CERTAIN ASPECTS OF THE LEGITIMATE INTERESTS PROTECTION IN THE INTELLECTUAL PROPERTY LAW

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In accordance with the article 418 of the Civil code of Ukraine "the intellectual property law is the person's right on the result of intellectual, creative activity, or on the another item of intellectual property rights defined by the law. The intellectual property law involves the personal non-property intellectual property rights and (or) property rights of intellectual property. The content of abovementioned rights in respect of certain intellectual property items determined by the Civil code of Ukraine and other regulations (p. 2 article 418 of the Civil code of Ukraine). Accordingly to the regulations and intellectual property law theories, the essentials of property rights of intellectual property, as a type of an exclusive rights, constitute from the authority to own actions (the person's ability to use the result of intellectual, creative activity or other items equated to them, at their own request in any way not contravening the law; the possibility to authorize or prohibit the using of intellectual property rights to third parties) and the authority of the requirements (the ability to request any person not to violate right holders' rights).

The intellectual property law should be defined as exclusive rights, and as a kind of absolute rights, with all objectively features, namely: 1) all rights on intellectual roperty items that are the results of creative activity, arising independently of the will of third parties; 2) all the third parties are passive subjects of law. They obliged to

refrain from the illegal actions against the intangible results of creativity (works, inventions, etc.), as well as from the illigal actions against the tangible things - property rights item; 3) if each of third parties commit the illegal act against the intellectual property rights of its holder, you could file the suits against such persons.

Conditionally, intellectual property law divided into four groups. Consequently, property and non-property legal interests may arise in respect of certain items of copyright, patent rights, trademarks, non-traditional items and rights on all of them. Further we turn our attention to the analysis of mentioned interests protected by the law.

The limitations and exhaustion of intellectual property rights as a balance between public interests and the interests of rights holders. As noted above, the exclusive right is the right to use the intellectual property item that includes two fundamental rights: the right of reproduction and the right of distribution the intellectual property items. In accordance with article 15 of the Law of Ukraine «On the copyright and the related rights» the authors' property rights (or other person's who owns the copyright) include: a) the exclusive right to use the work; b) the exclusive right to authorize or prohibit the use of the work by other persons. The limitations of property rights, established by the articles 21-25 of the Law of Ukraine «On the copyright and the related rights», will carry out, if such limitation don't harm the exploitation of the work and unreasonably don't restrict the legitimate author's interests.

If the copies of a lawfully published works legally introduced into civil turnover by their first sale in Ukraine, it's available to re-introduce them into civil turnover by sale, gift or otherwise, without the author's consent (or other person's consent that has the copyright) and without the payment of the author's fee. In respect of works of fine

art - in consideration of the provisions of article 27 of the Law of Ukraine «On the copyright and the related rights». However, in this case the right of the property lease or commercial rental solely belong to the person who owns the copyright (p. 7 art. 15 of mentioned Law).

It should be emphasized that are these rights are interrelated. In spite of the fact that these rights relate to the intellectual property items, any actions over the intangible objects are possible. Therefore, the reproduction right and the right of distribution relating to goods that embody the intellectual property items. The right of reproduction and the right of distribution can be defined as follows. The right of reproduction is the exclusive right to copy (including the changing of) the goods that embodied the intellectual property items. The right of distribution is the exclusive right of introduction a product that embodied the intellectual property items into the civil turnover.

Considering the right of reproduction, it should be noted that the possibility of copying or changing of the goods that contain the intellectual property items depends on the type of these items. For example, a lot of goods, that contain the item of copyright or related rights, coulad be easily copied. Suffice it to recall about the recording of TV programs, music, movies, computer programs CD's copying . Using the technique is easy to get a digital or an analog copy of practically any object of copyright and related rights. It's also easy to get an image of marketing designations, brand (commercial) names, trademarks, geographical indications, and illegaly use each of them for the marking of goods. But it's extremely difficult and sometimes impossible to copy the goods that contain the objects of patent law. For example, you cannot make a copy of your Bentley or the liquid crystal panel. Undoubtedly, copying

of modern high-tech products and related accessories is almost impossible. In other words, many objects of patent law are technologically protected.

