for covert and technical investigative measures only in emergency

criminal cases if a delay would jeopardize the security of the investigation or the safety of a person. Such provisional orders will be canceled if not confirmed in writing by a pre-trial judge within three days. In all other circumstances a pre-trial judge must issue the order.

The application for the order must be made in writing and include:

- The identity of the duly authorized police officer, officer of the body authorized to enforce criminal law or the state prosecutor making the application;
- Reasons and facts that support the application; and
- Information about any previous application known to the applicant involving the same person and the action undertaken by the authorizing judicial officer on such application.

If issued, the order cannot exceed 60 days from the date it was issued and will specify:

- The name and address of the subject or subjects of the order;
- The official designation of the measure and its exact legal bases;
- The grounds for the order;
- Measure and its exact starting and closing time, if applicable;
- The person authorized to implement the measure and the officer responsible for supervising such implementation.

An order for a measure under the present Chapter shall require that duly authorized police officers provide the authorizing judicial officer a report on the implementation of the order at fifteen day intervals from the date of the issuance of the order.

According to Article 93 of the Criminal Procedure Code, duly authorized police officers shall make a record of the time and date of the beginning and end of each action undertaken in implementing the order. The record shall state the names of the duly authorized police officers who carried out each operation and the functions they performed. Such records shall be annexed to the report submitted to the state prosecutor or competent judge.

A duly authorized police officer or a person acting under the supervision of a duly authorized police officer may perform a simulated purchase of an item.

With respect to the implementation of an order for an undercover investigation, a simulated purchase of an item:

- A person implementing the order may not incite another person to commit a criminal offence which that person would not have committed but for the intervention of the person implementing the order; and

- A person who implements such order does not commit a criminal offence.

According to Article 95 of the Criminal Procedure Code, on the completion of the implementation of a measure, the duly authorized police officers shall send all documentary records, tapes and other items relating to the order and its implementation (**“collected materials”**) to the state prosecutor.

3.6. INITIATION OF CRIMINAL PROCEEDINGS

Initiation of Investigative Stage

According to Article 102 of the Criminal Procedure Code, the state prosecutor may initiate an investigation on the basis of a police report or other sources, if there is a reasonable suspicion that a criminal offence has been committed, is being committed or is likely to be committed in the near future which is prosecuted *ex officio*.

According to Article 103 of the Criminal Procedure Code, during the investigative stage the state prosecutor shall ascertain not only inculpatory but also exculpatory circumstances and evidence, and shall ensure that evidence, which may not be available at the main trial, is taken.

The aim of an investigation is to collect evidence and data necessary for deciding whether to file an indictment or to discontinue proceedings and to collect evidence which might be impossible or difficult to reproduce at the main trial.

Every person against whom the state prosecutor has a reasonable suspicion that he or she has committed a criminal offence shall be named as a defendant in the decision to initiate an investigation. Every defendant named in the decision shall be entitled to the rights of a defendant under the present Code.

If the state prosecutor becomes aware of evidence of the commission of another criminal offence or another suspect during an investigation, the state prosecutor may initiate a new investigation of the new criminal offence or suspects, or may amend the decision of or expand the existing investigation. The state prosecutor shall inform the pre-trial judge about new or amended decisions.

According to Article 104, the investigation shall be initiated by a decision of the state prosecutor. The decision shall specify the person or persons against whom an investigation will be conducted, the date and time of the initiation of the investigation, a description of the act which specifies the elements of the criminal offence, the legal name

of the criminal offence, the circumstances and facts warranting the reasonable suspicion of a criminal offence, whether any technical or covert measures of investigation or surveillance had been authorized and the evidence and information already collected. A stamped copy of the ruling on the investigation shall be sent without delay to the pre-trial judge.

The result of initial steps by police or gathering of information shall be made part of the file on the investigation.

Once a decision under this Article is issued, the investigation shall be conducted and supervised by the state prosecutor.

The state prosecutor may undertake investigative actions or authorize the police to undertake investigative actions relating to the collection of evidence.

If the investigation moves outside the Kosovo, the police and/or prosecutor should liaise with the IP crime units in Europol and / or Interpol to continue their enquiries. Criminals do not stop at borders and neither should the police.

3.7. SEARCH AND CONFISCATION

When planning an IP crime raid, after securing authorisation, a police officer should take cognizance of whether the following is necessary:

- Record of events - photographs, video and/or sketch;
- Right holder involvement - expert knowledge of infringing product (right holders cannot participate in the raid but should be placed on stand by to assist with identification of infringing product);
- Computer forensic team - where computers used in commission of crime;
- Financial investigation team - identify and recover proceeds of crime;
- How seized equipment will be removed; and
- Where seized equipment will be stored.

According to Article 105, a defendant may voluntarily consent in writing to the search of property. Items found during a search may be temporarily sequestered and are admissible at the main trial and other proceedings.

Items found during a search to which the defendant did not consent may not be temporarily sequestered and are inadmissible.

Upon application by the state prosecutor at any time during the investigative stages, the pretrial judge may order a search of a house and other premises and property of a

defendant if there is a grounded suspicion that such person has committed a criminal offence and there is a grounded cause that the search will result in the arrest of such person or in the discovery and sequestration of evidence important for the criminal proceedings.

The pretrial judge may order a search of a house and other premises and property of a person not suspected of a criminal offence only in cases in which:

- There is a sound probability that the search will result in the arrest of a defendant; or
- It is necessary to preserve evidence of a criminal offence or to sequester specific objects, which cannot be preserved or obtained without the search and there is a sound probability that such evidence or objects are in the premises or property to be searched.

The pretrial judge may order a personal search of a specific person if there is a sound probability that the search will result in the discovery of traces or sequestration of evidence of a criminal offence.

A search order shall be issued in writing upon a written application of the state prosecutor or, in exigent circumstances, the authorized police officer.

A search order shall contain: an identification of the person or place against whom the order is directed, a designation of the criminal offence in relation to which the order has been issued, an explanation of the basis for the grounded cause, a description of the objects sought in the search, a separate description of the person, premises or property to be searched and other information relevant for the implementation of the search.

If there is grounded cause to search an electronic device, including but not limited to computers, cameras, mobile telephones, mobile electronic devices or mobile electronic storage devices, the search order must authorize the temporary sequestration of such device or devices and shall describe the type of electronic files for which the authorized police officer may search and copy.

According to Article 106, a search order shall be executed by the authorized police officers with the necessary assistance of other police officers within forty-eight hours of the issuance of the order.

The authorized police officers shall, as a rule, execute the search order between the hours of 06:00 and 22:00. Exceptionally, a search may be conducted outside these hours if it began within them and is not completed by 22:00 or if the pretrial judge determines that a delay could lead to the escape of the person being sought or to the destruction of traces

or evidence of a criminal offence and specifically permits a search outside the hours provided for by the present paragraph.

According to Article 107 of the Criminal Procedure Code, before beginning the search, the authorized police officers shall provide the order to the person against whom the order is directed and such person shall be informed that he or she has the right to contact a lawyer who has the right to be present during the search.

If the person requests a lawyer to be present during the search, the authorized police officers shall postpone the search until the arrival of the lawyer, but no longer than two hours after the lawyer has been informed about the search. In the meantime, the authorized police officers may restrict the movement of the person concerned and other persons in the premises that are about to be searched. In exigent circumstances the authorized police officers may begin the search even before the expiry of the time limit for the lawyer to arrive.

Before beginning the search, the authorized police officers shall ask the person to surrender voluntarily the person or the objects sought.

Exceptionally, a search may start without the prior presentation of the order or the prior request for surrender of the person or objects sought if armed resistance is expected, or if the effectiveness of the search is likely to be undermined if it is not conducted instantly and without warning, or if a search is conducted on public premises.

After the search has been initiated, consideration should be given to securing the following potential evidence:

- Infringing IP product;
- Manufacturing equipment;
- Documentation, including price lists, business records and sales receipts;
- Import and export paperwork;
- Computer evidence;
- Raw material used to commit the offence;
- Packaging or design templates used to commit the offence; and
- Proceeds of crime.

According to Article 108 of the Criminal Procedure Code, during a search of a house or other premises the person whose house or other premises and property is being searched or a representative of such person shall have the right to be present.

During a search of a person, a house or other premises, two adult persons shall be

required to be present as witnesses. Before the search begins the witnesses shall be warned to observe closely how the search is conducted, and shall be informed of their right to make objections, if any, to the contents of the record of the search before it is signed.

A search of a female person shall only be carried out by a female police officer and only female persons shall be witnesses.

The search of residential premises shall be carried out considerately, to avoid disturbing the peace. Locked premises, furniture or other objects may be opened forcibly only if their owner is not present or refuses to open them voluntarily. In opening these objects care should be taken to avoid unnecessary damage.

