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Topical Issues of Lawmaking in Intellectual Property Protection Sphere in Modern Ukraine

Recent changes in the economic and public life of Ukraine have made the issue of developing and realizing the country economic development long-time strategy extremely important. The strategy basis should be a balanced scientific and technical policy, contributing to the scientific and technical potential efficient employment, the industry technological re-equipment, competitive production manufacturing, satisfying the highest demands of both national and foreign consumer.

In this context the increase in the role and importance of intellectual activity and intellectual property for the social and economic development of our country under the market economy conditions demands creating such a legal mechanism of the intellectual property protection, that would ensure real, stable, reliable and efficient protection of the law.

At the same time, intellectual property law, in particular copyright protection, must meet the current demands and be democratic, transparent, accessible, etc. Laws targeted at the industrial property protection must effectively guarantee the authors' moral and economic rights for their intellectual activity results, encourage people's creativity in accordance with the state interests, employ its results and encourage fair trade. That is the reason for the industrial property objects copyright protection to exist throughout the world nowadays.

The state policy should take into account the science advance priorities, the support for the most important industries, in which the latest technological achievements employment can ensure the maximum effect and output. Meanwhile, due to the experts' conclusions, the failure to efficiently use modern technological advances is the reason for Ukraine to lose billions of the USA dollars. As a repercussion of the insufficient intellectual property protection our country annually loses at least one billion dollars.

It should be mentioned that the world economy globalization and liberalization contribute to the world countries mutual dependence, influencing integration processes.

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The main aim of the integration of Ukraine into the EU and its entry into the European economic space is extending mutually profitable cooperation, encouraging economic development and ensuring economic security of Ukraine, discovering possibilities to occupy the appropriate position in the world labour distribution, and in such a way, creating conditions for the country to flourish and the Ukrainian people welfare to increase. To reach the aim Ukraine must guarantee meeting extremely severe demands, set out in the EU official instruments: firstly, the availability of the functioning market economy, competitiveness, adequate participation in the market transformations within the EU common market, and secondly, obligatory abidance by the EU rules and principles.

Taking into account the intellectual activity role and importance for the social and economic advance of Ukraine as one of the socially beneficial activity forms, it is necessary to officially proclaim it on the state level to be a priority, causing all other socially beneficial activity forms successful development.

Such recognition of intellectual activity as the one ensuring a successful development of all other socially beneficial activity forms, causes the necessity of concentrating state capabilities (creative potential, material resources, money, etc.) on the all-round intellectual activity development.

The Ukrainian intellectual property legislation is known to have been created under the conditions of its independence almost from scratch. Currently the legislation still has some serious drawbacks, gaps, controversial statements, some norms are not mutually adjusted. The lawmaker is constantly seeking ways and methods of its adjustment to the world standards and improvement, as the level of social and economic development of Ukraine and finally its people well-being depend on the proper, reliable and efficient intellectual property legal protection. That is why lawmaking issues, scientific and theoretical analysis of the Ukrainian legislation on intellectual property and development of a comprehensive intellectual legal concept of the status of the intellectual property creator and his/her successors, that would ensure successful development of intellectual activity, its result and their reliable protection, are really important.

Despite the recent intellectual property law active research власності issues a great number of the issues have not been studied adequately yet, particularly, the intellectual property and activity role and importance in the social and economic development of Ukraine have not undergone a thorough research; intellectual property relevance, content, kinds and position within the civil law of Ukraine have not been properly defined, as well as the intellectual property law objects and subjects structure that are to be protected within the current civil law of Ukraine. One should also thoroughly study the civil legal forms of the intellectual property protection law: personal non-property and property rights; realization of personal non-property and property rights of the intellectual property subjects. The system of intellectual property rights protection under the current legislation of Ukraine needs a scientific theoretical analysis as well. Analysing lawmaking issues in the system of intellectual property protection, based on the results of studying the issues of the legal protection of personal non-property and property rights, the legal regime of the intellectual property objects and the intellectual property subjects legal status, one can discover some drawbacks and gaps in the system

of the civil legal protection of personal non-property and property rights, evaluate them properly, define their reasons and develop appropriate suggestions and recommendations, aimed at removing the identified drawbacks and increasing the civil legal protection of the intellectual property.

Our state has been developing at the time of the active, dynamic intellectual activity, its level causing the strategy and tactics of the European states social economical development. The level of the creative activity, its scope will define not only the Ukrainian people welfare level, but also the state political and economical independence, sovereignty and territorial integrity, security and authority at the international level as well as other parameters of the Ukrainian nation prestige and flourishing. The national production reforms and economical uprising must rely upon the thoroughly considered, competent economic policy in the sphere of the national economy intellectual potential employment, being targeted to creating necessary conditions for the stable increase and development of intellectual property as the highest and the most progressive form of economic relations under the market conditions.

