UDC 343.533

Topchiy Vitaliy Vasilyevich
Candidate of Law Sciences, Prosecutor of the Prosecutor's Office of the Kyiv region
e-mail: tv1959@ukr.net

THE HISTORICAL DEVELOPMENT OF THE CRIMINAL AND LEGAL PROTECTION OF INTELLECTUAL PROPERTY RIGHTS IN UKRAINE

Мақалада Украинадағы зияткерлік меншік құқықтарын қылмыстық-құқықтық қорғаудың тарихи дамуы талданады. Автор ішкі заңнамадағы зияткерлік меншікке қарсы қылмыстарды болдырмауға бағытталған құқықтық нормалардың орнын анықтауға байланысты кейбір теориялық және практикалық мәселелерді шешу бойынша ұсыныстарды ұсынады.
Түйін сөздер: *қылмыс, авторлық құқық, зияткерлік меншік, Авторлық құқық объектілері, сабақтас құқық, қылмыстық жауапкершілік*

В статье анализируется историческое развитие уголовно-правовой защиты прав интеллектуальной собственности в Украине. Автор предлагает рекомендации по решению некоторых теоретических и практических вопросов, связанных с определением места правовых норм, направленных на предотвращение преступлений против интеллектуальной собственности во внутреннем законодательстве.
Ключевые слова: *преступность, авторские права, интеллектуальная собственность, объекты авторского права, смежные права, уголовная ответственность*

The paper analyses historical development of criminal and legal protection of intellectual property rights in Ukraine. The author suggests guidelines on how to solve some theoretical and practical issues related to determining the place of legal norms aimed at preventing crimes against intellectual property in domestic legislation.
Key words: *crime, copyrights, intellectual property, objects of the copyright, neighbouring rights, criminal liability*

When it comes to defining rights to the objects of intellectual property and ways of their protection every domestic legal system sets tasks for itself related to creating appropriate regulations that would help govern the relationships with these intangible objects. However, this activity did not emerge spontaneously, it is an outcome of the evolution processes within this legal institute that took hundreds of years.

The issue of genesis of institute of protection of intellectual rights was studied in works of many prominent Ukrainian scholars, namely V.S.Drobiazko, V.V. Drobiazko, S.O. Dovgyi, V.O. Zharov, V.O. Zaichuk, A.S. Nersesian, O.A. Pidoprygora, M.J. Pototskyi, A.A. Pylypenko, O.D. Sviatotskyi, R.E. Ennan, H.O. Yakymenko and others.

Despite the significant amount of scientific works in this field the aforementioned scholars themselves point out that this issue still needs to be studied further within domestic legislation. And in view of the fact that Ukraine has declared integration with EU as one of the main areas of its foreign economic policy, accelerating the adaptation of Ukrainian legislation in the sphere of intellectual property to EU standards is turning into a task of the utmost importance due to the international obligations imposed on Ukraine by “Partnership and Cooperation Agreement between the European Communities and their Member States, and Ukraine”, law “On government-wide harmonization programme of Ukrainian legislation to EU legislation”, Agreement for scientific and technological cooperation between the European Community and Ukraine. The aforementioned facts define the relevance and significance of studying the issue of protection of intellectual property rights, where historical research is one of its main areas [1].

Traditionally, the notion of property is reviewed in three main aspects. According the first one, property is determined by the social perception and means something physical that belongs to somebody. The second one - the legal aspects - explains property as a set of property relations (right to own, use and dispose of property). And the third aspect, the economic one, sees property as a complex notion where property is not described by the relationship of a man towards any object, but by relationships of people in regards to appropriation or alienation of that object. It must be noted that every one of the three approaches to property includes criminal and legal features. In the first case property acts as an object of criminal violation. In addition, this object bears primarily criminal and legal value. In the other two approaches property is regarded as an object towards which crime is directed. Failure to comply

with the existing alienation of property procedure is always regarded as a violation of legal norms. When such alienation is carried out using generally harmful methods it is called a crime, envisaged by respective articles of the Criminal Code of Ukraine [2, с. 47–49].