A search of a person may include an intimate search, which shall be conducted by a qualified medical doctor or nurse in accordance with the rules of medical science and with **full respect for the person's dignity**.

If a search is conducted on the premises of a public entity, the head thereof shall be invited to attend the search.

A record shall be made of each search of a person, house or premises. Such record shall be signed by the person who has been searched or whose premises or property have been searched, his or her lawyer if present during the search and persons whose presence is obligatory. When conducting a search, only the objects and documents related to the purpose of that particular search may be confiscated. The objects and documents confiscated shall be entered and accurately described in the record, and the same shall be indicated in the receipt, which shall be immediately given to the person whose objects or documents have been confiscated.

Objects and documents confiscated in the search shall be maintained in appropriate containers or transparent plastic bags and the authorized police and state prosecutor shall maintain a record of the chain of custody for each object or set of documents.

According to Article 110 of the Criminal Procedure Code, police officers may, if necessary and to the extent necessary, enter the house and other premises of a person and conduct a search without an order of the competent judge if:

- The person concerned knowingly and voluntarily consents to the search;
- A person is calling for help;
- A perpetrator caught in the act of committing a criminal offence is to be arrested after a pursuit;
- Reasons of safety of people and property so require to avoid direct and serious risk

- from persons or property; or
- A person against whom an order for arrest has been issued by the court is to be found in the house or other premises.

Exceptionally, in exigent circumstances, if a written order for a search cannot be obtained in time and there is a substantial risk of delay, which could result in the loss of evidence or of danger to the lives or health of people, the authorized police officers may begin the search pursuant to the verbal permission of the competent judge.

Exceptionally, a search may be conducted without witnesses being present if their presence cannot be secured immediately and it would be dangerous to delay the beginning of the search. The reasons for conducting the search without the presence of witnesses shall be noted in the record.

The police may conduct a search of a person without an order or the presence of witnesses when executing a ruling to compel a person to appear or when making an arrest, if there is a grounded suspicion that the person possesses a weapon or a tool for attack or that he or she will dispose of, hide or destroy objects which should be taken from him or her as evidence in criminal proceedings.

If the police have conducted a search without a written judicial order they shall send a report to that effect to the state prosecutor and the competent judge, if a judge is assigned to the case, no later than twelve hours after the search in order to obtain retroactive approval of the court for the search, in compliance with Constitutional provisions.

According to Article 111 of the Criminal Procedure Code, evidence obtained by a search shall be inadmissible if:

- The evidence obtained by a search without a court order shall be inadmissible, if the search is not approved retroactively by the court, in compliance with the provisions of the Constitution;
- The search was executed without an order from a competent judge in breach of the provisions of the present Code;
- The order of the competent judge was issued in breach of the procedure provided for by the present Code;
- The substance of the order of the competent judge was in breach of the requirements of the present Code;
- The search was implemented in breach of an order of the competent judge;
- Persons whose presence is obligatory were not present during the search; or
- The search was conducted in breach of Article 108 of this Code.

According to Article 112 of the Criminal Procedure Code, objects that can temporarily be sequestered are objects which might be evidence in the criminal proceedings, objects or property that facilitated the criminal offence, or objects or property which constitutes a material benefit obtained from the commission of a criminal offence and under the law may be sequestered.

Objects, property, evidence or money may be subject to temporary restraint upon the order of the state prosecutor that shall last no more than five days if the authorized police officers become aware of such objects, property, evidence or money during a lawful search or arrest. The state prosecutor shall request a court order from the pretrial judge.

A state prosecutor may request an order from the pretrial judge for objects, property, evidence or money to be temporarily sequestered. Such a request must describe the objects, property, evidence or money with specificity and shall describe how the objects may be evidence of a criminal act, how the object, property or money may facilitate the criminal offence, or how the objects, property or money constitute a material benefit obtained from the commission of a criminal offence. Objects, property, evidence or money may be temporarily sequestered only upon a court order.

Objects that are temporarily sequestered shall be photographed and maintained in appropriate containers or transparent plastic bags and the authorized police and state prosecutor shall maintain the photographic record and a record of the chain of custody for each object or set of documents.

Weapons, automobiles, airplanes or other large objects that are temporarily sequestered shall be photographed and maintained in appropriate secure areas and the authorized police and state prosecutor shall maintain the photographic record and a record of the chain of custody for each object or set of documents.

Buildings or immovable property that are temporarily sequestered shall have notices placed on the building or immovable property that advise the public that the property is subject to temporary sequestration, that trespassing is not allowed, and that trespassers may be subject to arrest.

Monetary bills or coins that are temporarily sequestered shall be photographed and maintained in a safe and the authorized police and state prosecutor shall both maintain the photographic record and a record of the chain of custody of the monetary bills or coins.

Money held in a bank account that is temporarily sequestered shall be maintained in a bank account subject to the authority of the court.

Objects and property that are temporarily sequestered are under the supervision and

control of the state prosecutor. The state prosecutor may delegate the custody and control to an authorized police officer for objects and property temporarily sequestered.

When objects are confiscated, an indication shall be given of where they were found and they shall be described. If necessary, the verification of their identity shall be secured in some other way. A receipt of sequestration shall be issued for the objects sequestered.

If the person or entity who maintains supervision of the object, property, evidence or money that is subject to the order by the pretrial judge under this Article refuses to deliver the object, property, evidence or money to the authorized police officer responsible for executing the order, that person or entity shall be subject to a fine by the pretrial judge of up to fifty percent of the value of the object, property, evidence or money that is in dispute. The person or entity subject to such a fine may appeal the fine or may negate the fine by complying with the order by the pretrial judge.

According to Article 115 of the Criminal Procedure Code, objects, property, evidence or money that are temporarily sequestered shall, at the end of the criminal proceedings, be returned to the owner or possessor, except if the single trial judge or trial panel orders not to return the objects, property, evidence or money.

The single trial judge or trial panel shall order the items to be permanently sequestered in accordance with the law if the state prosecutor:

- Describes in the Indictment those objects, properties, evidence or money that should be subject to permanent sequestration;
- If the objects, property, evidence or money that is temporarily sequestered is proven during the main trial to be have facilitated the criminal offence or constitute a material benefit obtained from the commission of a criminal offence; and
- Under the law they may be confiscated.

Objects, property, or evidence that is permanently sequestered shall be sold and the proceeds used for restitution to the injured parties and any remainder transferred to the budget.

Money that is permanently sequestered shall be used for restitution to the injured parties and any remainder transferred to the budget.

Weapons or contraband shall be destroyed with the exception of items that may be used by the society after they no longer have evidentiary value for the main trial or appeal.

Vehicles or airplanes that are permanently sequestered may be transferred to the use of the Government of Kosovo upon request by the state prosecutor, if the transfer does not

diminish the ability of the injured parties to obtain restitution.

3.8. TAKING PRE-INDICTMENT EVIDENCE

According to Article 119 of the Criminal Procedure Code, once an investigation has been initiated, the state prosecutor shall interview and take pretrial testimony from witnesses, authorize the taking of expert testimony and reports, and shall collect other evidence as authorized by law.

According to Article 120 of the Criminal Procedure Code, where there is a need to establish whether a witness can recognize a person or an object, such witness shall first be asked to provide a description of and indicate the distinctive features of such person or object.

The witness shall then be shown the person with other persons unknown to the witness, or their photographs, or the object with other objects of the same kind, or their photographs.

The witness shall be instructed that he or she is under no obligation to select any person or object or photograph, and that it is just as important to state that he or she does not recognize a person, object or photograph as to state that he or she does.

According to Article 121 of the Criminal Procedure Code, the state prosecutor shall obtain all relevant documentary evidence in accordance with the law, if possible prior to taking pretrial testimony. Such documentary evidence shall include, but is not limited to:

- Passport, identification cards, or records of border entry;
- Financial records;
- Surveillance records or photographs,;
- Records of land ownership;
- Records of automobile ownership;
- Records of corporations or business entities;
- Electronic documents, such as email, text messages, or photographs;
- Medical Records;
- Notes, diaries, or calendars, or
- Any other document that is lawfully obtained.

The state prosecutor shall lawfully obtain all tangible evidence, if possible prior to taking relevant pretrial testimonial. Such tangible evidence shall include, but is not limited to:

- Tangible evidence obtained at the scene of the crime;

- Tangible evidence seized from the search of the premises of the Defendant;
- Tangible evidence seized from the search of the person of the Defendant prior to or during his or her arrest;
- Photographs of or forensic reports about tangible evidence; or
- Any other tangible evidence lawfully obtained whose existence and form provide evidence relevant to the investigation.

According to Article 123 of the Criminal Procedure Code, during the investigation stage, the evidence from witnesses and expert witnesses may be taken in one of three kinds of sessions: pre-trial interviews, pre-trial testimony or special investigative opportunity.

