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ON THEORETICAL AND LEGAL BASIS OF INTELLECTUAL PROPERTY RIGHTS JUDICIAL PROTECTION

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SUMMARY

In light of Ukraine's current European integration aspirations, the development of theoretical and methodological support for judicial reform is of particular importance. It has been established that the traditional regulation of intellectual property law is investigated within the framework of the science of civil law and process, but it is proved that judicial protection of intellectual property rights is an inter-branch institution. The cross-branch nature of the judicial protection of intellectual property rights is characterizing, in particular, the content analysis of the Unified State Register of Judgments was made. Some problem situations arising from the functioning of intellectual property rights as an inter-branch institute are considered.

Key words: judicial protection, intellectual property rights, Supreme Court of Intellectual Property, inter-branch law institute.

ТЕОРЕТИКО-ПРАВОВОЙ БАЗИС СУДЕБНОЙ ЗАЩИТЫ ПРАВ ИНТЕЛЛЕКТУАЛЬНОЙ СОБСТВЕННОСТИ

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АННОТАЦИЯ

В свете текущих евроинтеграционных устремлений Украины разработка теоретического и методологического обеспечения судебной реформы имеет особое значение. Традиционное регулирование права интеллектуальной собственности исследуется в рамках науки гражданского права и процесса, однако в статье доказывается, что судебная защита прав интеллектуальной собственности является межотраслевым институтом. Характеризуется межотраслевой характер судебной защиты прав интеллектуальной собственности, в частности, осуществляется контент-анализ Единого государственного реестра судебных решений. Рассматриваются некоторые проблемные ситуации, возникающие в результате функционирования прав интеллектуальной собственности как межотраслевого института.

Ключевые слова: судебная защита, права интеллектуальной собственности, Верховный суд по интеллектуальной собственности, межотраслевой юридический институт.

Formulation of the problem. In light of Ukraine's current European integration aspirations, the development of theoretical and methodological support for judicial reform is of particular importance. One of the important areas that correlates with pan-European and global trends is the protection of intellectual property rights.

Relevance of the research topic. Intellectual property rights are enshrined in Article 41 of the Constitution of Ukraine: "Everyone has the right to own, use and dispose of his property, the results of his intellectual, creative activity" [1]. The protection of property rights is stated in Article 1 of the Additional Protocol to the Convention for

the Protection of Human Rights and Fundamental Freedoms: "Every natural or legal person is entitled to the peaceful enjoyment of his property. No one shall be deprived of his property except in the public interest and under the conditions provided for by law and by the general principles of international law.

The protection of intellectual property rights in Ukraine is ensured through the use of numerous legal mechanisms, which is explained by the existence of a wide variety of intellectual property objects. The unity of approaches to the protection of intellectual property rights is ensured by the possibility of seeking judicial protection.



The state of the study. The theoretical and legal aspects of judicial protection, in particular intellectual property rights, have been investigated V. Seniuta, N. Kohut, D. Abliazov, P. Korniienko, D. Dykyi, M. Pototskyi, A. Kodynets, O. Yara, V. Khoma, E. Moldovan, etc.

The purpose and objective of the article. At the same time, in the context of the formation of theoretical and legal support for the functioning of the High Court on Intellectual Property, it seems advisable to further explore the scientific and applied aspects of this issue, which will strengthen the scientific foundation of judicial protection of intellectual property rights that determined the **purpose** of the study.

Statement of the main material. The importance of judicial protection of intellectual property rights naturally follows from their affinity with property rights. In this regard V. Seniuta rightly points out: "The initial consideration is that intellectual property is a form of property and should be protected, if not alike, because there are peculiarities in the nature of property rights and intellectual property, but just as naturally, ipso facto... since intellectual property is a kind of property of this natural way of appropriating objects, the need for its legal protection is also natural" [3, p. 53].

It is known that the creation of effective organizational and legal mechanisms for the implementation of a law is a prerequisite for the functioning of a democratic society. The declared but not realized right is evidence of significant deficiencies in the legal system of the state. On this point, we agree with N. Kohut, who emphasized that proper clear legal regulation of intellectual property rights and the establishment of a reliable mechanism for its implementation are one of the important indicators of the level of democratic development of the country. In the context of correlation of judicial protection mechanisms, the scientist emphasizes the importance of detailing general indicative and principled provisions of international normative-legal acts that regulate legal relations in the field of intellectual property and according to the Ukrainian legislation contain norms of direct action [4, p. 208].

Judicial protection of intellectual property rights is carried out in accordance with global trends in the protection

of rights and freedoms. In this regard, D. Abliazov emphasizes that the protection of human rights and freedoms, recognition of their authority as a defining goal of the development of society and the state is the key to the sustainable development of civil society. According to the scientist, sustainable development of the state, society and the individual will be possible only through the creation of reliable mechanisms for securing and protecting human rights and uniting the society around the idea of human rights [5, p. 1].

