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TRANSFORMATION THE SYSTEM OF PROTECTION OF INTELLECTUAL PROPERTY RIGHTS IN THE CONTEXT OF ADMINISTRATIVE AND JUDICIAL REFORMS

The article explores the conceptual basis for reforming the system of legal protection of intellectual property in Ukraine and the norms of the current legislation regulating relations in the protecting the rights to the results of intellectual activity. The provisions of the legislation of Ukraine are analyzed, the ways of its improvement are detailed, the steps taken in this direction in Ukraine are described. Within the scope of the subject of the study, it is noted that there are problems in the regulatory regulation of intellectual property relations, different contradictions between the provisions of special laws on intellectual property and the norms of the Civil Code of Ukraine, conclusions are formulated on improving the national system of legal protection of intellectual property.
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Implementation of innovative model in Ukraine is not possible without the creation a modern system of regulatory relations in the area of protection the intellectual property that would 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 the legal mechanism in the usage of results of intellectual and creative activity were laid in adopted in 2003 the Civil Code of Ukraine, which not only greatly expanded the scope of intellectual property rights, but also significantly enriched its substance. In the Civil Code of Ukraine[1] relations in the field of intellectual property were first fixed in a separate structural part (4 book "Intellectual Property Rights"), which indicates their importance to private law. Now 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 Agreement[2] concluded between Ukraine and the European Union (hereinafter – Agreement), Chapter 9 of which (Articles 157-252) contains requirements and standards related with the intellectual property rights.

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

One of the areas of reforming the judicial system of Ukraine is the deepening of the specialization of judges and creation the separate judicial body – the High Court on Intellectual Property. On June 2, 2016, the Verkhovna Rada of Ukraine adopted amendments to the Constitution of Ukraine and the Law of Ukraine "On the Judiciary and Status of Judges", which initiated the creation of the High Court

[1] *Цивільний кодекс 2003* (Верховна Рада України). *Офіційний сайт Верховної Ради України*. <http://zakon3.rada.gov.ua/laws/show/435-15 > (2018, March, 06).
[2] *EU-Ukraine Association Agreement 2014* (Угоду ратифіковано із заявою Законом № 1678-VII від 16.09.2014.). <http://ukraine-eu.mfa.gov.ua/en/page/open/id/2900> (2018, March, 06).

on Intellectual Property[1], the decree on its creation was signed by the President in September 2017[2]. At present, the process is continued the forming the personnel of such judicial body, determining the scope of its powers and fixing the regulation of the legal basis of its activity.

In this publication we will consider the peculiarities of the changes in the intellectual property protection system. In 1st of June, 2016 the Cabinet of Ministers of Ukraine approved the Concept of reforming the state system of legal protection of intellectual property in Ukraine (hereinafter – the Concept)[3], according to which the main directions of its reforming are introduction of a transparent two-level structure of the state system of legal protection of intellectual property, in which the Ministry of Economic Development and Trade provides the formation and implementation of state policy in the sphere of intellectual property, and the National intellectual property office performs public functions on the implementation of state policy in this area. Another direction of reforming include reorganization of the collective management system of proprietary copyright and relative rights and Improvement the national legislation and its harmonization with EU legislation.

Analyzing the directions of reform and the changes proposed in the Concept, we can not fail to mention some disadvantages of such a process. First of all, there are some problems in the sequence of changes in the intellectual property protection system chosen by the government.

As already mentioned, the reform is aimed at introducing a transparent structure of the state system of legal protection of intellectual property, and only the last direction of the proposed changes is aimed at improving national legislation. Probably, it seems that legislative changes must precede or, at least, take place in parallel with the reform of the state system of bodies implementing policies in the field of intellectual property protection. The effectiveness of the system of state bodies is directly related to the content of legislative norms. Based on the constitutional principle of the dependence of the content and orientation of the state's activities on human rights and freedoms (including intellectual property rights), we can emphasize the primary renewal of the legislative mechanism of intellectual property rights.