The pre-trial interview is conducted by the state prosecutor. A record of the interview will be made and shall be placed in the file. Evidence obtained during the pre-trial interview may be used as a basis to substantiate pre-trial investigative orders, orders for detention on remand, and indictments. Evidence obtained during the pre-trial interview may not be used as direct evidence during the main trial, but may be used during cross-examination to impeach witnesses if the witness has testified materially differently from the evidence given by the witness during the pre-trial interview.

The pre-trial testimony shall be conducted by the state prosecutor. Evidence from the pre-trial testimony shall be audio-recorded, audio and video-recorded or transcribed verbatim. Evidence obtained during the pre-trial testimony may be used as a basis to substantiate pre-trial investigative orders, orders for detention on remand, and indictments. Pre-trial testimony shall be admissible during the main trial for cross-examination of the same witness, and may be used as direct evidence during the main trial if the witness is unavailable due to death, illness, assertion of privilege or lack of presence within Kosovo, but may not be used as the sole or as a decisive inculpatory evidence for a conviction.

The Special Investigative Opportunity shall be conducted before a three-judge panel led by the pretrial judge. Evidence from the Special Investigative Opportunity shall be audio-recorded, audio and video-recorded or transcribed verbatim. Evidence obtained during the Special Investigative Opportunity may be used as a basis to substantiate pre-trial investigative orders, orders for detention on remand, and indictments. Evidence from a Special Investigative Opportunity shall be fully admissible during the main trial if at least one of the judges on the judicial panel which heard the testimony is a judge on the main trial panel and if the witness is unavailable due to death, illness, assertion of privilege or lack of presence within Kosovo. If the main trial panel does not include at least one of the judges from the Special Investigative Opportunity Panel, the evidence shall be treated as evidence from pre-trial testimony.

Statements provided by a defendant in any context, if given voluntarily and without

coercion, are admissible during the main trial against that defendant, but not co-defendants. Such statements may not serve as the sole or as a decisive inculpatory evidence for a conviction.

Expert Witnesses

After issuing an expert report, expert witnesses may be interviewed, provide pretrial testimony or special investigative opportunity.

According to Article 136 of the Criminal Procedure Code, for expert analysis to be used by the state prosecutor:

- There must be a question material to either the guilt or innocence of the defendant or the extent of harm caused by the criminal offence;
- The question can only be answered by specialized or technical analysis;
- The expert must have specialized training or experience that is relevant and current;
- The expert must have analyzed lawfully obtained evidence;
- **The expert's analysis must have used practices generally accepted within his or her field or has a scientific or technical basis;** and
- The expert must write a report that summarizes his or her method of analysis and conclusions.

Computer Forensics

According to Article 147 of the Criminal Procedure Code, for computer equipment, electronic storage media, or similar devices that are lawfully obtained through a court order or by consent, the state prosecutor may authorize a police officer or expert to examine, analyze and search for information or data contained within the computer equipment, electronic storage media or similar device.

The authorized police officer or other expert shall have education, training or experience in forensic computer analysis and searching.

The authorized police officer or other expert shall issue an expert report with their findings that shall also include the following information:

- The authorized police officer or other expert shall describe the computer equipment, data storage equipment, or specific computer files examined, including any identifying **names, numbers, or exhibit tags;**

- The authorized police officer or other expert shall describe where and how the computer equipment, data storage equipment or specific computer files were obtained by the police;
- The authorized police officer or other expert shall describe the chain of custody of the computer equipment, data storage equipment or specific computer files;
- The authorized police officer or other expert shall describe specific factual information for which he or she has been authorized to search on the computer equipment, data storage equipment or specific computer files;
- The authorized police officer or other expert shall describe the steps taken in keeping with the most current practices in the field of computer forensics to reliably and accurately accomplish the search, including but not limited to steps taken to protect against the loss of files, decrypt files, retrieve deleted files, or obtain metadata about computer files or emails; and
- The authorized police officer or other expert shall describe the results of his or her search and shall attach an electronic copy of the computer files that are relevant to the searches.

Financial Investigation

Concurrent to their investigation, the police should also endeavour to identify the assets of any viable target. Experience in other countries has shown that IP criminals are wealthy. If any proceeds of crime are identified, these should be confiscated.

For financial records that are lawfully obtained through a court order or by consent, the state prosecutor may authorize a police officer or expert to examine, analyze and summarize financial information. The state prosecutor shall specify whether the authorized police officer or other expert shall determine:

- Whether financial assets are material benefits of alleged criminal offences or were used in the commission of alleged criminal offences;
- The movement of financial assets that may be material benefits of alleged criminal offences or may have been used in the commission of alleged criminal offences;
- Whether financial assets are missing due to alleged criminal offences and, if possible, the means and methods used;
- The financial harm caused by alleged criminal offences;
- The financial gain from alleged criminal offences;
- The amount of taxes or customs fees that might be owed by a defendant; or
- Any other issue relevant to the criminal proceedings.

The authorized police officer or other expert shall have education, training or experience in financial analysis or accounting.

The authorized police officer or other expert shall issue an expert report with their findings.

If an expert audit of financial records is required due to the large extent of financial criminal offences, large or complex nature of the financial records, or the financial records must be reconstructed or regularized, the state prosecutor shall request the court to authorize an audit to be performed in which case:

- The Court order shall instruct the expert as to the aim and scope of the audit and the facts and circumstances which have to be ascertained. The costs of such task shall be borne by the business organization or legal person;
- The ruling on regularizing accounts shall be rendered by the court upon a written and substantiated report by the expert appointed to examine the business books. The ruling shall also specify the amount to be deposited with the court by the business organization or legal person as an advance on the costs entailed in regularizing the accounts. No appeal shall be permitted against this ruling;
- After the accounts have been regularized, the court shall, on the basis of the report of the expert witnesses, render a ruling by which it shall determine the amount of the costs incurred thereby and order that the costs be borne by the business organization or legal person. The business organization or legal person may appeal concerning the basis of the decision on refunding the costs and the amount of the costs. The appeal shall be decided by the three-judge panel;
- The payment of the costs, if their amount has not been advanced, shall be credited to the authority that has already paid the costs in advance and remunerated the expert.

Pretrial Examination of the Defendant

According to Article 151, prior to the filing of any indictment, the defendant shall be examined in a session of pre-trial testimony. If the defendant is being investigated for a criminal offence or offences punished with a maximum period of imprisonment of no more than three years, it shall be sufficient to give the defendant an opportunity to respond in writing.

The defendant shall be obliged to appear before the state prosecutor upon being summoned. The defendant may appeal to the pre-trial judge to decide on the lawfulness of his or her being made to appear before the state prosecutor.

According to Article 152 of the Criminal Procedure Code, the examination of the defendant shall be conducted by the state prosecutor. The state prosecutor may entrust the

examination to the police.

Before any examination, the defendant shall be informed of:

- The criminal offence with which he or she has been charged; and
- The fact that he or she may request evidence to be taken in his or her defense. If the defendant is in detention on remand, he or she shall also be informed before any examination of his or her right to have defense counsel provided if he or she cannot afford to pay for legal assistance;
- The right to remain silent and not to answer any questions, except to give information about his or her identity.

The defendant has the right to consult with his or her defense counsel prior to as well as during the examination.

An examination of the defendant by the police or state prosecutor when acting under the present Article shall be audio or video-recorded. In cases where this is impossible in practice, a written record of the examination shall be made and the record shall specify the reasons why the examination could not be audio or video- recorded.

3.9. REVIEW AND TERMINATION OF INVESTIGATION

According to Article 156 of the Criminal Procedure Code, every three months the state prosecutor and the head of his or her office shall review the case file to determine whether the investigation should remain open, whether it should be suspended, whether it should be terminated or whether an indictment shall be filed.

According to Article 157 of the Criminal Procedure Code, the state prosecutor may render a ruling to suspend the investigation if the defendant, after committing a criminal offence, has become afflicted with a temporary mental disorder or disability or some other serious disease, if he or she has fled or if there are other circumstances which temporarily prevent successful prosecution of the defendant.

According to Article 158 of the Criminal Procedure Code, the state prosecutor shall terminate the investigation if at any time it is evident from the evidence collected that:

- There is no reasonable suspicion that a specific person has committed the indicated criminal offence;
- The act reported is not a criminal offence which is prosecuted *ex officio*;
- The period of statutory limitation for criminal prosecution has expired;
- The criminal offence is covered by a pardon or an amnesty issued prior to the enactment of the Constitution;

- The criminal offense has been included in an amnesty that was issued before the adoption of the Constitution; or
- There are other circumstances that preclude prosecution.

The state prosecutor shall within eight days of the termination of the investigation notify the right holder of this fact and the reasons for this. The state prosecutor shall immediately inform the pre-trial judge about the termination of the investigation.

