



THE ROLE OF LEGAL SCIENCE IN THE PROCESS OF REFORMING INTELLECTUAL PROPERTY SPHERE IN UKRAINE: ACHIEVEMENTS, OBJECTIVES, MISSION

Olena Orliuk,

Doctor of Juridical Science, professor, corresponding member of the NALS of Ukraine, Director of the Intellectual Property Research Institute of the NALS of Ukraine; acting Head of the Department of Intellectual Property of Taras Shevchenko National University of Kyiv

Орлюк О. Роль правової науки у процесі реформування сфери інтелектуальної власності в Україні : досягнення, завдання, місія.

Автор аналізує кроки України у розвитку законодавства у сфері інтелектуальної власності. Крім цього, автор аналізує досягнення Науково-дослідного інституту інтелектуальної власності НАПрН України у розбудові системи інтелектуальної власності України та знайомить читачів з цілями та завданнями його діяльності.

Ключові слова: інтелектуальна власність, освіта, наука, законопроекти, НДІ інтелектуальної власності НАПрН України, реформування законодавства

Intellectual property is an integral part of international trade and global economy. However, since intellectual property rights are private and regional by their nature, the question arises as to whether it is possible to provide effective protection of intellectual property rights during the era of globalization. The rapid pace of international trade, interconnection of economic systems and known consequences of ineffective protection at level of certain national legal systems force countries to rethink the nature and ways to improve protection of intellectual property rights.

The countries are searching for the opportunities to create a favourable climate to attract investments and stimulate economic activity to make it more intensive. For its achievement it is important to create a strong and balanced

intellectual property mode, which should promote commercial and industrial activities in general. In support we can cite the report of the leader of the World Intellectual Property Organization in 2015 «Breakthrough innovation and economic growth», which states that «intellectual property is at the centre of innovative growth of the national economies» [1]. Currently the work of WIPO in the sphere of protection of rights is specified based on the Strategic goal VI, determined during the adoption of the Agenda for development [2]. According to the Strategic goal VI ensuring respect for IP in a sustainable manner is a broad concept, within which security and protection of intellectual property rights shall be performed taking into account the interests of socio-economic development and consumer protection.



European experience can be used as a model while viewing prospects for the development of protection of intellectual property rights. Nevertheless formation of a single European market requires the harmonization of respective national laws of the EU Member States, as well as improving the protection of intellectual property rights at the international level. The importance of the latter is proved by the provisions on the expansion of EU competence in the field of trade-related intellectual property rights in the Treaty of Nice of the EU as of February 26, 2001, which entered into force since February 1, 2003. Protection of intellectual property as an inalienable human right is proclaimed in part 2 of article 17 of the Charter of Fundamental Rights of the European Union. The text of the Charter was not included to the Lisbon Treaty as of December 13, 2007, but its provisions are mandatory. The article 6 of the EU Treaty stipulates that «The EU respects the rights, freedoms and principles set out in the Charter of Human Rights» [3].

For Ukraine, a member of most international treaties in the field of intellectual property, and country working towards European integration in the early 2000s, the issue of adequate protection and security of Intellectual Property rights has a particular meaning. Having concluded in 1994 Agreement on partnership and cooperation with the EU and the WTO after joining in 2008 (which caused application of Agreement on trade aspects of intellectual property rights [4]), Ukraine committed to ensure the protection of intellectual property at the level similar to the EU one.

Association Agreement between Ukraine, of the one part, and the European Union, the European Atomic Energy Community and their Member States, of the other part, was ratified as of September 16, 2014 by the Parliament of Ukraine and the European Parliament [5]; Chapter 9 is devoted directly to the intellectual property. Article 157 of the Agreement defines the main two objec-

tives in this area: a) facilitate the production and commercialization of innovative and creative products in the Parties; and (b) achieve an adequate and effective level of protection and enforcement of intellectual property rights.

Necessity to create conditions for the proper protection of intellectual property is also understood at domestic political level. Sustainable Development Strategy «Ukraine–2020» was approved by the Decree of the President of Ukraine as of January 12, 2015. According to [6], IPR protection is defined as a vector of reform of national security direction. Understanding of the role of intellectual property is also defined in government documents.