The central principle of judicial protection is the restoration of violated rights. According to P. Korniienko, the constitutional safeguards by which the restoration of violated human and citizen's rights are restored are an important part of securing the right to judicial protection. The scientist claims that it is the judicial form of protection of the legitimate interests of the person should be given priority character [6, p. 14]. The right to judicial protection is the key to the existence and development of a democratic society, and the essence of this right, as D. Dykyi points out, is that everyone has the right to go to court if his or her rights or freedoms are violated or obstructs their implementation [7].

From the text of the Constitution of Ukraine and from the materials of the Catalog of Legal Positions of the Constitutional Court of Ukraine we can characterize the right to judicial protection [8]:

- this right is guaranteed in accordance with Article 55 of the Constitution of Ukraine;
- the right to judicial protection belongs to the inalienable and inviolable;
- this right is complex and includes rights to appeal in court decisions, actions or omissions of state authorities, local self-government bodies, officials and officials, to file a constitutional complaint with the Constitutional Court of Ukraine, to appeal to international judicial institutions;
- rules providing for the settlement of disputes, in particular the renewal of the infringed law, cannot contradict the principle of equality of all before the law and the court and in this connection limit the right to judicial protection;
- justice is inherently recognized as such only on condition that it meets the requirements of justice and ensures effective restoration of rights;

– the right to judicial protection is guaranteed by the constitutional guarantees for the administration of justice by the courts established under the Constitution of Ukraine and in the manner prescribed by law;

– the protection of rights and freedoms requires, in particular, the legislative consolidation of mechanisms (procedures) that create real opportunities for the exercise of every citizen's rights and freedoms, such mechanisms include a structured system of courts and types of court proceedings established by the state.

Thus, through the exercise of the right to judicial protection, it is also possible to exercise and restore violated other rights, in particular, intellectual property rights.

Traditionally, judicial protection of intellectual property rights is considered in the context of civil law and process. Judicial protection of civil law and interest is one of the general principles of civil law [9].

According to Article 11, paragraph 2 of the Civil Code of Ukraine, the creation of literary, artistic works, inventions and other results of intellectual, creative activity is the basis for the emergence of civil rights and obligations. Article 177 of the same Code results of intellectual, creative activity, information related to civil rights objects [9].

The book of the fourth CCU is devoted to the regulation of intellectual property relations. Article 418 sets out the definition of intellectual property rights: a person's right to the result of intellectual, creative activity or to another object of intellectual property right defined by this Code and other law. Article 419 clarifies the relationship between intellectual property rights and property rights, in particular declaring the distinction between intellectual property rights and property rights, and Article 420 extends the list of intellectual property objects [9]. It should be noted that in the Resolution of the Kyiv District Court of Kharkiv in case No 640/2437/13-t the court found that the application was not subject to satisfaction, since the object of intellectual property can be only an intangible object, ie the result of intellectual, creative activities [10]. In case No 766/6298/17 the Kherson city court of the Kherson region found that the applicant appealed to the court with the application for securing a claim by



arresting the homeowner by prohibiting any action, on registration of real estate re-registration, and prohibiting any – what are the repair and construction works. The motivational part of the decree states that the sole basis for securing future claims is the need to prevent infringement of intellectual property rights, however, it appears from the statement of claim that the subject of litigation will not be infringement of intellectual property rights. Therefore, the application was denied [11].

Finally, the particular interest of the subject of investigation is the provisions of Article 432 of the CCU concerning the protection of intellectual property rights by a court. This article enshrines the principle of access to justice, namely, the right to apply to a court for the protection of its intellectual property rights, as well as the types of decisions that a court may order to terminate an infringement of intellectual property rights [9].

It should be noted that judicial protection of intellectual property rights is an inter-branch institution. Thus, Chapter 16 of the Economic Code of Ukraine regulates the use of intellectual property rights in economic activity, in particular, it is emphasized that the provisions related to the use of intellectual property rights in economic activity are subject to the provisions of the Civil Code of Ukraine taking into account the features stipulated by the Civil Code and other laws. Article 155 of the CCU discloses a list of (not exhaustive) objects of intellectual property rights in the field of business, and in the following articles defines the powers to use the invention, utility model and industrial design; use of the trademark; business name of business entities; the use of geographical indications, as well as the business entity's powers of trade secrets [12]. In addition, judicial protection of intellectual property rights is also carried out in the form of criminal proceedings, taking into account the provisions of Article 229 of the Criminal Code of Ukraine, which establishes responsibility for the illegal use of the mark for goods and services, trade name, qualified indication of the origin of goods [13].

At the same time, the Economic Procedure Code of Ukraine (Article 3) stipulates that cases that are within the competence of the High Court of Intellectual Property are dealt with in the manner provided by this Code. Article 20 of the CPCU

provides a list of (not exhaustive) cases that are considered by the High Court on Intellectual Property [14].

