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EU-UKRAINE ASSOCIATION AGREEMENT: SOME PROVISIONS OF INTELLECTUAL PROPERTY PROTECTION

The article examines the provisions of the Association Agreement between Ukraine and the European Union, Chapter 9 of which contains the requirements and standards on the protection of intellectual property rights. In article analyzes the norms of civil legislation of Ukraine, examines the ways of its improvement, and describes the steps taken in this direction in Ukraine. In article from the position of legal doctrine are analyzed the concept of regulation the information relations, an integral part of which are relationship of intellectual property.

The article concludes that the formation of the current legislative framework regulation of intellectual property involves bringing national legislation in line with international standards and requirements of EU directives, realization norms of the Association Agreement with the EU.

Key words: Association Agreement, license agreement, innovations, information, intellectual property, conflict, reform, civil legislation.

Implementation of innovative model in Ukraine is not possible without creation of a modern system of regulatory relations in the area of intellectual property protection that will ensure protection of subjects of creative work (such as authors, artists and inventors), guaranteeing observance of their rights and protection against possible violations.

The first steps in improving of legal mechanism in the usage of results of intellectual and creative activity were laid in the Civil Code of Ukraine adopted in 2003, which not only greatly expanded the scope of intellectual property rights, but also significantly enriched its substance. In the Civil Code of Ukraine¹ relations in the field of intellectual property were first fixed in a separate structural part (4 book "Intellectual Property Rights"), which indicates their importance for private law.

Further improvement of regulatory relations in the field of intellectual property aimed to implement the norms of the Civil Code in special laws, regulations, to creation the reliable mechanisms of implementation and protection of their subjects. Also is necessary to bring existing normative material in accordance with the general concepts and approaches of Civil Code of Ukraine with regard to the Association Agreement² concluded between Ukraine and the European Union³, Chapter 9 of which (Articles 157-252) contains requirements and standards related with the intellectual property rights.

Analyzing the changes that have occurred in the field of civil law, which regulates the relations of intellectual property, we may conclude that in fact since the adoption of the Civil Code of Ukraine the domestic legislation on intellectual property was not changed. Civil Code of Ukraine did not become the impetus that would be able to update an appropriate legislative framework, and many of its rules (some of which have truly innovative nature), and have not received their specification at the level of special laws and regulations.

National scientists have repeatedly emphasized the need to reform the current legislation on intellectual property.

The purpose of the article is to examine the contradictions and conflicts of the current legislation of Ukraine regulating relations in the field of intellectual activity, analysis its development and formulation of conclusions and proposals aimed at improvement of civil legislation in the field of intellectual property rights.

In Ukraine changes in legislation on intellectual property should include rejection of Soviet legal approaches and application of the provisions of Soviet legislation, both directly and in the form of certain norms Civil Code of Ukraine, which is based on the Soviet legal tradition.

¹ *Цивільний кодекс України 2003* (Верховна Рада України). *Відомості Верховної Ради України*, 40, 356.

² Hereinafter – Agreement.

³ *EU-Ukraine Association Agreement. European External Action Service.*

<http://eeas.europa.eu/ukraine/assoagreement/assoagreement-2013_en.htm> (2014, December, 29).

An example of existence of the Soviet norms in modern Ukrainian legislation may be "Provision about the Firm" approved by RNK in 1927¹. For a long time it was a major act of legislation in the field of trade names (firms). Before the adoption of Civil Code of Ukraine and Commercial code of Ukraine in Ukrainian legislation there was not special legal regulation in this area. In accordance with the Act of Verkhovna Rada of Ukraine on 09.12.1991 "On the order of interim actions on the territory of Ukraine some acts of the USSR"² "Provision about the Firm" 1927. kept in force to the extent not contrary to the Constitution and laws of Ukraine.

At one time the Presidium of the Supreme Economic Court of Ukraine in para.6 Recommendations of 10.06.2004 "About some Issues of disputes related to the protection of intellectual property rights" noted that due to the entry into force of the Civil Code and Commercial Code of Ukraine to relations arising from 1 January 2004 "The provision about the Firm" of 1927 is not applicable.