Therefore, adequate and effective protection of intellectual property rights relates to strategic areas of reforming of national legislation and law enforcement with regard to European integration vector for development. In this direction substantial role belongs to professionals involved in the process of preparation of the updated legislation.

Such professionals in the country are experts of the Intellectual Property Research Institute of the National Academy of Legal Sciences of Ukraine, which recently celebrated its 15th anniversary [7]. Today it is recognized as a national centre of expertise in the field of intellectual property; it deals not only with the fundamental and applied scientific developments concerning law and economics of intellectual property, but also with the direct practice. Such combination of practical experience and theoretical research makes it possible to perform the tasks efficiently.

At this stage, Ukraine is at the point where legislation on copyright and related rights, in the field of industrial property shall be revised and new requirements and obligations shall be applied that are specified in the Association Agreement of Ukraine with the EU. Existing problems shall be also taken into account in the process of legislation re-



forms: ones associated with poor quality of protection documents, patent trolling phenomenon, and possibility of administrative appeal against protection documents, decrease of the load of the court system and so on. The country shall gradually introduce alternative methods of dispute settlement in order not to settle disputes solely in court.

Within each of these areas the experts of our Institute together with the specialists from the Ministry of Economic Development and Trade of Ukraine (hereinafter referred to as MEDT), national system of intellectual property protection, representatives of professional environment in this area are actively working on a comprehensive change of legislation in the field of copyright, industrial property, protection of intellectual property rights and so on.

An institutional reform of the national system of intellectual property protection is performed alongside with legislative reforms in Ukraine. Thus, the Institute involves the working group bringing together representatives of public authorities, patent office, professional institutions in the field of intellectual property, public organizations, etc., aiming at drawing of a draft law which will determine the principles of the National System of Intellectual Property Legal Protection. According to the Concept of reforming of this sector [8] approved by the Government of Ukraine, development and implementation of state policy in the field of intellectual property is the responsibility of MEDT. The National Office of Intellectual Property is formed on the basis of the State Intellectual Property Service being liquidated and the Ukrainian Intellectual Property Institute (Ukrpatent). Nowadays the working group is engaged in issues of determining the legal status and tasks that must be solved by national system of legal protection of intellectual property in Ukraine.

Joint efforts will hopefully lead to the legislative changes in the field of intellectual property, significantly enhance the

protection of intellectual property, and create a much better basis for the compliance with the rights of owners, to a significant reduction in counterfeiting, to cease the mass violations of intellectual property rights on the Internet.

The Institute pays much attention to the issue of high quality legislative support. Since its establishment until now our irrevocable priority refers to researches, accumulation of unique knowledge and their continuous implementation, assistance to citizens, legal entities and state in solving practical issues related to creation and use of intellectual property.

The range of our scientific and practical interests includes among others traditional areas of intellectual property — copyright, related rights, trademarks for goods and services, geographical items, patents, utility models, industrial designs — but not limited to them. During 15 years the Institute performed 24 developments by fundamental and applied themes.

The results of Institute's activity cover more than 300 draft legal acts developed by the Institute independently or with involvement of other entities to perform development or review work. Legal examination of draft laws and other legal acts, development of recommendations and proposals is a form of implementation of the main results of our activity. Now the focus in legislative activities is the European integration towards the renewal of national legislation in the field of intellectual property.

This is due to the challenges faced by Ukraine. In particular, specialists of the Institute are actively involved in the activity of MEDT and other ministries (including the Ministry of Agriculture, Ministry of Health), involved in drawing the draft laws aimed at implementation of the Association Agreement between Ukraine and the EU. The developing laws include:

- Draft law «On amendments to some legislative acts of Ukraine relating to improvement of legal protection of



intellectual (industrial) property» (patent trolling)

- Draft law «On amendments to some legislative acts of Ukraine relating to enforcement of liability and protection of rights in the sphere of intellectual property)
- Draft law «On amendments to some legislative acts of Ukraine relating to improvement of legal protection of geographical items»
- Draft law «On amendments to some legislative acts of Ukraine relating to improvement of protection for layout of a semiconductor product» (integrated microcircuits — masswork)
- Draft law «On amendments to some legislative acts of Ukraine in the field of copyright and related rights»
- Draft law «On amendments to some legislative acts of Ukraine relating to improvement of protection of inventions (utility models)»
- Draft law «On amendments to some legislative acts of Ukraine (relating to improvement of protection of intellectual property rights)».