Article 159 of the Criminal Procedure code states If an investigation is initiated, the investigation shall be completed within two years. If an indictment is not filed, or a suspension is not entered, after two years of the initiation of the investigation, the investigation shall automatically be terminated.

The pretrial judge may authorize a six-month extension of an investigation where a criminal investigation is complex, including but not limited to if there are four or more defendants, multiple injured parties have been identified, a request for international assistance has been made, or other extraordinary circumstances exist.

3.10. PITFALLS

The following list contains some common mistakes and pitfalls that should be avoided, during an investigation. This list is not meant to be exhaustive and the Kosovo Police must always observe or refer to relevant codes of practice or working procedures:

- Failure to confirm IPR is protected in Kosovo;
- Failure to identify appropriate rights holder;
- Failure to contact rights holder;
- Failure to use rights holder to establish existence of IPR;
- Failure to use rights holder to confirm infringement or that goods are counterfeit;
- Lack of support from rights holder;
- Failure to observe relevant codes of practice for investigation, seizure and arrest;
- Offering inducements or pressurising traders during a test purchase;
- Failure to ask relevant questions at time of inspection;
- Failure to ask relevant questions during subsequent investigations;
- Failure to prove goods are counterfeit during court trial;
- Lack of accuracy;
- Break in continuity of evidence/evidential chain;
- Poor record keeping;
- Loss of evidence;
- Deterioration of evidence e.g. perishable products;

- Failure to treat a suspect fairly during investigation;
- Failure to treat a suspect fairly during interview;
- Allowing rights holders to unduly influence an investigation; and
- Failure to disclose evidence during legal process.

4. GUIDELINES FOR MARKET INSPECTORS ABOUT ENFORCING INTELLECTUAL PROPERTY RIGHTS IN KOSOVO

Market Inspectorate is responsible for protecting Intellectual Property Rights by enforcing respective legislation, which is written in Art 9. Law 03/L-181 on Market Inspectorate on Inspective Supervision and Law 04/L-186 on amending and supplementing the Law 03/L-181 on Market Inspectorate and Inspective Supervision.

In Article 9 the Law states:

"1 The market inspectorate is competent to inspect the standards of trading of goods, the quality of the services that economical entities offer throughout the territory of the Republic of Kosovo through oversight:

...

1.9. protection of industrial ownership rights in the market;

1.10. protection of the right of author and other similar rights in the market

4.1 COPYRIGHT

The relevant national legislation in the field of copyright in Kosovo is the Law No. 04/L-065 on Copyright and Related Rights, Official Gazette of the Republic of Kosovo No. 27 / 2011, as amended and supplemented by Law No. 05/L-047 Official Gazette of the Republic of Kosovo No. 37/2016 and amending and supplementing the Law No. 06/L-120 Official Gazette of the Republic of Kosovo No. 13/2019.

4.1.1. CONTROL OF PHOTOCOPYING OF LITERARY WORKS

Despite lack of high number of applications for action against piracy, market inspectors must pay attention to the exception allowing the copying of textbooks in their entirety, which is set out in the law of Kosovo in Article 44. In Art 44 is prohibited the reproduction of the written work in the complete book volume, except if printed copies were sold at least two years before.

Checking the entire stock of photocopied works, as individual textbooks are copied in several parts of copy shops could be necessary, in order to avoid a provision that allowed a partial copy of a copyrighted work and not the whole.

4.1.2. CONTROL OF PUBLIC PERFORMANCE

When supervising hotels, bars, restaurants or other public premises, market inspectors shall check for the compliance with regulations governing proper registration of the establishments, marking prices, issuing invoices, banning the dispensing of alcohol to

minors, banning advertising and selling tobacco to minors, advertising alcohol, working hours, etc. as well as copyright protection.

In public premises, copyrighted works are usually broadcast from phonograms or with the help of a radio or television receiver, for which the owners of these facilities must have agreements with and obtain licenses for the use by the competent collecting societies. Compliance with copyright provisions shall also be verified in hairdressing, car repair shops, all kind of shops, etc., although music is not directly related to a particular activity these economic entities.

In the case of supervision, economic operators are required to provide proof of copyright licenses. In case of irregularities, the inspectors should initially request the elimination of irregularities by an administrative decision. Soft measures could be used such as warnings to violators who could immediately settle these rights.

4.1.3. CONTROL OF SOFTWARE PIRACY

Due to the specific nature of the inspection in relation to computer programs, this control is carried out by a specially trained group of market inspectors, who, among other tasks, also perform such controls. If, at the Market Inspectorate, there is no formal division of inspectors who would perform exclusively inspections in the field of IPR, a specially qualified group could be formed taking into account the expressed interest of inspectors, knowledge of computers, the desire to acquire new knowledge. Before the annual supervision, if necessary, special training should be organised for the benefit of this group. If necessary, global IT corporations also offer assistance in education for inspectors.

In accordance with the provisions of the Inspection Act, an inspector has the right to conduct inspection of the economic entity on the basis of the law (without special permission of the court) and without prior notice.

This means that inspections in this area are not carried out on natural persons who use computers for their own purposes in the private premises of Houses, apartments. Entry into an apartment is a constitutionally protected category.

The unlicensed reproduction of software programs is called software piracy and can take the following forms:

- ¶a. softlifting, i.e. the creation of additional copies of a program that can be used by more users than permitted by the license. This category also includes the exchange of discs with illegal copies of software between friends and collaborators.
- ¶b. trading of a pirate copy together with the PC (uploaded in the hard disk drive). This is the case where certain salesmen of computers install illegal copies of software in the hard disks of computers they sell.
- c. Forgery (complete imitation of the original product): It is the illegal reproduction and sale of software in such a way that it appears legal. It can include the imitation of packing, logos and often the holograms.
- d. Online: This form of piracy arises when the users "download" software from the internet without explicit authorisation of the beneficiary.

Inspection against illegal software is performed on the basis of an annual plan. Subjects are chosen by the industries in which they operate, from lawyers, media organizations (radio and TV organizations, newspapers, magazines, architects, small businesses, vehicle breakdown diagnostics companies, notaries, etc.. Every year, inspections shall also be carried out at entities against which the Market Inspectorate receives a complaint.

Most violators are aware that they must obtain the author's permission (license) to use a certain program, but this applies only in the most used programs (operating system, office programs), while in smaller programs (especially those obtained over the internet) intentionally do not respect these rights.

The following method for conducting inspections could be introduced with promising results. The inspections shall take place in two parts. In the first part (carried out in the spring), a letter shall be sent to economic operators informing them about their obligations regarding use of computer software. At the same time, they should be warned to check themselves how many computers they have and which programs they use on them, and to check whether they are using all the programs legally (or have all the necessary licenses). Economic operators only would have to submit to the Market Inspectorate data on the number of computers and a list of programs they use. After receiving the replies to the letter, an analysis of the received documentation shall be performed. Based on the analysis, economic operators who did not reply to the letter were selected, as well as a few randomly selected economic operators who sent information correctly. All of these economic operators were inspected in the autumn months.

Every year, inspections should also be carried out at entities against which the Market Inspectorate receives a complaint. The law explicitly states that the mere possession of an unlicensed program is a violation:

*Article 124
Special protection measures*

1. Violation of the author's right on the computer program is considered:

1.1. any distribution, including also the offer for the use of one or more copies of the computer program, which is known that it is or it could be an illegal copy.

1.2. possession of the copy of the computer program for commercial use, which is known that it is or it could be an illegal copy.

This fact is very important when exercising inspections of illegal software.

4.2. INDUSTRIAL PROPERTY RIGHTS

Intellectual property rights are closely related to innovation, continuous business development, cooperation among businesses and other subjects. A characteristic of industrial property rights is that they arise on the basis of an application to the register, unlike copyrights arising from the moment of creation without the need for any registration.

Industrial property takes a range of forms, including:

- Patents,

- Topographies of integrated circuits
- Industrial designs,
- Trademarks,
- Geographical indicators
- Trade secret

Law No. 04/L-029 on Patents (Official gazette of Republic of Kosovo, No. 12/2011) on amending and supplementing the Law No. 05/L-039 on Patents (Official gazette of Republic of Kosovo, No. 26/2015) is the basis for legal protection in Kosovo. When we talk about patent infringements, it should be emphasized that in such cases, right holders usually file a lawsuit in the courts where they exercise their rights.

Industrial design protection is regulated by Law No. 05/L-058 on Industrial Design (Official gazette of Republic of Kosovo, No. 40/2015). The holder of the protected industrial designs right, that has been infringed, in addition to the request for compensation of damages may claim measures to prevent further infringement of his exclusive rights. Article 64 of the Law stipulates that the Basic Court in Prishtina is competent for the application of industrial design rights. Administrative Instruction MTI, No. 12/2016 on registration of the industrial design give many answers and help right holder how to protect his right.

