

UDK 343.533

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## ISSUES OF CRIMINAL AND LEGAL PROTECTION OF INTELLECTUAL PROPERTY IN UKRAINE

*Мақалада Украинадағы зияткерлік меншіктің қылмыстық-құқықтық қорғалу мәселелері қарастырылады. Автордың пікірі бойынша, тиісті ақпарат базасының болмауы құқық қорғау органдарының қызметіндегі басты кемшіліктердің бірі болып табылады. Жоғарыда айтылған мәселе бойынша ықтимал шешім ретінде заңды меншік иелері (олардың заңды мекен-жайы, қайталанатын жұмыстары, лицензиялық келісім-шарт нөмірі) туралы ақпаратты қамтитын жаңа арнайы дерекқор құру ұсынылады. Осындай деректер базасының болуы осы санаттағы істерді тергеуді жеделдетуге және жеделдетуге мүмкіндік береді. Сонымен қатар қылмыстық тергеушіге қатысты авторлық және сабақтас құқықтарды бұзу саласындағы нақты қылмыстық іс бойынша деректерге тез және оңай қол жеткізуге мүмкіндік береді. Автор аталған қылмыстарды криминалдандырудың нақты аспектілерін талдады.*

**Түйінді сөздер:** қылмыстық және құқықтық қорғау, қылмыстық меншік, авторлық құқық, зияткерлік меншік

*В статье затрагиваются вопросы уголовно-правовой защиты интеллектуальной собственности в Украине. По мнению автора, отсутствие надлежащей информационной базы данных является одним из основных недостатков в деятельности правоохранительных органов. В качестве возможного решения вышеупомянутой проблемы предлагается создать новую специальную базу данных, которая будет содержать информацию о законных правообладателях (их юридический адрес, тиражируемые произведения, номера лицензионных соглашений). Наличие такой базы данных значительно облегчит и ускорит расследование дел в этой категории. Это также предоставило бы возможности для быстрого и легкого доступа к данным по конкретному уголовному делу в области нарушения авторских и смежных прав, которое имеет отношение к уголовному следователю. Автор также проанализировал конкретные аспекты криминализации вышеупомянутых преступлений.*

**Ключевые слова:** criminal and legal protection, copyright, intellectual property, objects of intellectual property right, related rights, criminal liability

*The article touches upon the issues of criminal and legal protection of intellectual property in Ukraine. According to the author absence of a proper information database is one of the main flaws in the activity of law enforcement bodies. Creation of a new, special database, that would contain information about legitimate right holders (their legal address, replicable works, license agreement numbers) is suggested as a possible solution to the aforementioned issue. Having such a database would significantly facilitate and speed up the investigation of cases in this category. It would also provide opportunities for a fast and easy access to data in a given criminal case in the field of copyright and related rights violation that is pertinent to the criminal investigator. The author also analyzed specific aspects of criminalization of aforementioned crimes.*

**Key words:** criminal and legal protection, copyright, intellectual property, objects of intellectual property right, related rights, criminal liability

Property as an object of criminal and legal protection is a complex phenomenon. Its nature is linked to many internal and external factors, where the most defining ones describe the following things: a) the state of development of society and state; b) the state of development of industrial relations and means of production; c) legal and social status of property in the public and social life; d) the role and place of property in political, economic and social reforms; e) the impact of society on state and political processes within the country. However, each stage of development of human civilization is characterized by the individual human's, social group's or the society's huge desire to protect what gives the opportunity to extend human life on Earth or to extend domination of certain individuals [1].

Some scholars emphasize on the fact that property – is, primarily, a set of relationships that ensure the method of appropriation of various things, the ability to benefit from the use of these things, the nature of certain interests; because of being an economic and legal notion has both

economic and legal aspects to it [2].

Other scholars, however, also allocate the social element to the notion of property. S. Mochernyi, for instance, who adheres to the sociological approach when defining the essence of property as an economic and legal notion, states that it is a relation between people regarding the appropriation of means of production, workforce, commodities, services, objects of intellectual property in all sphere of social reproduction [3, 21].

In accordance with the article 2 of law of Ukraine "On property" the right to property is interpreted as a set of regulated by the state's own legislation social relations in regards to owning, using and disposing of one's assets [4]. This law also specifies the existing in Ukraine forms of property, which include personal, collective and state property. The article 143 of Constitution of Ukraine introduces communal property as another form of property [5]. Under the Constitution all forms of property are equal before the law.

Ukrainian civil science of today contains an updated rendition of the institute of in rem rights that has been around since Ancient Rome. Roman lawyers perceived in rem right as a legal link between the person and the object – *iura in re* (right to an object). For example, Y.Pokrovskiy (1868-1920) in his textbook "The history of Roman law" says, that: «any right to property constitutes a direct legal relationship between a person and the object – *ius in rem*: the object belongs to a certain person and all other members of society must accept that relationship and refrain from violation of it with their own actions. Consequently, any right to property is absolute in the sense that it is addressed to all and, in case of violation, protects from all. No matter who got their hands on my property, I can always reclaim it based on the fact that it was given to me by the law» [6].