The agenda includes the issue of the development of amendments to the Criminal Code of Ukraine and the Customs Code of Ukraine.

Ad hoc committee of the Verkhovna Rada of Ukraine on Science and Education approved the IT environment draft law amending copyright and related rights in respect of the allocation of rights for the service objects of intellectual property rights.

However, in addition to specific legislation on intellectual property, changes shall be made also in the Civil Code of Ukraine, where volume 4 is dedicated to intellectual property rights. Intellectual property shall be recognized as a commodity in the Commercial Code of Ukraine. In addition, there shall be arranged the system of balance and off-balance accounting of intellectual property. It is also necessary to review the methodology for assessing the value of intangible assets, adopted by the State

Property Fund of Ukraine more than ten years ago. Activity of the Institute supports these findings. As a certified evaluator the Institute is involved in assessment and audit of intellectual property. Specifically, certified evaluators developed over 60 assessment findings on proprietary rights for intellectual property, customers of which often were the leading national brands.

As for the practical component of the Institute, the first is the provision of oral and written consultations on issues relating to law and economics of intellectual property, civil, civil procedure, business, finance right and so on. Specialists of the Institute are involved to the registration of rights for works, objects of patent right, means of individualization, acting also as patent attorneys. In addition, during the years of work our experts prepared more than 100 scientific expert reports upon request of higher and central government authorities, carried out about 300 scientific researches ordered by public and private organizations and over 470 researches ordered by regional entities, including local self-government entities and local authorities. This experience is useful in the process of reforming of the intellectual property protection system. After all, now Ukraine initiates the issue of creation of a body to combat piracy and the possibility to attract the Anti-Corruption Bureau to strengthen the protection of intellectual property rights. Ensuring control over royalties and license fees shall be entrusted to the authorities of the State Fiscal Service of Ukraine, and thus there shall be a high quality financial legislation, which will properly reflect intellectual property issues.

The leading role in the practice of the Institute refers to the judicial and special studies of intellectual property. During the past period of time the legal experts certified by the Ministry of Justice of Ukraine carried out more than 1 700 research works. Our experts, including experienced lawyers and advocates repre-



sent the interests of entities of intellectual property rights within judicial and non-judicial settlement of disputes; represent interests of entities of intellectual property rights in case of illegal use of intellectual property, as well as at unfair competition in administrative and judicial bodies.

Thus nowadays this experience will be useful for the High Specialized Court for Intellectual Property [9] founded in Ukraine, which will start its activities in 2017.

Within the judicial reform being implemented in the country, there are significant alterations proposed to the civil and economic process applying directly to the protection of intellectual property. In particular, the Council for Judicial Reform presented the Draft amendments to the Civil and Commercial Procedure Codes, the Code of administrative proceedings [10]. Alterations include expansion of court remedies and evidence forms (including electronic evidence as the independent means). Protection of rights shall not be restricted by the manner specified by law or contract, but involve also another way, effectively protecting such rights. Effective mechanisms are offered to ensure the claim and evidence (including expanding the ways the claim provision, widely used counter injunction, compensation for damage caused by unreasoned claim or evidence). The court will perform the role of arbitrator only and will never act as investigator.

There are also proposed changes in order to simplify and accelerate the proceedings of simple and less significant cases; to ensure thorough preparation and review of complex cases; to ensure the timeliness of the case and legal certainty; introduction of «electronic court» and so on. In the course of reform there are the proposed mechanisms to prevent abuse of procedural rights. The latter involves prevention from «clone claims» and other manipulation tools for cases distribution, deliberate prolongation of the case, manipulation of jurisdiction

and effective responsibility measures for abuse of rights. It is extremely important for intellectual property rights, because the disputes of intellectual property infringement can be settled during the long term (for years). In this sense we feel extremely positive to create a specialized court for intellectual property issues.