Law No. 03/L-165 is determining the rights and protection of topographies of integrated circuits. Art 19 provides that a holder of the protected topography right, that has been infringed, in addition to the request for compensation of damages may claim measures to prevent further infringement of his exclusive rights.

Law No. 05/L -051 on Geographical Indications and Designations of Origin sets the foundations for protection of Geographical Indicators in Kosovo. It is necessary for inspections under this law to be carried out by inspections targeting food control. In addition to the law, Administrative Instruction MTI No. 11/2016 on registration procedure of Geographical indicators and designations of Original and Administrative Instruction MTI No. 09/2018 on determining Symbols for Geographical indicators, designation of Origin and guaranteed traditional specialties could be also very helpful.

Law No. 04/L-026 on Trademarks is the basis for legal protection of trademarks in Kosovo. According to the experience of countries in the Kosovo neighborhood, as well as Slovenia as an EU Member State, market inspectors could most often encounter infringements related to the unjustifiably use of trademarks.

Publicly available databases help to control whether a particular trademark is registered. Some of the most useful databases are below:

- Database managed by the Industrial Property Agency in Kosovo including trademarks registered in Kosovo
- Community trade mark (EUTM - European Union TradeMark), it provides quick access to Community trade mark information <https://oami.europa.eu/eSearch/>
- Romarin International Base, The international database of trademarks includes registered trademarks from 87 countries (list of countries: http://www.wipo.int/treaties/en/documents/pdf/madrid_marks.pdf)
<http://www.wipo.int/romarin/>

- TMView international database, The international database of trademarks includes registered trademarks from EU Member States and WIPO. <http://www.tmview.europa.eu/tmview/welcome.html?language=s/>

The Law in Kosovo being the basis for the effective inspection actions by Market Inspectorate in cases of suspected marketing of counterfeit products, it is necessary to be supplemented by provisions that already exist in Regulation 608/2013, where the active role of right holders is clearly defined. These provisions will be explained in detail in the section regarding border enforcement. By adopting such provisions, two goals would be realized. Inspectors would be given clear powers and procedures will be further clarified, and at the same time, the right holder and the infringer would be required to be involved in the proceedings.

So far, right holders expected that Market Inspectorate protects their rights (free of charge!) without doing anything to help. Unfortunately, it may also happen that they would abuse of their rights and report their competitors, in order to destroy competition. The law should clearly define the competent inspection bodies according to their substantive jurisdiction.

4.3. FURTHER STEPS AND RECOMMENDATIONS

The organization and working areas of the Market Inspectorate of the Republic of Kosovo are determined by Law 03 / L-181 on Market Inspectorate on Inspective Supervision and Law 04 / L-186 on amending and supplementing the Law 03 / L-181 on Market Inspectorate and Inspective Supervision.

In addition to the law, there is also Regulation No. 10/2013 on Internal organization and systematization of jobs in the Market Inspectorate, which was approved at the 121st meeting of the Government of Kosovo, with the decision no. 06/121 date 27.03.2013.

Market Inspectorate is responsible for protecting Intellectual Property Rights by enforcing respective legislation, which is written in Art 9. Law 03/L-181 on Market Inspectorate on Inspective Supervision.

Taking into account the fact that currently, the Inspectorates system in Kosovo is under reform, but the Market Inspectorate jurisdiction on IPR area will remain, it is necessary to adopt certain changes as listed below:

- Reform the Internal organization of the market inspectorate in order to adjust the organization of the market inspection to the actual needs of effective controls
- Inclusion of additional inspection bodies as supervisory bodies for individual segments of supervision
- Define and establish procedures for inspection bodies for supervision in the area IPR
- Improve communication and cooperation within all supervisory authorities and other stakeholders
- Provide training for inspectors and other bodies involved in the IPR protection process
- Amend and supplement the existing legislation

5. ENFORCING COPYRIGHT BY INDEPENDENT MEDIA COMMISSION IN KOSOVO

According to article 30 of the Copyright Law of Kosovo, all complaints relating to violation of copyright during broadcast and rebroadcast of programs on behalf of broadcasting organisations shall be prosecuted to the Independent Media Commission (IMC).

Article 30

Broadcast and Rebroadcast of audiovisual program content

1. Audiovisual media services licensed by the Independent Media Commission - IMC as well as cable operators and other operators that regardless of technology they use offer audiovisual content are obliged to broadcast and rebroadcast programs based on valid copyright agreements.

2. Copyright agreement dealing with the broadcast and rebroadcast of audiovisual programs will be valid only after they have been registered by the collective associations licensed by the Office for copyright in the Ministry of Culture, in accordance with the Article 171. of this Law.

In Kosovo there has also been issues with broadcasting of football matches which are granted on a territorial basis. Independent Media Commission had to administer complaints about the broadcast of football matches of the European Champions League.

6. BORDER ENFORCEMENT

The Customs officers are empowered to take action against infringements of Intellectual Property Rights (IPR). The procedures to be followed are governed by:

- The Customs and Excise Code no.03/L-109-2008
- The Law No. 06/L-015/2018 on Customs Measures for protection of IPR
- The Administrative Instruction no.053/2018.

Thus, this manual provides a rough interpretation of the application of the procedures for the protection of intellectual property by the Customs authorities. This manual is not a legal act and is not binding, but only provides instructions and standard information on the application of customs measures for goods that are suspected to infringe intellectual property rights.

Enforcing IPRs at the border, wherever the goods are, or should have been, under “customs supervision”... makes good use of resources. Where goods detained by Customs at the border, one legal proceeding is required, whereas several separate proceedings would be required for the same level of enforcement for goods found in the market, which have been disaggregated and delivered to retailers.

The conditions *and procedures* for action by the customs authorities who suspect that goods under their supervision infringe IPR are set out but not any criteria for ascertaining the existence of an infringement of an intellectual property right. Except in cases where one of the simplified procedures set forth can be applied, it will be up to the courts to determine whether such goods will be allowed to enter or leave the Kosovo customs territory, or whether they must be forfeited to the exchequer, destroyed, or disposed of outside commercial channels.

The Legal framework covers all possible circumstances in which goods cross an external border of Kosovo. This includes goods manufactured or originating in third countries, entering the Kosovo customs territory, regardless of whether they are being trans-shipped, released for free circulation, placed under a suspensive procedure, or placed in a free zone or warehouse. This also covers the cases where goods suspected of infringing IPR are in the process of being exported, re-exported, or otherwise leaving the Kosovo customs territory.

Since customs authorities are only empowered to take action against goods under supervision which they suspect of infringing IPRs, they are no longer entitled to intervene once the goods have been released into free circulation within Kosovo (meaning that all customs formalities have been fulfilled and that the applicable customs duties have been paid). It should be noted, however, that when goods are released into free circulation at a reduced or zero rate of duty, on account of their end-use, they do remain under customs supervision. Since the border measures does not aim to apply to goods in free circulation, the Law explicitly mentions that it will not apply to goods in free circulation under the end-use regime.

6.1 THE SCOPE OF LAW NO. 06/L-015

The following is the type of the rights covered by the Law No. 06/L-015 on Customs Measures for protection of IPR.

6.1.1. TYPES OF RIGHTS COVERED

By definition, Intellectual Property Rights should be understood as certain kinds of *exclusive rights* to *intellectual capital* and *creations of the mind*. IPR cover all forms of commercial activities and artistic creations. They fall into two categories: industrial property and copyright. Industrial property includes a diversity of rights such as patents, trademarks, geographical indications and designs. Copyright protects literary and artistic works (books, plays, films, musical works, paintings, photographs, sculptures, maps etc.). Copyright also includes related or neighboring rights such as those of performers, producers of films and sound recordings, and broadcasters.

Law No. 06/L-015 on Customs Measures for protection of IPR has widened the scope of border measures system to include IPR which hitherto did not form part of it. Customs checks should be extended to goods suspected of infringing :

- a) trade names (in so far as they are protected as exclusive property rights under national law),
- b) topographies of semiconductor products,
- c) utility models.

6.1.2. TYPES OF INFRINGEMENTS COVERED

Basically, with the exception of the specific case of goods contained in personal luggage, the Law grant powers to Customs to take action, with regard to the mentioned IPR, against *all type of infringements* contemplated by Kosovo's substantive legislation.

6.1.2.1. PRINCIPLE

In principle customs measures should be applied by the Kosovo Customs in terms of IPR protection with regard to counterfeit goods, pirated goods and goods suspected of infringing an IPR.

Counterfeit goods

Goods, including any packaging, label, sticker, brochure, operating instructions, warranty document or similar item (even if presented separately) which are subject of an act infringing a trade mark or a geographical indication.

Pirated goods

Goods which are the subject of an act infringing a copyright or related right or an industrial design.

Goods suspected of infringing an IPR

Goods where there are reasonable indications that they are the subject of an act infringing an intellectual property right in Kosovo. Any mould or matrix which is specifically designed or adapted for the manufacture of goods infringing an IPR are also deemed as goods suspected of infringing IPR.