The new approach of the Supreme Economic Court of Ukraine to address this issue was described in para.1.6. Resolution №12 from 10.17.2013 p.³ which states that after the entry into force of the Civil Code of Ukraine and Commercial Code of Ukraine in matters of intellectual property rights for trade names, commercial courts may apply "The provision about the Firm" 1927.

We should admit that these provisions are one of the oldest legal acts, which may apply in Ukraine for regulation of intellectual property. It was signed in 1927 and consists of 14 items.

In the Soviet period there were no needs of regulation of intellectual property, this can explain gaps in legislative regulation. But in modern conditions of market economy, the rule of law in civil society, it seems debatable position of Plenum of the Supreme Commercial Court, which despite the regulation of commercial names in Chapter 44 of the Civil Code of Ukraine and art.159 of Commercial Code of Ukraine, still points on the possibility of application of this Provision 1927. In modern legislation and judicial practice, probably, we should reject of this vestiges of the past.

The other provisions of law, which has Soviet origin and does not fit into the modern system of regulatory relations in the field of intellectual and creative activity and disposition of intellectual property rights are seen in art.1111 Civil Code of Ukraine. Part 1 of Art.1111 of Civil Code of Ukraine contains provisions that "authorized authorities or creative unions may approve model license agreements."

We should note that conclusion of typical agreements are provided by art.630 of the Civil Code. The typical agreement is a standard contract, which is approved by the competent authority with pre-defined conditions. The model agreement should be distinguished from sample agreement.

In legal literature is also noted that at the conclusion of certain types of contracts standard forms may be applied; for example, the model agreement on drafting land for allotment of land, approved by the Cabinet of Ministers of Ukraine⁴. Cabinet of Ministers approved typical land lease agreement⁵. Standard form contracts provide the same design of contractual relations.

Typical forms of contracts concluded in areas related to public interest or for the regulation of the relations that are under special state protection (land, education, public rental property, etc.). Terms of model contracts approved by the central executive authorities and are binding on the parties to the relevant contractual relationship.

In view of the above, provisions of Art. 1111 Civil Code of Ukraine seem unclear, according to which not only authorized agency, but also creative unions (non government organizations) have the right to approve the terms of standard contracts that are binding on the parties of contractual relations, including those who are not members of such unions.

For the protection the rights and interests of authors, artists, inventors and other subjects of intellectual property, authorized agencies (primarily State Service of Intellectual Property as a central

¹ *Постановление о введении в действие положения о фирме 1927 (ЦИК СССР, СНК СССР).*

Официальный сайт Верховного Совета Украины. <<http://zakon4.rada.gov.ua/laws/show/n0002400-27>> (2014, December, 29).

² *Постанова про порядок тимчасової дії на території України окремих актів законодавства Союзу РСР 1991 (Верховна Рада України).* *Відомості Верховної Ради України*, 46, 621.

³ *Постанова про деякі питання практики вирішення спорів, пов'язаних із захистом прав інтелектуальної власності 2012 (Пленум Вищого господарського суду України).* *Вісник господарського судочинства*, 6, 57.

⁴ *Типовий договір про розроблення проекту землеустрою щодо відведення земельної ділянки 2004 (Кабінет Міністрів України).* *Офіційний вісник України*, 10, 127.

⁵ *Типовий договір оренди землі 2004 (Кабінет Міністрів України).* *Офіційний вісник України*, 9, 30.

executive body in the field of intellectual property) may approve the standard forms of licensing agreements. In particular, the Ministry of Education and Science of Ukraine¹ approve sample contract on the distribution of property rights of intellectual property, which were created in office or by the order of employer. This sample of contract has an advisory nature, so should be emphasized, that the current legislation does not regulate the standard license agreements.

However, the formulation of Art.1111 Civil Code of Ukraine becomes quite clear if we turn to the historical aspects of legal regulation of agreements in the field of copyright.

The Art.503 of Civil Code of the Ukrainian SSR contained a provision that "typical copyright agreements may be approved by the Council of Ministers of the Ukrainian SSR or on behalf of the relevant departments and creative unions".