Moreover, the countries all over the world have a broad experience in this field. Typical samples of a special patent court are used in the United States of America, Austria, Germany, Sweden, Great Britain, South Korea, Taiwan and others. At the beginning of 2004 the European Commission proposed to found a patent court to settle disputes on intellectual property; it starts its activities now.

Effective, qualified settlement of dispute arising from infringement of intellectual property rights is crucial for Ukraine. After all, nowadays legal procedure has a prevailing role in the procedures relating to protection of the rights. Over the past decade the number of passed judgments is about 18 000. And a number of such disputes is growing.

To protect intellectual property rights a court shall implement tribunal and international commercial arbitration. In addition, mediation shall take at last its place. Country faces overdue need for active use of ways alternative to judicial one to protect intellectual property rights.

In addition, strengthening the role of the Antimonopoly Committee of Ukraine is essential in the process of suspension of unfair competition, inherent to the intellectual property. In this context the country shall also benefit from the experience of European countries and may be based on European directives in this area.

Ukraine has to aim at participation of its representatives in working groups of the European Committee on monitoring intellectual property rights infringement. Active cooperation shall be arranged with law enforcement agencies, including Europol, customs, special European organizations established to combat infringements of intellectual property rights.



However, in the future the decisive role in improving the protection of intellectual property, in our opinion, should be played not only by the state government (legislative, executive and judiciary), but also to science and education.

Role of legal science is extremely important in this process. Relevant directions for finding ways to protect intellectual property rights are reflected in the Priority areas of legal science development in 2016–2020, approved by the National Academy of Legal Sciences of Ukraine in March 2016 [11]. Experts of our Institute actively participated in their development.

Decisions taken at parliamentary and committee hearings on intellectual property for the past 15 years, were prepared with participation of specialists of the Institute. Most of the directions of reforms in this area as set out in numerous fundamental and applied researches of the Institute [7, 12]. Today, according to the Priority areas of legal science development the Institute is developing a strategy for the development for the next five years, taking into account the underlying problems requiring solving at the level of national policy. For example, the direction of legal maintenance of national security and international law stipulates the drawing of the draft law «On legal protection of secret inventions», which will include study of the experience of NATO countries, offer incentive mechanisms to encourage the creation and use of secret inventions and protection of the rights of inventors.

Currently the Institute continues working on a number of laws, including the draft law relating to issues of legal protection and enforcement of intellectual property rights in the field of national defense. Thus, it is offered to make amendments and alterations to the Commercial Code of Ukraine, Laws of Ukraine «On the State Defense Order», «On the assessment of property, property rights and professional valuation activities in Ukraine», «On state control over

international transfers of military and dual-use» and so on.

In addition, within academic pursuits experts of the Institute focus their efforts upon scientific and practical developments in intellectual property field, coupled with issues of human rights; national security and defense; IT business; biotechnology, biosafety, green ecology; energy-saving technologies and so on.

From the start of its activity the Institute made efforts to create a national school of intellectual property rights. Today the results of scientific work of the Intellectual Property Research Institute include more than 50 monographs, 20 manuals and more than 20 comments and guidelines. Our Institute prepares the thesis for the degree of Doctor of Science in Philosophy (PhD) and Doctor of Science.

Currently, there are reasons to talk about intellectual property right as a shaped phenomenon (not just as an institution of civil law). Intellectual property is now perceived as a complex legal area, including knowledge of the history, theory of law, civil, criminal, administrative, financial, tax, customs and many other legal aspects. In fact, a scientific platform has been created for 15 years, gathering supporters of this trend. Over the years we have established close cooperation with all scientific and educational centres of Ukraine and many European (Polish, Slovak, German, and Baltic) institutions specializing in this area.

One of the basic problems for Ukraine is the building of legal culture of «fair user». Achieving of this objective shall be one of the educational tasks. It shall be taken into account at formation of new educational standards, including intellectual property ones.