Counterfeit goods infringe a trade mark and often look the same as the genuine goods. They contain a symbol or mark on the product or on the packaging that look identical to that of the genuine goods for which the trade mark was registered, even though they are not made by the owner of that trade mark or with his consent.

Pirated goods that are copied without the approval of the owner of the copyright or design. The most well-known copied goods are CDs and DVDs containing music, films or video games.

Goods infringing other types of rights, such as MP3 players infringing patents or flowers or plants infringing plant variety rights.

6.1.2.2. EXCLUSIONS

Certain infringements are excluded from the scope of the Law No. 06/L-015.

Infringements resulting from so-called illegal parallel trade and overruns are excluded from the scope of the Law No. 06/L-015. Goods subject to illegal parallel trade, namely goods that have been manufactured with the consent of the right-holder but placed on the market for the first time in Kosovo without his consent, and overruns, namely goods that are manufactured by a person duly authorised by a right-holder to manufacture a certain quantity of goods, in excess of the quantities agreed between that person and the right-holder, are manufactured as genuine goods and it is therefore not appropriate that customs authorities focus their efforts on such goods. Illegal parallel trade and overruns therefore are excluded from the scope of this Law.

The other exclusions are:

- Goods under the end-use regime as such goods remain under customs supervision,
- Goods of a non- **commercial nature contained in travellers' personal luggage.**

6.3 THE APPLICATION FOR ACTION

Customs enforcement of an IPR may be carried out only where an application for action (AFA), requesting that action be taken with respect to goods suspected of infringing the IPR, has been granted to the person holding the IPR. AFAs are edited in both the Law No. 06/L-015 and Administrative Instruction No. 53/2018.

6.3.1 PERSONS ENTITLED TO REQUEST A CUSTOMS ACTION

A full description of the persons and entities entitled to submit an AFA can be found in Article 4 of the Law No. 06/L-015 and includes:

- Right holders

- IP collective rights management bodies
- In respect of geographical indications; groups of producers or representatives of these groups and business entities being entitled to use a geographical indication or similar competent authorities for such geographical indications
- Persons or entities duly authorised by the right holder to initiate proceedings in order to determine whether an IP right has been infringed

6.3.2 STANDARD FORMS-CONTENT OF APPLICATION

The application for customs action, which is required by Customs to undertake actions concerning the goods suspicious for infringing the intellectual property rights shall be done using the form in Annex I of the Administrative Instruction No. 53/2018.

Fields in the form marked with an asterisk (*) are mandatory fields and shall be filled in.

Where in a box one or more fields are marked with a plus sign (+) at least one of those fields shall be filled in.

The applicant must provide:

- Name, address and contact details along with his status
- IP right or rights to be protected
- documentary evidence that he holds the relevant rights or are authorised to act on behalf of the right holder
- a sufficiently detailed description of the goods to enable Customs to recognise the goods
- specific technical data on the authentic goods, for example markings, bar codes, and images as appropriate
- the name and contact details of his appointed legal and technical experts
- agreement that data provided may be processed by the Kosovo Customs
- whether he wishes to request the use of the "small consignment" procedure and agree to cover the costs of goods destroyed under that procedure.

The applicant will also be required to provide undertakings as follows:

- to notify the Division for the Protection of IPR where an IPR ceases to have effect
- forward and update information that will enable customs authorities to analyse and assess the risk of an IP infringement
- to assume liability towards the holder of the goods where, following detention:
 - (a) action is discontinued due to an act or omission on the part of the applicant
 - (b) samples are either not returned or are damaged and beyond use due to an act or omission on the part of the applicant
 - (c) the goods in question are found not to infringe an IP right

- to reimburse, where requested, the costs incurred by customs authorities or other persons acting on their behalf, from the moment of detention.

Wherever applicable and if known the applicant should also include within the application:

- any specific information concerning the type or pattern of fraud
- the port or country from which the goods are consigned and their intended port of arrival in Kosovo
- details identifying the consignment or packages; for example descriptions, marks and numbers, the container number, waybill or manifest details
- the expected date of arrival or departure of the goods
- the means of transport and the identity of the carrier, logistics operator and/or customs broker/agent involved
- the identity (including address and postcode) of the importer or exporter.
- the country or countries of production and the routes used by traffickers
- the technical differences, if known, between the authentic and suspected infringing goods.

6.3.3 FILING AND GRANTING OF APPLICATIONS FOR ACTION

In Kosovo, AFAs are submitted to the Division for the Protection of Intellectual Property of the Kosovo Customs.

The applicant will not be charged a fee for new applications, or requests for extensions, submitted under the Law No. 06/L-015. However Kosovo Customs reserve the right to pass on to the applicant any costs they incur in from the moment of detention including handling, storage and for destroying the suspect goods.

The validity period of an AFA shall not exceed one year but may be extended upon request. Where an AFA is submitted in response to an ex-officio detention which does not contain all of the mandatory information regarding technical data etc. it shall be granted only for the detention period of the goods in question, unless the information is provided within 10 working days after the notification of the suspension of the release or detention of the goods.

The Kosovo Customs shall notify the applicant of its decision granting or rejecting the application within 30 working days of the receipt of the application.

If the applicant has been notified of the suspension of the release or the detention of the goods by the customs authorities before the submission of an application, the Kosovo Customs notify the applicant of its decision granting or rejecting the application within 2 working days of the receipt of the application.

6.3.4 EXTENSION OF THE VALIDITY PERIOD OF AN APPLICATION

The request for extension of the period of time during which the Kosovo Customs are to take action shall be done using the form in Annex II of the Administrative Instruction No. 53/2018.

To ensure continuity of coverage the renewal should be received at least 30 working days before expiry of the application and in any event must be received before the expiry date or a new AFA may be required.

6.3.5 AMENDMENTS OF DECISIONS GRANTING AN APPLICATION

The Kosovo Customs may modify the list of intellectual property rights approved by their decision at the request of the holder of the decision.

6.3.6 SUSPENSION OR REVOCATION OF DECISIONS GRANTING AN APPLICATION

Should an IP right cease to have effect holder of the decision must inform the appropriate customs authority so the AFA can be amended or revoked. Similarly where an applicant ceases for any reason to be entitled to submit an AFA they must inform the appropriate customs authority; the AFA will be revoked.

The Kosovo Customs may revoke and suspend decisions granting AFAs if the holder of the decision fails to return samples of the goods detained, fails to notify Kosovo Customs regarding changes to the IP rights covered by the decision, fails to initiate proceedings under Article 23 of the Law No. 06/L-015 and misuse of information provided by Kosovo Customs in relation to the declarant.

6.4. PROCEDURES SET OUT IN LAW No. 06/L-015

6.4.1. CUSTOMS ACTION

6.4.1.1. ACTION UPON APPLICATION

When customs intercept goods that they have reason to believe are infringing and are covered by a valid application, the suspect goods should be detained and customs should notify the declarant or holder of the goods of their detention within 1 working day of the decision to detain and give them 10 working days in which to either consent or object to their abandonment for destruction.

The holder of the decision should also be notified of the detention, on the same day as, or promptly after, the notice of detention issues to the declarant or holder of the goods. This letter informs the decision-holder that there is a period of 10 working days in which to indicate:

- whether or not the holder of the decision believes that the goods infringe any of the decision-**holder's IP rights**,
- where it is believed that the goods infringe an IPR, whether the holder of the decision agrees to their destruction.

The response period of 10 working days granted to the declarant or holder of the goods and to the holder of the decision is reduced to 3 working days in the cases of perishable goods.⁵

⁵ Perishable goods are the goods considered by the Kosovo Customs to deteriorate by being kept for up to 20 days from the date of their suspension of release or detention.

6.4.1.2. EX OFFICIO ACTION

When goods suspected of infringing an IPR are detected by Customs but no valid AFA is in place, then the *ex officio* procedure permits the detention of goods which are suspected of infringing an IPR. However, this procedure does not apply in the case of perishable goods.

Prior to detention Customs may seek to identify the relevant right holder. If no right holder has been identified within 1 day of the detection, Customs must release the goods; subject to the completion of all other customs formalities. If an entitled right holder is identified and he expresses an intention to lodge an AFA covering any IP right he believes is infringed by the consignment, then Customs detain the goods.

Customs notify the declarant or holder of the goods of their detention within 1 working day of the decision to detain and give them 10 working days in which to either consent or object to their abandonment for destruction.

Notice of the detention must also be given to the entitled right holder concerning the alleged infringement of IPR, on the same day or promptly after notice of the detention issues to the declarant or holder of the goods. Customs invite them to submit an AFA covering the goods and the right in question and to confirm whether or not they believe the goods to be infringing and if so whether they agree to their destruction. Customs give 10 working days to respond but they must send an acceptable AFA before the end of 4 working days.