Modern studies on intellectual property also describe it from three different perspectives: economic, legal and sociological. Considering the aforementioned data it becomes clear that there is no unified approach to historical development of intellectual property. The European community created several intellectual property theories using the practices of Marxism. But when things come to comparing views of scientific schools from different periods of history on the essence of intellectual property, it should be noted that exactly the quintessence of neoclassical, Marxist and neo-institutional approaches created foundation for modern intellectual property theory in modern economic conditions [3, с. 20]. When defining the notion of "intellectual property" legal scholars apply such concepts and categories as "mind", "invention", "art" and many similar ones [4], that provide grounds to a statement that the notion of "intellectual property" is far more complex than "property" even because the structure of the former one includes such intangible category as "mind(intellect)". Nonetheless, generation of new knowledge is vital for understanding the concept intellectual property. It also should be stressed that from a legal point of view intellectual property is not simply a result of one's intellectual activity, but rather the right for that. According to the Civil Code of Ukraine, intellectual property is the right over the individual's own creation made as a result of intellectual or creative activity or right over any other object of the right of intellectual property. Results of human's intellectual activity, unlike physical objects, cannot be protected from use by third parties just based upon the fact that somebody owns them. Legislating in the field of intellectual property aims at protecting the interests of right holders by giving them certain limited in duration rights, that enable the right holders to control the use of their objects of intellectual property rights. It should be understood that one does not acquire rights to physical objects that are the outcome of one's creative activity, but to the outcome of one's thinking itself. Thus, it can be said for sure that intellectual property right is a general term for certain results of one's intellectual activity and commercial designations which represent intangible intellectual values one can acquire rights for, that are similar to right to property that contributes to market activities [5, с. 6–7]. Consequently, intellectual property constitutes numerous right to the outcomes of one's intellectual activities in the industrial, scientific, literary, art and other fields that are envisaged by laws. Rights to intellectual property are exclusive(absolute) rights. This is due to the fact that state grants the owner of the objects of intellectual property rights with the whole spectrum of powers in regards to the object of the right. Nevertheless, other actors (including the state) have no such authority and must refrain from actions that may violate the owner's absolute rights. Clearly, all property right are also absolute, but to our mind, these two notions differ slightly. Despite that, individual scientists disagree with this approach and recognize property as a generic term, which, in turn, can be divided into right to property(assets) and right to intellectual property [6, с. 14–16; 6, с. 204].

It is also important to consider the time period when Ukraine was a part of Soviet Union when reviewing the issue of intellectual property protection. A.M. Kovalchuk, in particular, states that although criminal legal acts of Soviet period contained norms regarding protection of intellectual property rights, but this protection was considered from the standpoint of prioritized needs of Soviet state [7, с. 21]. Confirmation to the aforementioned facts can be seen in works of A.S. Nersesyan, who conducted an analysis of articles 101, 198, 199 of 1922 Criminal Code of Ukrainian SSR and found that it provided criminal and legal protection of industrial property rights on a much higher level compared to copyright. This is reflected in the fact that the state used to protect only the artwork and literary that were confirmed as the republic's heritage. But in fact this was just a clever way for the state to ensure its monopoly on printing and distribution of, what they used to call, classic literature. Thus, according to the all-union legislation only the state had a sole right to impart popular works that had a status of "the republic's heritage". 1922 Criminal Code of Ukrainian SSR saw "commercial application" as one of the main indicia of crimes prescribed in the articles 101, 198 and 199 of the aforementioned Code. Which means that not all actions were recognized as crimes against copyrights or industrial property rights, but only those that were carried out with the intent to supply pirated products (article 101 of the Criminal Code), or with ulterior motives(article 198), or unfair competition (article 199). However, there also was one undoubtedly positive aspect hidden in

the sanction of articles 198 and 199 of the 1922 Criminal Code of Ukrainian SSR. Each one had and alternative punishment by a fine set as three times the profits made from illicit use of objects of industrial property right of others [2, c. 29].

The next step in the management of the issue of protection of intellectual property was the adoption of an updated version of the Criminal Code of Ukrainian SSR in 1927. The new rendition of the Criminal Code, in comparison to the old one, had some new and positive features. For example, the norms of article 190 started to provide criminal and legal protection to all artwork, literary and scientific works, and not just to the ones deemed as the republic's heritage. It also include transferring legal norms regarding protection of intellectual property rights to the correct chapters (article 126-2 to Chapter V "Economic crimes", articles 190 and 191 to Chapter VII "Property crimes"). In this way it was finally recognized that violation of intellectual property rights causes primarily material damage to the injured party. Consequently, sanctions for these crimes were adjusted accordingly – term of correction labour in all articles was reduces and fine as an alternative punishment for these crimes was introduced.

The highest point in Ukrainian SSR legislation in the field of criminal and legal protection of intellectual property rights was achieved with the adoption of yet another rendition of the Criminal Code on December 28th in 1960, which came into force on April 1st in 1961. In the new version all legal norms regarding criminal and legal protection of intellectual property rights were consolidated in the Chapter VI "Crimes against political and labour right of citizens". This approach to placement of articles 136 "Copyright infringement" and 137 "Inventor's rights infringement" was consistent with the views of Soviet state on intellectual property.