The intellectual property sphere is a powerful resource of the internal economical market development and stabilization, but its role in the national economy development is underestimated, consequently the absence of demand for the collected intellectual affluence has already resulted in numerous scientific and production establishments decay, massive brain-drain and technological stagnation of the production. In spite of the available powerful intellectual potential the economic development of Ukraine acquires more and more extractive, labourious and energy-demanding character. Weakening the scientific and technical potential of the country, reducing research in the strategically important spheres and brain-drain endanger the state position in the world, its external technological independence and defensive capacity. The state needs a civilized market of intellectual property objects that would make it possible to radically increase Ukrainian enterprises profits and the state budget inflow.

As a country with its own fully valid non-material assets, creating high added value and part in the gross domestic product, Ukraine can become an object of external ruling by other states. So it is necessary to intensify our own non-material economy development, based on the intellectual property law connected with scientific and technical advance products manufacturing.

It is impossible to form an innovative type of economy in Ukraine and to ensure the state's appropriate positions in the world community without developing and improving relations in the sphere of intellectual property management according to the world trends, the analysis of the world experience in the intellectual property legal protection state regulation, intellectual property assignment and commercialization.

An important current task of the development of Ukraine is to create an efficient innovative system, capable of ensuring technological modernization of the national economy, to increase its competitiveness on the basis of the advanced technologies. It is necessary to improve the intellectual activity results rights market, the state system of intellectual property legal protection and to transform the state scientific potential into the active resource of the economical uprising.

The priorities of the development of Ukraine are based on the provisions of the Economic Reforms Programme for 2010-2014 entitled *Prosperous Society, Competitive*

Economy, Efficient State and the annual address of the President of Ukraine to the Verkhovna Rada of Ukraine called *Modernization of Ukraine – Our Strategic Choice*, and the Concept of the State Programme of Economic and Social Development of Ukraine for 2012, approved with the Cabinet of Ministers of Ukraine ruling № 219 dated back to March, 21, 2011 and other state programme documents.

The tasks set out in the *Concept of the Intellectual Property Legal Protection State System Development for 2009–2014* and in the *Intellectual Property Legal Protection State System Development Programme for 2010–2014* should be regarded as the activity priorities of the government, the economy subjects and numerous inventors and innovators. It is vitally important and necessary to form the main trends of the intellectual property legal protection state system activity, targeted to: encouraging the state social and economical development; creating favourable conditions for business through reducing administrative barriers for its development; preserving and developing the professional potential of the state system employees through raising efficiency and ensuring the social protection stability and advanced training due to the production demands.

The major current science, culture, technology and manufacturing development trends testify to the fact that the humanity has reached such a level in its development when the further advance will be caused by the mental, i.e. intellectual activity. Nevertheless, not all creative activity results become intellectual property law objects. The above mentioned intellectual property law objects cover only those intellectual activity results that are protected by the laws of Ukraine on intellectual property and satisfy the current legislation demands. Other intellectual activity results become objects of the civil law and are practically not protected, as they can be used by anybody without any permission. That is the collision between intellectual property law and civil law. Being the civil law object the creativity result should have been protected by it, but under the current legislation of Ukraine on intellectual property such a result can be used by anybody without any permission.

The range of intellectual property law objects is determined by the creative activity character and content. The intellectual activity result is the intellectual property law object. The part of the creative activity which is out of the scope of intellectual activity has for its result objects that can not be legal protection objects.

As for its judicial nature, intellectual property law is the right to own, employ and administer the proper result of creative activity (article 41 of the Constitution of Ukraine). The legislation of Ukraine on intellectual property has defined intellectual property law objects as goods with all the resulting consequences. Only the objects that can be the property law objects shall be defined as goods.

The stable structure of the intellectual property law system is not perfect. As for their scientific, technical and creative level, means of the civil goods and services turnout individualization can not be equal to the scientific and technical creativity results (inventions, utility models, commercial prototypes, integrated circuit and selective achievements configuration). Such intellectual property law objects as brands, trade mark, geographical identification shall be allotted into a separate group of intellectual property law objects. Concerning their scientific, technical or creative level one can not compare an invention and a brand, literary or arts works and trademarks.

Subjective rights of intellectual property are at the heart of the intellectual property legislation. These very rights encourage most authors to create their works for the purpose of the proper ensurance of their own well-being and their family welfare. They are the main source of the majority of authors' existence. The intellectual property subjective rights efficiency contributes to the active intellectual, creative activity. The more real content the above mentioned subjective rights have, the more active and efficient this kind of socially beneficial activity as the main source of Ukrainian intellectual potential will be.