It should be noted that the right of reproduction existing during all the period of the intellectual property item exclusive right existing. In the contrast to the right of reproduction, the right of distribution has a different effect. For example, if the author has negotiate the contract with the publishing house, he handed the exclusive property rights for created work to such publishing house. This means that he let the publisher to reproduce the work that will be sale. In other words, the author gives the permission not only to product books that embodied his work, but to distribute this books or ohter tangible objects. There are any restrictions on further distribution of the goods (books) in the contract between the author and the publisher. Moreover, the royalty's size defined by the volume of goods' (books') distribution (sale). So, for the distribution of the goods the additional permission from both the primary owner (author), the secondary owner (publisher) not required. Therefore, the product is in the civil turnover with the consent of the owner and his right to distribute the work was exhausted. This example shows that there is a principle of exhaustion of the distribution of intellectual property right that can be formulated as follows. The consent of the right holder of the intellectual property item embodied in the product doesn't required after the introduction of this product into civil turnover. There is the essence of principle of exhaustion of the distribution right.

Under this principle that acts for the protection of public interests protected by law, the sold goods will stay the object of civil turnover. If this principle wasn't performed, any goods' resaling will require the right holders permission for ane resaling of goods. It could cause the trade inhibition or mass violations of the right holders' rights.

Very important form of good's civil turnover is their using in the production of other goods. For example, a lot of modern high-tech productions creates the new product mainly from the components of the other goods. The principle of exhaustion of the distribution right means that any producer of products, who use the components of other goods, has the right to sell their products without the consent of the rights holder of intellectual property items embodied in the sets of goods.

The "exhaustion of the distribution right" is mentioned in the international treaties. For example, the aricle 6 of the TRIPS Agreement establishes that any provision of this Agreement couldn't be used to resolving the questions concerning with the exhaustion of intellectual property rights [1, p. 19]. In accordance with the article 6 WIPO Copyright Treaty, the countries are free to define the principle of exhaustion of the right of distribution of the original and copies of the works. The same situation is found in the articles 8 and 12 of the WIPO Treaty on performances and phonograms concerning with fixed performances and phonograms [2, p. 10].

The mention that contains in the TRIPS Agreement on "questions about the exhaustion of intellectual property rights" can lead to the errors. The fact is that after the first sale of the goods only the right of distribution could become exhausted, but not all intellectual property rights. It should be noted that the author's or inventor's right of the reproduction, as the most important exclusive right, couldn't become exhausted. This right prohibits the illegally (noncontractual) reproduction of the intellectual property items that included as a component to the goods.

Thus, the goods are distributes, but no one has the right to reproduce it, because it means the reproduction of the intellectual property items embodied in the products. This rule is meant to protect the interests of the manufacturers and vendors.

The realization of the law protected interests through the restriction of the intellectual property right. The intellectual property system designed to protect the interests of right holders, and it became the means of legal monopoly in the certain goods production. The antimonopoly legislation is in force in most countries. It established that the monopoly do not contribute to the technical and social progress. The prohibition of the intellectual property items free using undermines the development of science, education, creation of new engineering and technologies. It means that the intellectual property system in some ways hinders the development of science and technology, education and culture, as well as social development in general.

With the aim of reducing the negative consequences of legal protection of intellectual activity results (monopolization), the law introduces the intellectual property rights restrictions. The concept of the intellectual property exclusive rights limitation means that the free using of intellectual property rights does not require the consent of the right holders and doesn't violate the law. But such free using of the intellectual property items shouldn't injure the normal exploitation of the objects and does not prejudice the legitimate interests of the right holders. The admissibility conditions of the restrictions of exclusive rights are established on the basis of the «three-level criterion for copyright and related rights items or on the basis of a «two-level criterion for patent law items.