We may allow the existence of standard forms of contracts in areas related to public interest under special state protection, but within the contractual relationship of intellectual property, the principle of freedom of contract are combined with the constitutional principle of the impossibility of restricting freedom of creativity.

The wording of Art.1111 of the Civil Code of Ukraine concerning standard forms of license agreements should be removed or at least, should be changed in terms of the possibility of creative unions to approve the form of model contracts. As a non-government organization such structures cannot approve the form of contracts, the terms of which are mandatory for all participants of contractual relations, including those who are not members of such creative unions.

The others provisions of legislation, which has the Soviet origin and does not meet the modern system of regulatory relations of intellectual property are the rules of Chapter 41 of the Civil Code of Ukraine about the rationalization propositions.

It should be emphasized that in the Soviet period rationalization was the most common and most accessible form of technical work, aiming at the improvement of the technical, technological or organizational decisions. The procedure of legal protection of rationalization propositions was very simple to its author and does not need the additional state registration, examination, processing the application or granting the patent. Thanks to this features rationalization propositions were very popular in the Soviet times.

In modern market conditions, freedom of establishment and freedom of creativity the inventors have an alternative ways of protection of their results of technical activities. New technology may be patented as an invention or as an utility model. However, only patent holder gets exclusive of protection of intellectual property. The mode of protection of rationalization propositions provides the payment of equitable remuneration to the author and securing intellectual property rights for the usage of technology to the legal entity.

Probably due to these factors in addition to Chapter 41 of the Central Committee of Ukraine, which consists of four articles (st.481-484) protection of rationalization propositions are made only in accordance with the Temporary Regulations on the legal protection of industrial property and rationalization propositions in Ukraine approved by the act of the President of Ukraine on 18 September 1992 p. № 479/92². According to the decree of the President of Ukraine of 22 June 1994 p. № 324/94 Temporary Regulations was rejected in the part of protection the industrial property.

So today there is a paradoxical situation in which one of the oldest regulations in the area of intellectual property in Ukraine with the name "Temporary Regulations ..." is one of the most tenacious in the national legislation about the protection of results of intellectual and creative activity.

Improvement of regulatory relations in the field of creative works provides detailed provisions of the Civil Code level laws and regulations create reliable mechanisms for implementation and protection of the rights of their subjects. It is necessary also to bring existing normative material in accordance with the general concepts and approaches, the Civil Code of Ukraine with regard to the Association Agreement concluded between Ukraine and the European Union, which contains in Chapter 9 unit 4 the requirements and standards for the protection of intellectual property rights.

¹ *Наказ про затвердження зразків документів 2004 (Міністерства освіти і науки України). Бізнес - Бухгалтерія. Право. Податки. Консультації. Збірник систематизованого законодавства, 2006, 3.*

² *Указ про затвердження Тимчасового положення про правову охорону об'єктів промислової власності та раціоналізаторських пропозицій в Україні 1992 (Президент України). Інтелектуальна власність в Україні: правові засади та практика. Київ: Видавничий Дім "Ін Юре", 212-215.*

The intellectual Property are protected by the provisions of the Chapter 9 of Division IV of the Agreement, consists of 96 articles (Articles 157-252) from 486 Articles of Agreement, which demonstrates the importance of protection the intellectual property rights to the European Community.

The provisions of the Agreement are intended to complement and to clarify the rights and obligations of Ukraine under the Agreement on Trade-Related Aspects of Intellectual Property Rights (hereinafter - the TRIPS Agreement)¹ and under other international agreements on intellectual property.

The scope of intellectual property rights within the meaning of the Agreement covers both traditional rights to the results of intellectual activity: copyright, relating rights, patents, industrial designs, trademarks, trade names, topographies of integrated circuits, geographical indications, varieties plants and extends to the protection of confidential information and unfair competition. According to the national legislation confidential information and unfair competition do not directly belong to the results of intellectual property. Separately, emphasizes the spread of legal protection on the inventions in biotechnology, protection of genetic resources, traditional knowledge and folklore.

The text of the Agreement is widely used a special terminology (such as "order public" - art. 221, "mutatis mutandis" - art. 232, "sui generis" - art. 229). Overall, the norms of Agreement are written by a difficult language with a large number of banquet rules and exceptions. This is not characteristic to the provisions of national legislation in the field of intellectual property.