Over the past ten years, the system of state bodies in the sphere of intellectual property has changed several times, but these changes did not lead to significant improvements in legislative regulation, the creation of effective guarantees for the implementation and protection of creators' rights on the results of intellectual and creative activity. The special executive body, which carries out the policy in the field of intellectual property, periodically changed its name and subordination. At first, the State Patent Office of Ukraine was reorganized into the State Department of Intellectual Property of the Ministry of Education and Science of Ukraine, and then to the State Service of Intellectual Property. Currently, the Concept proposes to introduce a two-level structure of the state system of intellectual property protection, which includes the liquidation of the State Service of Intellectual Property and the creation of a National office of intellectual property on the basis of the state enterprise Ukrainian Institute of Intellectual Property (Ukrpatent). By the Resolution of the Cabinet of Ministers of Ukraine on August 23, 2016 No. 585[4] the State Service of Intellectual Property Service was liquidated, the task and functions for implementing the state policy in the area of intellectual property were assigned to the Ministry of Economic Development and Trade of Ukraine.

At the same time, the implementation of changes in infrastructure did not lead to an update of the legislative system for the protection of intellectual property. Existing provisions of the Law of Ukraine "On the protection of rights to inventions and utility models"[5] concerning the declaring patent for invention and the declarative patent for utility models remain, but these patents have not been granted since 2004

[1] *Закон про судоустрій і статус суддів 2016* (Верховна Рада України). *Офіційний сайт Верховної Ради України*. <http://zakon2.rada.gov.ua/laws/show/435-15/page5> (2018, March, 06).

[2] *Указ про утворення Вищого суду з питань інтелектуальної власності 2017* (Президент України). *Офіційний вісник України, 80,* 11.

[3] *Розпорядження про схвалення Концепції реформування державної системи правової охорони інтелектуальної власності в Україні 2016* (Кабінет Міністрів України). *Офіційний сайт Верховної Ради України*. <rada.gov.ua/laws/show/402-2016-%D1%80> (2018, March, 06).

[4] *Постанова про деякі питання оптимізації діяльності центральних органів виконавчої влади державної системи правової охорони інтелектуальної власності 2016* (Кабінет Міністрів України). *Офіційний сайт Верховної Ради України*. <http://zakon2.rada.gov.ua/laws/show/585-2016-%D0%BF > (2018, March, 06).

[5] *Закон України про охорону прав на винаходи і корисні моделі 1993* (Верховна Рада України). *Відомості Верховної Ради України, 1994, 7,* 36.

in Ukraine. Declarative patents that have been issued are now invalid. However, the provisions of the special law were not changed.

One of the requirements of the Association Agreement regarding the improvement of the mechanism for the legal protection of industrial designs is the provision of an additional condition for their patentability in national legislation – individuality. Industrial design is individual in the case when the overall impression it produces on an informed user differs from the general impression made by such a user of any other industrial design that was brought to the attention of the public (Article 213 of the Agreement)[1]. The implementation of such provisions of the Agreement, in addition to introducing formal legislative changes, will obviously require verification of applications for the protection of industrial designs in order to correspond to individuality. Therefore, the provisions of the legislation on the procedure for patenting industrial designs should be specified, which in the final analysis will require adjusting the functions of the patent office and increasing the number of its employees. Patent Office, issuing a patent for industrial designs, will have to check the presence of individuality, otherwise the provisions of the Agreement will not be implemented in practice. Therefore, we once again emphasize the primacy of reforming legislation in the field of intellectual property protection and the dependence of infrastructure changes in the system of state bodies from possible legislative changes.

According to the Concept, the improvement of national legislation and its harmonization with EU legislation should be carried out by: Implementing the plan of the Association Agreement; Implementation of amendments to the legislation with respect to: legal protection of copyright and related rights, inventions, utility models, industrial designs, commercial designations (trademarks, geographical indications, trade names), taking into account the experience of EU countries; improving the distribution of rights to intellectual property objects created in connection with the employment contract, or with the agreement on order by the expense of the state budget; implementation of amendments to legislation on the protection of intellectual property rights, including protection of copyright and related rights on the Internet; changes in the legislation on liability for violation of intellectual property rights (amendments to the Criminal Code of Ukraine and the Code of Ukraine on Administrative Offenses).

Directions of the reform of the system of legal protection of intellectual property proposed by the Concept left aside the problem of harmonization the norms of special intellectual property laws with the provisions of the Civil Code of Ukraine. In general, it seems that the developers of the Concept forget that the Civil Code of Ukraine is the main basic codified act regulating relations in the field of intellectual property.