But the development of criminal legislation in the field of criminal and legal protection of intellectual property rights didn't end with the adoption of the aforementioned Code, it continued until the collapse of USSR and then started anew in the finally and completely independent Ukraine. However, modern scholars highlight certain weaknesses in the criminal and legal protection of intellectual property rights when analyzing specific norms of 1961 Criminal Code of Ukrainian SSR, namely:

1. Articles 136 and 137 of 1961 Criminal Code of Ukrainian SSR, much like the 1927 Code, do not indicate the existence of material losses and commercial purpose. Therefore, intellectual property rights infringement is only recognized as a right to labour infringement and nothing more. This approach is constant with the view of Soviet policy with the aforementioned field.

2. The state remained the sole right holder to results of creative and intellectual activity of its citizens. The right for use of inventions, excluding those which needed a patent, belonged exclusively to the state. Even the author could not manage his/her invention, otherwise it would lead to criminal liability under the article 137 of the aforementioned Criminal Code [8, c. 479].

3. As noted earlier, multiple objects of intellectual property right were left without criminal and legal protection. Despite the adoption of Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations in 1961 that for the first time declared the need to protect related rights, neither civil, nor criminal legislation of Ukrainian SSR saw any changes in that regard. 1961 Criminal Code of Ukrainian SSR also didn't recognize certain objects of industrial property as trademarks and trade names, that, by contrast, were considered by the 1922 and 1927 Criminal Codes of Ukrainian SSR [7, c. 39].

Bibliography

1. Волкова А. Генезис кримінально-правового захисту інтелектуальної власності в Україні [Електронний ресурс] / Аліна Волкова // Електронне видання. – 2015. – Режим доступу до ресурсу: http://www.legalactivity.com.ua/index.php?option=com_content&view=article&id=1027%3A180515-11&catid=125%3A5-0515&Itemid=147&lang=en.

2. Жапинский А. Э. О соотношении уголовного и гражданского права в сфере экономики / А. Э Жапинский // Государство и право. – 1999. – ? 12. – С. 47– 52.

3. Ходаківський Є. І. Інтелектуальна власність: економіко-правові аспекти: [навчальний посібник] / Є. І. Ходаківський, В. П. Якобчук, І. Л. Литвинчук. – К.: «Центр учбової літератури», 2014. – 276 с.

4. Гордієнко С. Г. Інформаційне право і право інтелектуальної власності: проблеми співвідношення [Електронний ресурс] – Режим доступа: file:///C:/Users/SZ740/Downloads/Chkup_2014_1_53%20(2).pdf. 4. Жаров В. О. Захист права інтелектуальної власності. Захист авторського права і суміжних прав. Захист права промислової власності: [навчальний посібник] / В. О. Жаров. – К.: ЗАТ «Інститут інтелектуальної власності», 2003. – 64 с.

5. Лихова С. Я. Злочини проти громадянських, політичних та соціальних прав і свобод людини і громадянина за Кримінальним кодексом України (теоретико-правове дослідження): автореф. дис. … д-ра юрид. наук: 12.00.08 / С. Я. Лихова. – К., 2006. – 39 с.
6. Коваль А.М.. Кримінальна відповідальність за порушення прав інтелектуальної власності: історія та правова перспектива / А.М. Коваль // Юридична газета. – ?3(39) – 28 лютого 2005 р. – С. 21-22.
7. Нерсесян А.С. Кримінально-правова охорона прав інтелектуальної власності: дис. канд. юр. наук 12.00.08 / А.С. Нерсесян; Національна Академія наук України інститут держави і права ім. В.М. Корецького. – К., 2008. – 208 с.
8. Уголовный кодекс Украинской ССР: Научно-практический комментарий. [Н.Ф. Антонов, М.И. Бажанов, Ф.Г. Бурчак и др.] – К.: Политиздат Украины, 1987. – 880 с.

Топчий Виталий Васильевич
Лауазымы: заң ғылымдарының кандидаты, Киев облысы прокуратурасының прокуроры, Украина мемлекеттік фискалдық қызмет университеті
Пошталық мекен-жайы: 08201, Украина, Киев облысы, Ирпень қ., Университет к., 31
Ұялы тел.: +380978132504
Украинаның зияткерлік меншік құқықтарын қылмыстық-құқықтық қорғаудың тарихи дамуы

Топчий Виталий Васильевич
Должность: кандидат юридических наук, прокурор прокуратуры Киевской области, Университет государственной фискальной службы Украины
Почтовый адрес: 08201, Украина, Киевская область, г. Ирпень, ул. Университетская, 31
Моб.тел.: +380978132504
Историческое развитие уголовного и юридического протекции прав интеллектуальной собственности в Украине

Topchiy Vitaliy Vasilyevich
Position: Candidate of Law, Prosecutor of the Prosecutor's Office of the Kiev region, University of State Fiscal Service of Ukraine,
Mailing address: 08201, Ukraine, Kiev region, Irpen, ul. University, 31
Mobile: +380978132504
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