Taking into account the requirements to the volume of this publication, in this article will be considered the most important provisions of the Agreement regarding to the protection of intellectual property rights, which require additional regulation in Ukrainian national legislation.

In the field of copyright and related rights the Parties of Agreement confirmed performance of its obligations under major international conventions (International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (1961). Berne Convention for the Protection of Literary and Artistic Works (1886, amended in 1979), the World intellectual Property Organization Copyright Treaty (1996), the WIPO Performances and Phonograms Treaty (1996).

The Agreement is set that the copyright in a literary or artistic work are protected during the life of the author and 70 years after his death and related rights in the period of 50 years from the date of performance or recording the phonogram.

Specific rules Agreement, which have to be implemented into national law, is the requirement for the protection of critical and scientific publications which have become common property. The maximum term of protection of such rights is 30 years from the date when the work was first legally published.

Ukraine also pledged to provide adequate legal protection against the circumvention of any effective technological measures implemented by the person (Art. 176) and to ensure the protection of copyrights management information (art. 177).

Additional requirements established by the Agreement are about the regime of legal protection of computer programs. Settling by Berne provisions on protection of computer programs as literary works, the rules of the Agreement specify some aspects of such protection: the term "computer program" within the meaning of the Agreement covers all previous research materials; protection are provided by the mathematical expression of a computer program of any shape; ideas and principles that underlie any element of a computer program, including its interface are not protected; protection of computer programs are original in the sense that they are the product of the author's intellectual creation.

The relations for the establishment of software during the execution of the employment contract are separately regulated in the Agreement.

Where a computer program is created by an employee in the execution of his/her duties or following the instructions given by his/her employer, the employer exclusively shall be entitled to exercise all economic rights in the program so created, unless otherwise provided by contract. In this context, we note that the provisions of Art. 429 Civil Code Ukraine, which establish a different procedure for distribution of intellectual property rights during the performance of job duties, should be changed according to formulation of art.181 of Agreement.

In the field of protection of trademarks, provisions of the legislation of Ukraine in general conformity with the standards and protection established by the Agreement. However, the rules of art.197 and 198 provide for the possibility of cancellation of registration of the trade mark if, within a continuous period of

¹ Угода про торговельні аспекти прав інтелектуальної власності 1994 (Угода ТРІПС). Офіційний вісник України, 84, 503.

five years the trade mark has not been put into use in the relevant territory for the goods or services for which it is registered, and there are no proper reasons for non-use. Currently, the Law of Ukraine "On Protection of marks for goods and services"¹ establishes a three-year period of non-use of the mark, which may be a reason for the termination of the certificate. The provisions of the Agreement also establish the additional terms of inability to cancel the trademark: if within five years of the date of completion of the registration procedure, the proprietor has not put a trade-mark to genuine use in connection with the goods or services in respect of which it is registered in the relevant territory, or if such use has been suspended during an uninterrupted period of five years, the trade-mark shall be subject to the sanctions provided for in this Sub-section, unless there are proper reasons for non-use.

Particular attention the Agreement pays for the Protection of geographical indications. Ukraine, signing the Agreement, should provide the legal protection for geographical indications of considerable numbers of European producers, mentioned in Annexes XXII-C (geographical indications for agricultural and food products) and XXII-D of the Agreement (geographical indications for wines, flavored wines and spirits).

In the Agreement also were recorded a 10-year transition period for the protection of geographical indications of the European Union such as Champagne, Cognac, Madera, Porto, Jerez, Armagnac, Tokaj and 7-year period for the protection of geographical indications, for example, such products as Parmigiano-Reggiano, Roquefort and Feta. Products produced and labeled in accordance with national legislation of such geographical indication after the entry into force of the Agreement and to the expiration of this period can be sold in the country of origin until they run out of stock.

In the field of patent law agreement delineates the category "patent", used to refer to inventions, including inventions in biotechnology and the term "industrial design", which, although is protected by patents, but according to the provisions of the Agreement is independent result of intellectual activity (division 4 Chapter 9 of the Agreement).