It should be noted that the Supreme Court on Intellectual Property was established by Presidential Decree No 299/2017 of 29 September 2017 in accordance with subparagraph 6 of paragraph 161 and section XV of the “Transitional Provisions” of the Constitution of Ukraine, Article 19, clauses 15, 40 of section XII. “Transitional provisions” of the Law of Ukraine “On Judiciary and Status of Judges” [15], but as of 2019 the Court has not yet started its work.

According to the Part 6 of Art. 37 of the Law of Ukraine “On Judiciary and Status of Judges”, a separate chamber is obligatory to be created in the Court of Cassation for the consideration of cases concerning the protection of intellectual property rights. As of 2019, the Court of Cassation within the Supreme Court of Ukraine has a trial chamber to hear cases concerning the protection of intellectual property rights, as well as related to antitrust and competition law [16]. According to the content analysis of the Unified State Register of Judgments, as of 2019, there are 70220 decisions in the civil proceedings (of which 59623 in the first, 9048 in the appeal and 1547 in the cassation instance), with 53217 in the commercial (of which 40257 in the first, 9304 in the appeal and 3656 in the cassation instance), 23915 in the criminal (of which 22103 in the first, 1733 in the appeal and 78 in the cassation instance), 23490 in the administrative (of which 15112 in the first, 6085 in the appeal and 2293 in cassation instance), 3344 in administrative cases (of which 3189 in the first instance and 155 in the appellate instance) [17].

The fact that intellectual property rights function as an inter-branch institution inevitably creates problematic situations that impair the quality of judicial protection. As M. Pototskyi rightly points out, the existing theoretical problems adversely affect the practice of protecting the intellectual property rights of economic entities, in particular, the judicial authorities, instead of the legal qualification of the relationship and the determination of the legal norm to be applied to resolve the dispute, forced to fill in the gaps of law legal constructs are capable of protecting the rights [18, p. 2].

Reflecting on the theoretical foundations of property rights protection, V. Seniuta tried to identify commonalities for all intellectual property objects and to determine what features required their legal protection. The scientist has found that the primary reason for protecting private property rights is their privacy, but intellectual property objects are non-discrete [3, p. 52]. Discussion on the legal nature and properties of intellectual property rights raises views on the feasibility of narrowing the boundaries of legal protection of these rights. Thus, A. Kodynets notes, that “an important trend in the development of legal regulation of intellectual activity in the information society is the gradual weakening of the intellectual property protection system, the introduction of regulatory changes aimed at ensuring a balanced combination of the interests of creators and their successors in the award of rights and members of the community access to, dissemination and use of information” [19, p. 19].

And, at the same time, it turns out that the basic theoretical foundations of property rights are still underdeveloped. According to M. Pototskyi, the lack of elaboration of provisions on the location of intellectual property rights in the property of economic entities complicates the assessment of its commercial content [18, p. 3]. In addition, it should be noted that the formation of the organizational and legal foundations of judicial protection of intellectual property rights is under the influence of not only domestic but also international factors. In this regard, we agree with O. Yara that “Criminal justice activities for intellectual property rights cease to be a purely national affair and are based on the rules of international law. Ukraine’s international treaties are subject to Ukraine’s consistent adherence to international law principles and norms. The rules of national and international legislation in the field of intellectual property are intended to ensure the protection and protection of intellectual property rights against criminal offenses and related to the objective side of crimes legally enshrined in national law, international treaties and conventions because of their international dangers and special the international obligations of states in the fight against them” [20, p. 84–85].

Effective protection of intellectual property rights in the age of the information society is a key factor in the transition



of the state to a new level of quality of the legal system. For Ukraine this means an opportunity to realize European integration intentions and become a full member of the European community. In this context, we draw attention to V. Khoma and E. Moldovan on the effectiveness of the functioning of the system of protection and protection of intellectual property rights, the achievement of which, according to scientists, depends on the clear orientation and strategic orientation of all legal norms and measures that regulate relations in the field of intellectual property, and also recognize and restore their rights in the event of their violation [21, p. 58]. The crucial role in the process of protection of intellectual property rights should be given to the judiciary, because, as P. Korniienko points out, the courts in Ukraine are the main organizational and legal guarantee of constitutional human and civil rights and an important subject of human rights activity, and the gradual transformation of the judiciary and its new positioning inspires confidence in the reality of democratic transformations [6, p. 19–20].

Conclusions. On the basis of the conducted research it is established that judicial protection of intellectual property rights is carried out in accordance with the global tendencies of securing rights and freedoms. The right to judicial protection has been characterized and it has been found that its implementation can also effectively restore violated other rights, in particular, intellectual property rights. It has been established that the traditional regulation of intellectual property law is investigated within the framework of the science of civil law and process, but it is proved that judicial protection of intellectual property rights is an inter-branch institution. The cross-branch nature of the judicial protection of intellectual property rights is characterized, in particular, the content analysis of the Unified State Register of Judgments is made. Some problem situations arising from the functioning of intellectual property rights as an inter-branch institute are considered.

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