The problem of the intellectual property law subjects is the employer status definition. Under the current legislation of Ukraine on intellectual property, the employer possesses the right to the work-related object (according to the Civil Code of Ukraine, the object, created in connection with employment agreement implementation), i.e. the Civil Code of Ukraine rejected the term „work-related” object of intellectual property law. According to the Civil Code of Ukraine (Article 429), intellectual property rights to the object, created in connection with employment agreement implementation, are possessed by the employee, having created it, and by the legal or physical entity, employing him/her, jointly, if otherwise is not set up by the employment agreement.

The Civil Code of Ukraine stance concerning the definition of the legal status of the subject of intellectual property for the object, created in connection with employment agreement implementation is a step further in solving the problem, but the problem has not been decided completely yet. In any case the intellectual property original law subject shall be the object author, regardless of its creation conditions. Recognizing half the right to the object, created in connection with employment agreement implementation complicates the issue. To activate intellectual, creative activity the author shall be recognized to be the only original intellectual property law subject for the created object in all cases, except for those set out by the law.

In our opinion, in defining intellectual property law subjects, Article 54 of the Constitution of Ukraine, recognizing only Ukrainian citizens as the law subject, needs detailing. Meanwhile, citizens of other states and stateless persons can be intellectual property law subjects as well.

The Civil law standards, under which intellectual property law non-property rights may be assigned to other persons (Articles 429 and 4300), contradict the provisions of the Civil law provisions.

In this context article 13 of the *Law of Ukraine on Copyright and Concurrent Rights*, under which persons as a result of whose work the creative product has been created may be treated as coauthors. But such persons may be both physical and legal entities, though the latter ones can not be authors and coauthors. Coauthorship takes place only under one essential condition – there must be common creativity of coauthors. That is why there can not be treated as coauthors the writer and the artist during the book illustration, authors of audiovisual works, authors of collective work separate parts (collections, encyclopedia, journal, etc.). There will not be coauthorship in case of using somebody else's published work for the purpose of creating a new, independent one (e.g., the novel author and the appropriate script author).

Successors of original intellectual property law subjects are sure to be this law subjects. Legitimate heirs are also successors, though the current legislation of Ukraine on intellectual property, including a new Civil Code of Ukraine, does not proclaim legitimate heirs to be successors of intellectual property law subjects.

A serious flaw of the current legislation of Ukraine on intellectual property, including the Civil Code of Ukraine, is the absence of standards for recognizing Ukraine to be the subject of intellectual property law. That is the reason for grounding recognition the state of Ukraine to be intellectual property law subject.

The lawmaking issue in the sphere of the state intellectual development optimization, intellectual property system management improvement demands permanent attention of the state. It is necessary to develop complex action plans, aimed at achieving results in the priority scientific and technical growth of the state economy, taking into account the world trends and demands at the legislative level.

Within the context of the above mentioned it is practicable to consider 5 basic or priority lawmaking directions in the sphere of intellectual property of the state.

Firstly, it is the necessity to improve regulations and standards of intellectual property and mechanisms of rights protection in this sphere. The lawmaking need in this direction, connected with the necessity to reform the intellectual property management, is caused by the necessity to adjust the national legislation to the European Union laws. Within the context it is necessary to bring intellectual property legislation in compliance with the Civil Code of Ukraine and with the international regulations in the intellectual property sphere. Liberalization, simplification, intensification and maximum comfortability of the procedure for applicants to obtain intellectual property rights for objects also should be adjusted to the national and general legislation. It is also vitally important to increase responsibility for intellectual property rights violation, intellectual property economic aspects legal regulation improvement, including the system of paying fees for intellectual property objects protection acts, creativity economic encouragement legal regulation improvement, etc.

Secondly, it is of vital importance to improve the authors and intellectual property exclusive rights owners protection procedure. Lawmaking in this sphere needs ensurance of law enforcement and inspection bodies activity effective state control and coordination as for intellectual property rights violation prevention. European experience and judicial reform require the special patent court creation for the purpose of considering cases, related to intellectual property rights protection, as well as implementing alternative dispute resolution means, developing a unified forensic enquiry method to declare intellectual property objects documents to be invalid, developing methods to calculate damages in intellectual property law violation cases.

Thirdly, it is the direction of lawmaking in the sphere of copyright and concurrent rights protection. It is necessary to improve the current *legislation* in the sphere of copyright and concurrent rights *in the part of* encouraging legal business for the purpose of the service market unshadowing; to legalize the software, employed by the executive bodies, to introduce free Internet access to the state intellectual property objects register.

Fourthly, it is the staff issue. Nowadays it is of vital importance to train specialists in the sphere of intellectual property, to disseminate knowledge, the culture and education in the appropriate sphere.