If an AFA is not made within that period, or if an application is rejected, the goods must be released on completion of all customs formalities.

The procedures to be followed in *ex officio* cases are the same as those for cases falling under the simplified destruction procedure set out in 3.2 of this manual.

6.4.1.3. ACTIONS FOLLOWING THE FILING AND ACCEPTANCE OF AN APPLICATION FOR ACTION

Preliminary contacts with the holder of the decision prior to the decision to detain or suspend the release of goods:

Before goods are detained, the holder of the decision should be asked to provide any relevant information about the goods to determine if an IPR infringement has occurred. Likewise, Customs may provide the holder of the decision with information about the actual or estimated quantity of the goods, their actual or presumed nature and images of them.

Information to be provided to the holder of the decision:

If the holder of the decision so requests, and if the information is available, the following should be provided:

- names and addresses of the consignee
- the consignor, and the declarant or holder of the goods

- the customs procedure involved and,
- the origin, provenance and destination of the detained goods.

In case of ex officio action the only information that can be provided to any such person when making enquiries is; the actual or estimated quantity of the goods; their actual or presumed nature or; images of the goods. Nothing further can be disclosed at this stage that might identify the declarant, such as the name of an individual or company. Where an AFA has been granted, the holder of the decision may then request the above listed information, where available.

Inspection and sampling of the goods

Kosovo Customs may give all parties the opportunity to inspect the goods; in the case of goods suspected of being counterfeit or pirated, the holder of the decision may request a sample for further analysis. This is strictly for the purposes of analysis and to facilitate any subsequent procedure in relation to counterfeit or pirated goods. The holder of the decision is responsible solely for any analysis of the samples. The samples must be returned when the analysis is completed by the holder of the decision.

6.4.2. SIMPLIFIED DESTRUCTION PROCEDURE

Goods can be considered as abandoned for destruction under the following conditions:

- The holder of the decision confirms in writing within the required period that, in their opinion, the goods infringe an IPR and they agree to their destruction and,
- The declarant or holder of the goods gives written confirmation of agreement to their destruction,

Kosovo Customs may deem that consent has been given where:

- the holder of the decision confirms in writing that, in their opinion, the goods infringe an IP right covered by the AFA and consents to destruction and,
- the declarant or holder of the goods has not confirmed his agreement to destruction nor notified his opposition to it; for example by failing to respond within the period set out.

Destruction is carried out under customs control and under the responsibility of the holder of the decision. The prescribed detention period is 10 working days from the notification of detention. In the case of perishable goods this is reduced to 3 working days.

If the declarant or holder of the goods objects to their destruction or, in the absence of an objection, Kosovo Customs have chosen not to deem that consent has been given; Kosovo Customs will notify the holder of the decision accordingly. It is then open to the holder of the decision to initiate legal proceedings to determine whether an IPR has been infringed. If the holder of the decision has not submitted a copy of the lawsuit as filed with the competent court to determine whether an IPR has been infringed to Kosovo Customs that they have initiated proceedings to determine whether their IP right has been infringed before the end of the detention period, including any extension, the goods must be released from detention; subject to the completion of all other customs formalities.

Except in the case of perishable goods Customs may, at the request of the holder of the decision and where they agree it is justified, extend the detention period by a maximum of a further 10 working days. The total period cannot exceed 20 working days.

6.4.3. SIMPLIFIED DESTRUCTION PROCEDURE FOR SMALL CONSIGNMENTS

The Law No. 06/L-015 establishes an option procedure whereby goods in small **consignments may be abandoned for destruction at the holder of the decision's expense** without any reference to the holder of the decision or the need for the holder of the decision to commence legal proceedings. A small consignment is defined by the Kosovo Customs as a postal or express courier consignment, which:

- contains three units or less, or
- has a gross weight of less than 2 kilograms.

The simplified destruction procedure for small consignments applies only where all the following conditions are fulfilled:

- the goods in the consignment are suspected of being counterfeit or pirated
- the goods are not perishable
- there is an AFA already in place covering the goods in question, and,
- the holder of the decision has requested the use of the simplified destruction procedure for small consignments when they submitted their AFA.

Where goods in a small consignment which are suspected of infringing an IPR are detected at the border, they should be detained and notice of the detention should be given to the declarant or holder of the goods. This letter should be issued within 1 working day of the detention.

The holder of the decision is not notified of the detention at this stage.

The declarant or holder of the goods has a period of 10 working days from the date of the notification to reply indicating either 1) agreement to the destruction of the goods, or 2) objection to their destruction.

If the recipient of the notice of detention responds, within the period specified in the notice, indicating agreement to their destruction, destruction is carried out under customs control.

If no response is received within the specified time, it may be deemed that agreement to destruction has been given, and arrangements for destruction should proceed accordingly.

If the declarant or holder of the goods has notified his opposition to destruction or, in the absence of an objection, Kosovo Customs have chosen not to deem that consent has been given; the holder of the decision must be given the opportunity of initiating proceedings to protect his IP right.

The holder of the decision has a period of 10 working days from that notification in which to advise Kosovo Customs that proceedings have been initiated seeking confirmation that this is the case. It is not possible to extend this period.

Kosovo Customs shall upon request and where the information is available give information about the actual or estimated quantity of destroyed goods and their nature to the holder of the decision.

If upon expiry of the deadline Kosovo Customs has not received a copy of the lawsuit as filed to the competent court then the goods must be released; subject to the completion of all other customs formalities.

Goods to be destroyed both under regular simplified procedure and simplified procedure for small consignments shall not be:

- Released for free circulation;
- brought out of the customs territory of Kosovo;
- exported;
- re-exported;
- placed under a suspensive procedure;
- placed in a free zone or free warehouse.

6.5. LIABILITIES AND COSTS

6.5.1 LIABILITY OF THE KOSOVO CUSTOMS

The granting of an AFA shall not entitle the holder of the decision concerned to compensation in the event that goods suspected of infringing an IP right are not detected and are released or no action is taken to detain them.

6.5.2. LIABILITY OF THE HOLDER OF THE DECISION

The holder of the decision is liable towards the holder of the goods or declarant where, following the detention:

- action is discontinued due to an act or omission on the part of the holder of the decision
- samples are either not returned or are damaged and beyond use due to an act of omission on the part of the holder of the decision
- the goods in question are found not to infringe an IP right

Additionally, if the holder of the decision fails to initiate proceedings under simplified destruction procedure, the Kosovo Customs may decide not to act as per the decision granting an AFA and the holder of the decision will not be able to file a new application for the same IP right within 1 year.

6.5.3. LIABILITY FOR COSTS

Given that customs authorities take action upon application, it is appropriate to provide that the holder of the decision should reimburse all the costs including costs of storage, handling and desruption incurred by the customs authorities in taking action to enforce his intellectual property rights. Nevertheless, this should not preclude the holder of the decision from seeking compensation from the infringer or other persons that might be considered liable under the legislation in force.

The holder of the decision is also liable for the costs for any translation required by the Kosovo Customs with regard to suspect goods.

6.6. OTHER MATTERS RELATING TO ENFORCEMENT PROCEDURES

6.6.1. EARLY RELEASE OF GOODS

Where a holder of the decision has initiated proceedings to determine whether an industrial design right, patent, topography semiconductor product, utility model or plant variety right has been infringed the declarant or holder of the goods may request their release from detention before the completion of the proceedings.

Release will only be allowed where:

- a sufficient bank guarantee has been provided by the declarant or the holder of the goods,
- no precautionary measures have been imposed by the court,
- all customs formalities have been complied with.

6.6.2. RISK INDICATORS FOR INTELLECTUAL PROPERTY INFRINGEMENTS

Risk is a chance that the enforcement of controls may be adversely affected. Risk analysis aims to concentrate controls on areas of highest risk while at the same time leaving the majority of trade to flow relatively freely through customs. Risk indicators are those factors that can increase or decrease the level or degree of risk to the IPR enforcement function.

6.6.2.1. DOCUMENT BASED RISK INDICATORS

Examination of documents and electronic information submitted by the consignor, consignee, importer or their representatives help customs officers to identify goods that pose a high risk against counterfeiting and piracy.

-Description of the goods/risky goods

It is one of the methods used by those dealing with piracy and counterfeiting to make false statements or vague item descriptions.

Luxury goods, designer items, and popular or trendy items carry the greatest risk to counterfeiting (especially of well-known brands) and piracy.

Clothes and accessories; watches and their parts; bags, wallets, backpacks etc.; sound recordings, moving recorded media, including images and computer software (especially optical discs); cigarettes; beer, wine and spirits; toys and video games; computer hardware and accessories; sunglasses; hats; shoes; electronic stuff; automobile and aircraft spare parts and medicines may be defined as risky goods for counterfeiting and piracy in general.