It should be noted that when forming the national system of normative protection of intellectual activity, the national legislator used the principles of unity and differentiation. General approaches to regulating relations with intellectual property rights are enshrined in Chapter 75 and Book 4 of the Civil Code of Ukraine, and individual legal protection of certain intellectual property is regulated by special laws. As a result of the implementation of these principles, there were some contradictions between the provisions of the Civil Code and the norms of special legislation.

Analyzing the changes in the laws on intellectual property, it should be noted that since 2003 (the date of adoption of the Civil Code of Ukraine), the national legislation on intellectual property has not actually changed. The Civil Code of Ukraine did not become an incentive that would provide an updated legal basis, and many of its provisions (some of which were truly innovative) did not receive their specifics in legislation and regulations.

Here are a few examples. Article 429 of the Civil Code of Ukraine regulates the relations of the distribution of intellectual property rights to objects created under an employment contract – the ownership rights to these objects belong to employers and employees who created these objects, unless otherwise provided by the employment contract.

Special laws on intellectual property contain provisions that exclusive rights of intellectual property belong to the employer, unless otherwise provided by the employment contract and / or civil law agreement between the author and the employer. In connection with the foregoing, the question arises as to which legal instrument should be used: the Civil Code of Ukraine, which contains a general rule indicating the commonality of the rights of the employer and employee to the object of intellectual property or

[1] *EU-Ukraine Association Agreement 2014* (Угоду ратифіковано із заявою Законом № 1678-VII від 16.09.2014). <http://ukraine-eu.mfa.gov.ua/en/page/open/id/2900> (2018, March, 06).

previously adopted special laws, which indicate that intellectual property rights belong only for the employer. The answer is contained in the Civil Code itself, in Art. 4, which states that the Civil Code of Ukraine is the main act of civil law, and other laws of Ukraine must be adopted in accordance with the Constitution of Ukraine and the Code. This means that to the relations associated with the distribution of intellectual property rights are used the provisions of Civil Code of Ukraine, Art. 429. But, of course, the legislator should resolve this conflict of norms.

The similar situation is with the regulation of registration of agreements on intellectual property. The second part of Article 1114 of the Civil Code of Ukraine contains a provision that the transfer of exclusive property rights of intellectual property, which in accordance with the Civil Code of Ukraine or other law comes into effect after their state registration, is subject to state registration. Taking into account that rights to objects of patent law, integrated microchips and trademarks come into force from the moment of their registration, the agreement on transfer of such objects comes into force from the moment of its state registration. However, special legislation contains other requirements for state registration of contracts for the transfer of rights to industrial property objects, which only indicate the possibility of such registration. Taking into account that the Civil Code of Ukraine is the main act of civil law (Part 2 of Article 4), its norms take precedence over the provisions of special legislative acts, and therefore the approach defined in the Civil Code of Ukraine is applied.

Norms of the Civil Code of Ukraine are also sometimes far from perfect, and the legislative provision of some norms of the code does not contribute to their unambiguous application. The most interesting in this aspect is the norm of article 488 of the Civil Code of Ukraine, which deals with the legal regulation of the validity of intellectual property rights for plant varieties and animal breeds, part fourth of this article completely literally is repeated in the sixth part.

The disadvantages of the current legislation on the regulation relations in the area of intellectual property rights are reflected in practice. For example, the Law of Ukraine "On Copyright and Related Rights"[1] provides the following types of copyright's agreement: an author's contract to transfer the exclusive intellectual property right and the author's agreement to transfer the non-exclusive right. However, the Law defines an exclusive right only as a proprietary right of a person concerning a work of art, a performance, a phonogram and videogram or another related rights object. From the provisions of the Law, it is possible to done conclusion that, since the exclusive right is a property right, then non-exclusive is a personal non-proprietary right of intellectual property. However, it is well-known that personal non-property rights – can not be transferred on the basis of a contract, this contradicts the essential of such rights, which have non-property nature and cannot be transferred to another person.