The peculiarity of lawmaking in legal culture in the sphere of intellectual property must rely on all population strata in complex. Telecommunication media also play an important role in the sphere as they might provide public information campaigns to inform on the repercussions of intellectual property objects illegal usage. Measures for training scientific staff for the intellectual property sphere, introducing various forms and methods of retraining and advanced training of different social categories – patent attorneys, enterprise, establishment and organization managers, state authorities and local government employees, professionally involved into intellectual property management call for great attention. It is also publicizing intellectual property knowledge, targeted to teach various population categories, first of all school pupils, improving regulatory framework underlying the activity of patent attorneys, advanced training of judges, deciding cases on intellectual property issues, etc.

The fifth direction is realizing international policy aimed at our state international image improvement and its influence on the international processes in the sphere of intellectual properties. Lawmaking in this sphere makes sense in defending the national interests within participation in the World Intellectual Property Organization executive bodies, international projects, targeted to small and medium-size enterprises development in the intellectual property sphere. Special attention shall be paid to analyzing the national intellectual property realization, taking into consideration the international experience. It will make possible for our country to define the appropriateness of joining them, as well as to defend the national interests in geographical names mutual protection while creating free trade zones, taking into account national manufacturers and businesses needs.

Conclusions. Summarizing the above mentioned, one can make the following conclusions as for intellectual property lawmaking improvement. Alongside with the 5 given directions of the legislation development, improvement and adoption, we should emphasize that there is need to study and legally regulate issues of correlation of the generally known trademarks and various levels domain names, geographical names, the former USSR signs, it is necessary to enter generally known trademarks to the special generally known trademarks register at the national, regional and international levels; to forecast issuing the national and international certificate for the generally known trademark. It is also worth mentioning that the Civil Code of Ukraine does not contain the invention notion definition. In our opinion, the Civil Code of Ukraine, defining the basics of the Ukrainian civil legislation and intellectual property law, shall contain the invention definition.

Despite the fact that in Ukraine there exists the intellectual property rights protection system, meeting the international standards, it is necessary to decide at the legislative level issues of approaching the European Union legislation in the sphere of industrial property protection, namely in the sphere of: preventing violations of inventors rights, inventions indirect usage, licencing, cross licencing, introducing fiscal incentives not only for inventors but also for entrepreneurs, using the invention.

Improving intellectual property lawmaking must be realized in complex and consistently, on the basis of the appropriate, in our opinion, special national program, satisfying not temporary interests of some political or commercial forces, but the interests of the whole society.

Intellectual property lawmaking improvement in Ukraine will efficiently contribute to the Ukrainian nation scientific and technical potential development, economic advance realization under conditions of the world economic crisis, entering the sphere of high innovative technologies production and becoming one of the economically developed countries. In general, the above mentioned factors will contribute to strengthening not only the intellectual property legal protection, market relations development, but also to our country flourishing.

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A SZELLEMI TULAJDON VÉDELMERE VONATKOZÓ JOGALKOTÁS AKTUÁLIS KÉRDÉSEI A MAI UKRAJNÁBAN

(Összefoglalás)

Az utóbbi évek társadalmi és gazdasági változásai egyértelműen rámutattak arra, hogy Ukrajna hosszú távú gazdasági fejlődése rendkívül fontos kérdés. A gazdasági-társadalmi fejlődés területén az is bizonyossá vált, hogy a szellemi tulajdon egy sokoldalú eszköz. Fel kell tárnunk azon irányokat, amelyek mentén a szellemi tulajdon a növekedés felé mozdíthatja el az Ukrán gazdaságot, hozzájárulva ezzel a jóléti társadalom létrejöttéhez. A szellemi tulajdon védelme és érvényesítése területén súlyos hiányosságok mutathatók ki Ukrajnában. E terület vagy egyáltalán nem szabályozott, vagy nagyon felületes módon. Előbb említett indokok alapján indult el az a kutatási program, melynek célja egy pontos, megbízható térkép a szellemi tulajdon ukrán viszonyairól. Jelen tanulmány átfogó képet kíván nyújtani a kutatási program gazdasági-társadalmi- jogi háttéréről, valamint a szellemi tulajdon területén feltárt hiányosságokról. Kifejtésre kerülnek az ukrán Polgári Törvénykönyv ezirányú arányoldalai is, melyet a szerző lényegében abban jelöl meg, hogy a szellemi tulajdon alapfogalmait nem találhatjuk meg a jogszabályban, holott véleménye szerint ezeket itt lenne szükséges elhelyezni. A nemzetközi és európai uniós követelményeket is figyelembe véve öt jogalkotási irányt javasol a szellemi alkotás kapcsán, melyeknek alapos átgondolását és vizsgálatát követően megszülethet e fokozatosan fejlődő területen szükséges produktív jogszabály. A szellemi tulajdon tudatos, versenyképességet fokozó, minél szélesebb körű alkalmazása így lehet hatékony, serkentve ezzel az ukrán iparjogvédelmi és szabadalmi tevékenységek aktivitását.