-Vague description of goods

The goods described in ambiguous terms such as "empty", "unfinished", "plastic goods", "plastic coating", "metalware", "metal coating", "metal disks", "samples", "household items" often have a high risk of counterfeiting and piracy.

-Country of origin known as source of counterfeit or pirated goods

The goods originate in countries known as source of counterfeit or pirated goods pose a risk for counterfeiting and piracy.

According to EU IPR report 2018, with regards to countries of provenance in relation to value, China is at the top of the list, followed by Hong Kong, China, Turkey and United Arab Emirates as in former years. Vietnam, Cambodia and Bangladesh complete the top seven.

Goods entering through the land border or goods transiting through a country known to be weak in the protection of IPR rights also pose a risk for counterfeiting.

Free zones are often used as distribution points for counterfeit and pirated goods. These goods either come from countries where imitation and counterfeit goods are produced, or they are produced in the free zone.

-Country of destination has a reputation of demand for counterfeit or pirated goods

Not only when goods are imported, transits, (re) exports with a final destination country who has a reputation of demand for counterfeit or pirated goods become a risk indicator for counterfeiting or piracy.

-Nature and quality of the documentation

Unusual printouts of bill of lading and invoices; poor print quality, handwritten or hand-typed invoices on bill of lading or invoices pose a risk. Normally, invoices are generated electronically and are often printed on special paper with the company logo or address pre-printed. Changes on the documents, strikethrough expressions or other corrections, incomplete invoice or bill of lading may be determined as risk indicators for IPR.

Many legal documents contain;

- Telephone / fax number, e-mail address, business registration numbers of the shipper, importer or the manufacturer of the goods
- Sales and Delivery statements; FAS (free along side), FOB (free on board), Net 30 (payment within 30 days)
- Order number or invoice number and date (business world uses invoices with numbers in serial form.)
- Legal invoices payment discount (e.g. 2% discount if paid within 30 days)

Lack of invoices and bill of lading can also indicate high risk. Importers, owners or buyers of counterfeit goods usually try not to use electronic customs declaration and other systems.

-Manufacturer/Consignor and Importer/Consignee Name and Address

- Importer has little or no import history, having customs violations criminal record
- The name of the manufacturer, consignor or importer appears to be fictitious.
- The name of the manufacturer, shipper or importer is incompatible with the trader of the declared goods. Generally, if there is a relationship between the importer, owner or consignee and the exporter or shipper of the goods, it means less risky in terms of IPR.
- The address of the manufacturer, shipper or importer is missing or they can not be verified through telephone directories, internet or similar open sources.

- The manufacturer, shipper or importer uses a mailbox or email address or the recipient is known only by their telephone (mobile phone) number.
- The addresses of the manufacturer, shipper or importer belonging to a famous region in the production of counterfeit and pirated goods.

-Place of Production

If the declared country of origin is a country where the right holder does not allow for production this indicates that the goods may be counterfeit or pirated (however, goods from a non-manufacturing country may be parallel import goods.)

Parts or materials containing a right holder's name or brand which are shipping to a non-manufacturing country, may be counterfeit or pirated.

For instance, original Rolex watches are produced exclusively in Switzerland. Rolex branded watches coming from a country other than Switzerland is questionable.

-Routing of the goods and means of transport

- Goods arriving at a port other than the usual distribution channels of the right holder. Use of routes or distribution that is different from the one specified by the right holder. (While this raises a suspicion that the goods could be counterfeit, it also suggests that the goods could be subject to parallel import.)
- The use of an unreasonable route in the shipment of goods (transshipment) or the presence of disproportionately high transportation costs.

-Declared value of the goods

- Unusually high or low declared value
- Goods insured with very low value.
- If the declared customs value (within the framework of the WTO Value Agreement) includes royalties, licenses or other payments for other property rights, it means less risk of counterfeiting and piracy.
- Goods that are invoiced as "Bulk" or goods that are invoiced by weight instead of quantity. For instance; CDs invoiced in kilograms rather than pieces.

-Size of the shipment

Delivery of unusually high or low quantities of goods depending on the type of goods. For example; a shipment of 20,000 Rolex watches is unusually large.

-Terms of sale/delivery

- Sales terms in the form of "Cash" or "COD" (Cash on Delivery)
- Shipping term in the form of "EXW" (Ex-works)
- Prepaid shipments involve risk.

6.6.2.2. PACKAGING BASED RISK INDICATORS

During the unloading of the goods, the packaging inspection or the inspection of the storage facilities and warehouses can also help Customs officers to detect goods that pose a high risk of counterfeiting. Generally, right holders use high quality packaging material and they pack it neatly. Goods are individually packaged and they are placed in durable boxes labeled with unit numbers, barcodes and quantities.

-Appearance of packaging

- Goods packaged in a way that does not match with the one that right holder uses. (wrapping the entire good with transparent plastic, shipping the CDs in a multi-CD box instead of their own special boxes used for retail sale, without title of the CDs, the artist's name in the boxes)

- If the appearance (size, shape) of the package of the goods is not standard. (For instance; the watches packed in plastic or transparent bags)
- The quality of the packaging or the marks or brands on the package are bad. (Spelling mistakes)

Examples: High quality watches are normally shipped in wooden boxes. Genuine shoes are boxed in pairs and placed in larger cardboard boxes. Clothes and accessories are usually packaged in high quality breathable, plastic bags with warnings printed in different languages and placed in boxes.

6.6.2.3. GOODS BASED RISK INDICATORS

-Quality of the goods

- Goods of poor quality that do not fit the reputation of the right holder.
- Goods shipped without instructions, warranty or insurance documents, or with low quality printed or photocopied instructions for use, warranty or insurance documents.
- The labels, instructions or insurance documents of the goods are not translated or contain typographical errors.

-Labels and marks on the goods

- Missing lot numbers, barcodes, expiration dates or other standard marks such as the place or date of manufacture. Product labels include generally product number, reference or catalog number, facility or factory information, serial or model number.
- Goods bearing the geographical indication, designation of origin of a source, place or region that is not located in the country of manufacture or export.
- Missing marks for trademark or copyright or incomplete trademark or copyright notices
(® for a registered trademark, © for a registered copyright).
- Labels and marks which do not comply with the laws of the country of import or other regulatory standards. (e.g. textiles whose contents or cleaning instructions are not specified; goods whose country of origin is not correctly specified; foods or cosmetics missing the ingredient list).
- Goods and labels that do not conform to the labels and goods produced by the right holder (e.g. watches produced in Switzerland should not be marked with "Made in Japan" or "**Made in China**")

-Product Details

Right holders often attach secret or other details to their products to facilitate identification of counterfeit goods. In such cases, it will be useful to use the product description booklet provided by the right holder or to contact the right holder directly.

Many right holders use details that are difficult to produce, such as holograms, to document the accuracy and authenticity of their products. Real optical discs (CD, CD-Rom, DVD) carry a code called SID. (SID: Source of Identification Code) Guarantee documents accompanying high quality watches carry special identification features such as watermarks or cold stamps.

-Multiple trademarks in one consignment

Consignments containing goods produced by a large number of trademark holders. For instance; computer software produced by different companies within the same shipment,

motion pictures produced by different studios, or sound recordings produced under different labels.

A shipment containing many different brands of handbags or a shipment containing different brands of watches that are not connected with each other.

6.6.3. AVAILABLE TOOLS ON HANDLING IPR CASES

To help enforcement authorities develop their understanding and to assist them in their daily work, multiple organizations provide a series of guides as well as access to key resources. Here you will find a list of tools and databases developed to support enforcement.

- World Intellectual Property Organization (WIPO) Gold WIPO GOLD provides a searchable one-stop gateway to WIPO's global collections of IP information and data. **WIPO's global brand database, WIPO PATENTSCOPE, WIPO's global design database, WIPO Lex** are the online free open sources.
<https://www.wipo.int/reference/en/>
- European Patent Office Database- The European Patent Office database offers free access to more than 70 million patent documents worldwide, containing information about inventions and technical developments from 1836 to today.
<https://www.epo.org/searching-for-patents/technical/espacenet.html>
- European Commission Taxation and Customs Union (DG TAXUD) The indications provided by Taxation and Customs Union can help to identify fakes and other IPR infringing goods.
https://ec.europa.eu/taxation_customs/business/customs-controls/counterfeit-piracy-other-ipr-violations_en
- The International Intellectual Property Crime Investigators College (IIPCIC) is a fully interactive online training facility that aims to equip enforcers with the skills necessary to effectively combat transnational organized IP crime. All law enforcement IP crime investigators including police, customs officers and appropriate regulatory body representatives are able to take the training without charge. The Intellectual Property Rights Enforcement for Customs Officers online training series is developed and maintained by the International Intellectual Property Crime Investigators College (IIPCIC) with the assistance of the World Customs Organization (WCO).
<https://www.iipic.org/>