Only on the basis of the systematic interpretation of the Law in comparison with the Civil Code of Ukraine it can be determined that the author's contract on the transfer of non-exclusive rights is an agreement to grant a non-exclusive permission for usage of the work of art or object of related rights. That is, under such an agreement, the rights are not transferred (not alienated), the contractor only receives permission for their usage within the limits set by the conditions of this contract. However, the existence of such terminology in the Law does not contribute to the certainty of legal norms.

The reform of the system of legal protection of intellectual property should provide for the elimination of deficiencies in the legislative mechanism for obtaining rights to the results of intellectual and creative activity, the creation of legal bases for the reliable protection of the rights of creators and their successors, and the prevention of cases of abuse of intellectual property rights.

It is no secret that in modern conditions in Ukraine it is much easier to obtain a patent for a utility model or industrial design, issued on the basis of the results of an official examination than to declare it invalid. This situation has led to the spread of cases of "patent trolling" in the internal realities, that is, when unfair applicants obtain security documents (patents or certificates) for simple technical or artistic decisions with the aim of creating obstacles or obtaining remuneration from companies or businessmen which have used such decisions in their activity for a long time. The length of the legal process for the cancellation of security documents at intellectual property, the cost of the process, the needs for forensic examination, the possibility of cassation and appeal processes and other factors certainly does not contribute to the proper protection of the rights from the persons, which abuse of intellectual property rights. Ultimately, even

[1] *Закон про авторське право і суміжні права 2001* (Верховна Рада України). *Офіційний сайт Верховної Ради України*. <http://zakon2.rada.gov.ua/laws/show/3792-12> (2018, March, 06).

the decision to invalidate the patent does not prevent the unfair applicant from reapplying the new application for the same technical or artistic decisions and obtaining a new security document.

In such circumstances, the reform of the intellectual property protection system should include a set of measures to combat patent violations. These include, inter alia, the introduction of an administrative procedure for the invalidity of issued protection documents (patents and certificates) by the Appeals Chamber of the Patent Office with the possibility of appealing the decision in court; introduction together with the formal procedure for considering technical solutions and the procedure of considering such decisions on the merits (on the subject of local novelty – for utility models and for individual designs – for industrial designs); establishing responsibility for the persons who abuse intellectual property rights, etc.

Another important direction of reforming the system of protection of intellectual property rights should be the consolidation in legislation the deadlines for making decisions on the qualification of obtaining protection of the results of intellectual and creative activity. Currently, the legislation clearly specifies the conditions for the submission of individual application materials, the priority date, the time of filing applications, the state fee for the issuance of protective documents and fees, the publication of information for their release, etc. However, there are no terms (limitations) for processing applications and decision of the Patent Office on protection or refusal of legal protection of intellectual property object.

Ultimately, the law establishes deadlines for the consideration of appeals, complaints and objections of citizens, restrictions on trial, pre-trial investigation, etc. However, unlike other areas of state activity, national legislation does not provide any terms for patent registration or terms of patent procedures. On practice, this does not only lead to delays and unjustified length of the process of acquiring intellectual property rights, but also to the appearance of so-called "accelerated expert procedures" (in particular for the trademarks), which are not provided by current legislation, but can also lead to additional financial income of the patent office. The granting of intellectual property rights should be based on the principles of legal certainty and transparency of the activities of state structures, the responsibility of the state bodies for their activities. In these circumstances the reformation the legislation in the field of intellectual property protection should also take into account the decision such problems.

Summing up the consideration of some principles of reforming the legislation regulating relations of intellectual property, it should be noted that the introduction of an innovative model of Ukraine's development is impossible without the creation of a modern system of normative regulation of relations in the field of intellectual property results that would provide effective protection of IP rights.

Within the limits of one publication it is impossible to consider all problems and lacks of regulation the relations of intellectual property. It should only be noted that the implementation of the Concept of Reforming the State System of Legal Protection of Intellectual Property should not be limited to a formal regrouping of the system of state bodies authorized to implement state policy in the field of intellectual property and superficial amendments of some laws. The reform of the intellectual property protection system should ensure the implementation of profound legislative changes, bringing the existing regulatory system in line with the approaches defined by the Civil Code of Ukraine and the norms of the Association Agreement, securing the principles of legal certainty, timeliness and transparency of state bodies, creating legal mechanisms for implementation and effective protection the rights on the results of intellectual, creative activities.

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