Specialists of the Institute are involved to organization or teaching master programs on intellectual property throughout Ukraine. Today Intellectual Property education is available in Kyiv, Kharkiv, Dnipro, Odesa, Lviv, Sumy etc. It may refer to a degree of legal, econom-



ic, technical direction, with a focus on creativity, invention, law, management. Ukraine has founded special master programs on intellectual property, taking into account the experience in teaching of intellectual property disciplines in major European centres, including Munich, Turin, Bilbao and others.

Thus, Taras Shevchenko National University of Kyiv founded the Department of Intellectual Property three years ago. The department has three accredited master's programs: 1) for lawyers it is «Intellectual Property Rights»; 2) interdisciplinary master's program «Intellectual Property» (which includes law, economics, management of intellectual property disciplines for people with different education); 3) master's program «Intellectual Property» accredited jointly with the Baltic University — Mykolas-Romeris University (double diploma of Ukraine and the EU, in English). However, at this time less than 100 experts in the field of IP graduate in Ukraine per year. It absolutely does not reflect the real needs of the state, as it needs not just lawyers.

Institute initiated and conducts during the third consecutive year the Summer School on Intellectual Property in cooperation with National Taras Shevchenko University of Kyiv and the State Intellectual Property Service of Ukraine, which invite leading experts in this field. Ukraine actively conducts national student competitions and contents on intellectual property; for many years the Institute is also involved in their arrangement.

It should be noted that one of the activities of the Institute since its establishment is spreading knowledge on intellectual property in Ukraine. Today the Institute does its best to meet the needs of society for information on various aspects of law and economics of intellectual property. Specialists of the Institute are involved in educational projects aimed particularly at increasing legal awareness of citizens.

In this relation, we believe that one of the main objectives of science and education is systematic and continuous conduction of various scientific and educational activities, programs and active work with the media to expand the cultural level of the population at 180 degrees — to the direction corresponding to the view of the civilized world in relation to intellectual property rights. The international community is actually interested in adequate security and even more, in adequate protection of intellectual property rights: to stop infringement, to ensure royalty payment, to suspend sites with illegally produced items, to ensure that counterfeit is not the norm no more. If we try to make the country attractive to foreign investment, we have to ensure the appropriate level of protection. No one expects the changes to effectively start operating within six months, but the world shall see that we are making certain steps.

We consider the popularization of knowledge on intellectual property as the mission of our Institute. We are working on a strategy of national policies on intellectual property. Efforts are made to introduce in Ukraine the policy aimed at developing the creative economy, creativity and inventiveness. We believe that educational programs shall promote basic questions of intellectual creativity in mass media, on TV and radio. Mass media should present the achievements of science, because we have them and the problem is only their promotion and popularization. It shall be noted that it is much easier to work with the younger generation in Ukraine. After all, it is not necessary to argue with the youngsters that intellectual property rights shall also be respected. State «intellectual property» policies had been implemented for 20–30 years in developed countries of the world, countries that made economic breakthroughs. In our country, this policy also has its time lag. We have to act without waiting for immediate results, but seeing the ultimate goal ahead. ♦



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Орлюк О. Роль правовой науки в процессе реформирования сферы интеллектуальной собственности в Украине: достижения, задачи, миссия. Автор анализирует шаги Украины в развитии законодательства в сфере интеллектуальной собственности. Помимо этого, автор анализирует достижения Научно-исследовательского института интеллектуальной собственности НАПрН Украины в развитии системы интеллектуальной собственности Украины и знакомит читателей с целями и задачами его деятельности.

Ключевые слова: интеллектуальная собственность, образование, наука, законопроекты, НИИ интеллектуальной собственности НАПрН Украины, реформирование законодательства

Orliuk O. The role of legal science in the process of reforming intellectual property sphere in Ukraine: achievements, objectives, mission. The author analyzes the steps taken by Ukraine in the development of legislation in the field of intellectual property. In addition, the author analyzes the achievement of the Intellectual Property Research Institute of the NALS of Ukraine in the development of intellectual property of Ukraine and acquaints readers with the goals and objectives of its activities.

Keywords: intellectual property, education, science, laws, Institute of Intellectual Property NALS of Ukraine, law reform