When tackling the issue of deciding the belonging of products to intellectual property it is important to base the decision on the substance, general notion and their structure. Intellectual property is a set of exclusive rights to results of one's creative activity and means of its identification, including copyright and related rights, right to objects of industrial property (inventions, prototypes, industrial designs, trademarks and names for services, service marks, brand names, geographical indications, integrated circuit layout designs, confidential information and so on). Copyright and related rights act as necessary elements to develop one's creative abilities, motivate and stimulate authors by providing recognition and material reward.

Only an intangible object can represent the studied form of property, that is, results of one's intellectual and creative activity [7]. Though, it can be perceived by others or replicated only if it exists in the physical world, i.e., if it becomes tangible (scientific formulations turn tangible after being published in the scientific works collection or after converting them into text and location on an electronic device). Nevertheless, it should not be forgotten that right of property over the object is not dependant on intellectual property right (part one, art. 419 Civil Code of Ukraine).

Intellectual property right consists of personal property and personal non-property rights. Legal literature rightfully emphasizes that personal non-property rights are inalienable and are independent from personal property rights [8]. Under the part one, article 423 of Civil Code of Ukraine personal non-property intellectual property rights include: a) right to recognize a person as a creator (author, performer, inventor) of the object; b) right to prevent any infringements on this right that may harm the

creator's honour or reputation; c) other personal non-property intellectual property right set by law [9].

So, it can be seen that toughness of Ukraine's innovative model for development, its modernization and improvement of competitiveness on the global social and economic level depends on resolution of the issue of creating an efficient system for protection of intellectual property. And, in turn, prospects of creating jobs in new fields that are recognized by the global economy of twenty-first century – an economy based on knowledge – are dependent on Ukraine's model for development. It also includes the issue of creating a civilized market environment where both business and consumers would be secured from unfair competition related to unlawful use of objects of intellectual property right and production of falsified goods. All aforementioned issues have been discussed during the recent round table held in Kyiv under the topic of «Issues of protection of intellectual property in Ukraine» hosted by Razumkov Centre for economic and political research of Ukraine. About 200 representatives from public administration bodies, embassies from several countries, agencies in the sphere of patenting and registration of copyright, representatives from the National academy of sciences of Ukraine, non-state scientific and research organizations and leading mass media participated in the event.

Issues of protection of intellectual property as they stand have come to the forefront in the global debate and turned into something bigger than just legal and commercial issues. Due to the overall intellectualization of modern global economy these issues start to turn into more of a political issue related to economy security and demand a strategic approach. Today, intellectualization processes are at a high intensity level that was simply inconceivable just a decade ago. There are 4 million valid patents in the world as of this moment; approximately 700 thousand application for patenting are filled every year; the income from selling licenses on patented objects is about 100 billion dollars.

It is important to note that foundation for the global control system for protection of intellectual property has already been formed. And Ukraine has no other choice but to adapt to it, if it intends to develop as a constituent element of the world economy, and not as an economy separated from the global tendencies of social, economic and technological development. Over recent years Ukraine has intensified the processes for integration with global structures of intellectual property management, and is already a member of 15 out of 26 universal international conventions and agreements in this sphere.

Ukraine's integration into the regional European structures and, mainly, structures of EU that operate in the sphere of protection of intellectual property is essential for efficient protection of intellectual property. However, there still are some issues in this direction that remain unresolved, namely, Ukraine's position on the Eurasian patent convention and building relationships with the Eurasian patent organization, absence of forward-looking programmes on cooperation with European patent office and Office for harmonization in the internal market (trade marks and designs).

It should be emphasized that Ukraine has intensified the processes for establishment of system of protection of intellectual property over the past decade.

The most vital issues of protection of intellectual property in Ukraine are as follows: protection of computer programmes (as noted by 65,3% interviewees), protection from unfair competition (55,6%), protection of marks for goods and services (trade marks) – 52,1%, protection of producers of audio-visual works – 50,0%.

Law standards in the sphere of protection of intellectual property are caused by lack of qualified experts in this sphere, as it requires a rather large amount of specific knowledge.

And, lastly, it is worth noting that experts suggest the following facts as reasons for inadequate

level of protection of intellectual property of Ukrainian individuals and legal entities that is located abroad. These include: lack of government resources for patenting and conducting registration procedures abroad (as noted by 54,8% interviewees), low level of legal culture in the country (46,6%), lack of proper knowledge and information in regards to procedure for protection of intellectual property outside of Ukraine (45,2%)[10].

Copyright and related rights violations pose a serious threat to national economy that manifests in: firstly, tax evasion, carried by hiding considerable profits from selling counterfeit goods; secondly, lack of trust from investors due to inadequate level of protection of intellectual property, a decline in the investing and innovative activities[11, с. 213].

Based on the above considerations it must be noted that one of the flaws in the activity of law enforcement bodies is the absence of a proper information database. A specialized database that would contain information regarding lawful right holders (their legal address, replicable works, license agreement numbers) must be created in order to overcome such an issue. It is obvious that the existence of such databases would Having such a database would provide opportunities for a fast and easy access to data in a given criminal case in the field of copyright and related rights violation that is pertinent to the criminal investigator [12].

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