Mode of legal protection of designs, which is set by the Agreement is different from that required by the national legislation of Ukraine. First of all, the terms of patentability of industrial designs in addition to novelty also includes an individual level.

An industrial design is considered new if no identical industrial design has been brought to the public. Industrial design is one that has an individual character if the overall impression it produces on the informed user differs from the overall impression that this user has on any other industrial design, brought to the public. In assessing of individual character takes into account the degree of freedom of the designer in developing the industrial design (Art. 213 of the Agreement).

The Agreement provides legal protection to both registered and unregistered industrial designs that meet the conditions of legal protection. The duration of protection of industrial designs is at least five years. Holder may renew the term of one or more of the five-year period to the deadline, which is 25 years from the filing date.

The term of protection of unregistered industrial design is at least three years from the date on which the sample was brought to the public. We should admit that the current legislation of Ukraine provided legal protection to registered industrial design maximum term of 15 years (Art. 465 CC of Ukraine). Therefore, this part should also be amended to the Civil Code of Ukraine and the Law of Ukraine "On the Protection of Industrial Designs"².

In the field of patent law the main provisions of the Agreement relating to the protection of inventions in the field of Health and biotechnology.

The agreement contains a commitment to provide an additional period of plant protection, protection of medicines, which are the subject to administrative authorization procedure (additional protective certificate).

Ukraine ensures the protection of inventions in biotechnology accordance with its national patent law. This inventions that are new, have an inventive step and are subject to industrial application even if they concern a product consisting of biological material or a process by which biological material is produced, processed or used. Not subject to patenting, plant varieties and animal breeds; the human body in

¹ Закон України про охорону прав на знаки для товарів і послуг 1993 (Верховна Рада України). Відомості Верховної Ради України, 1994, 7, 36.

² Закон України про охорону прав на промислові зразки 1993 (Верховна Рада України). Відомості Верховної Ради України, 1994, 7, 36.

various stages of formation and development and the simple discovery of its elements, including the sequence or partial sequence of genes.

Some provisions of the Agreement are related to the protection of plant varieties, topographies of semiconductor products and Traditional Knowledge and Folklore. In particular according to Art.229 of Agreement the Ukraine undertakes to respect, preserve and maintain knowledge, innovations and practical heritage of indigenous and local communities embodying traditional lifestyles that meet conservation and prolonged use of biological diversity.

A significant part of the Agreement's is dedicated to the protection of intellectual property rights, including civil measures, procedures and remedies, liability of providers and other provisions.

The Agreement states that all procedures and precautions should be honest and fair and should not be overly complicated or costly, or entail unreasonable terms or undue delay.

Agreement also specifies the concept of "damages" for violation of intellectual property rights. In determining the losses should be taken into account all relevant aspects, including the negative economic consequences, including lost profits incurred by the injured party, any unfair proceeds infringer. Alternatively, in determining the amount of loss can be considered royalty payments or fees that would be incurred if the offender has applied for authorization to use the disputed intellectual property.

We should note that the possibility of determining damages for infringement of intellectual property rights in the form of possible royalties are not expected by legislation of Ukraine. Therefore, in this aspect should also be made the relevant amendments to the provisions of national legal acts of Ukraine.

On the bases of analyze of main provisions of the Association Agreement concluded between Ukraine and the EU in terms of protection of intellectual property, we may conclude that in general the legislation of Ukraine in the field of intellectual property meets the standards of protection, international treaties and Association Agreement.

The formation of the current legislative framework regulation of intellectual property involves bringing national legislation in line with international standards and requirements of EU directives, realization norms of the Association Agreement with the EU. When you update the legislation on intellectual property is also important to reject of Soviet legal approaches and application of the Soviet law.

A significant number of norms of the Agreement require its implementation by amending Book 4 of the Civil Code of Ukraine and by updating legislation for the protection of intellectual property. These changes should relate to improvement of the legal protection of research and critical works, computer programs, databases, changes in the legal regime of industrial designs, ensuring the protection of inventions in biotechnology and the protection geographical indications of food and wine products.

The solution to these problems of legal regulation of intellectual property is a promising task of the national legal system that should be urgently and effectively solved.

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