In the international treaties such as the Berne Convention there are some cases of free use of copyright items. The similar examples exists in the national legislation of most countries. For example, the citation of the fragmentes of literary works for the scientific and educational purposes. The legislation establishes another cases of

free using of the works. And in all these cases such using conforms to the three-level admissibility condition limitations.

It should be noted that a three-level criterion expands the list of works free using cases and this list directly formulated in the legislation. This is an important advantage of this criterion; however, it's difficult to use it. The three-level criterion sets the creation of Internet digital libraries for the development of the society. According to copyright law, the copying of the works and their transformation from analog to digital form allowed with the permission of the copyright holder. In other words, if you want to scan the work and post it digital form on the Internet server, you need to get compensated permission from the copyright holder. Because of mentioned conditions the creation of digital libraries did not become a mass, this fact hinders the society's access to the knowledge and information, makes the education difficultty and expensive. The third condition is the most important of all admissibility conditions established by the three-level criteria. The free using of works or related rights objects allows if it doesn’t prejudice the legitimate interests of right holders. One of such legitimate interests is the remuneration. If the right holder could receive remuneration from any use of their work, the free use of this work is forbidden, and if he could not, then it's enabled. In the case of scanning books for digital libraries it's important to note such information. The «digitization» of book that is on sale could reduce its sales and reduce the author's fees. And if the same book isn't on sale and it can't be bought, theirs scanning and posting won't harm the legitimate interests of the rightholders. Moreover, the works that are in the Internet could be the author's or publishing house's advertisement. Therefore, in the case of digital libraries the three-level criteria allows the Internet posting of digital copies of books that are not in free sale.

Here is the example of the free use of the related rights objects derives from the three-level criterion. In countries with a low life level a lot of goods that embodid the copyright and related rights objects sometimes are very expensive. Thus, computer programs, video and audio discs can constitute a much of earned income or even more. In other words, most people can't buy licensed computer programs and other similar goods on theirs earned income. Therefore, the free use of such objects can't restrict the material interests of the right holder, because of the absence of the opportunity to buy the licensing object due to the lack of funds. As a consequence, even the appearance of counterfeit products may not cause the injury to the manufacturer. Despite this conclusion that follows from a three-level criterion that formulated in one of the fundamental documents of the WTO (TRIPS Agreement), a lot of countries violate even their national legislation and international norms, and persecute their citizens in the interests of transnational companies.

The three-level criterion that restrict the exclusive copyright and the exclusive rights on some related rights objects established in the TRIPS Agreement, the WIPO Copyright Treaty and the WIPO Performances and phonograms Treaty [3, p.16-17]. Part 3 of article 426, 444 of the Civil code of Ukraine sets a single criterion for all intellectual property items. However, the absence of the first restriction criterion does not correspond to the TRIPS Agreement for the exclusive copyright and related rights.

The article 30 of the TRIPS Agreement establishes two-level criterion of the admissibility restriction of the legitimate interests of the third parties for patent law objects.The two-level criterion of the admissibility restriction it is the conditions of free use of patent law object, that do not prejudice the normal exploitation of objects and do not unreasonably prejudice the legitimate interests of rights holders.

This criterion is different from the three-level criterion of the admissibility restrictionof copyright in two ways: a) the three-level criterion is applied in certain special cases of using, and two-level is applied in any case; b) the three-level criterion does not take into account the legitimate interests of users, and two-level - take into account, because the restrictions are permitted in the legitimate interests of the third parties.

The national legislation of the patent law usually lists the cases of admissibility free use of the patent law objects, the most important of which is reverse engineer or reverse technical analysis, the combination of scientific, technical and other methods of analysis of the competitors' achievements. Such an analysis has been used in industry, scientific and technical research and development and it is one of the elements of competitive intelligence. National legislation de jure recognize that is happening de facto. The two-level criterion limitations of patent law expand the amount of free use that directly formulated in the legislation.

Such criterias doesn't establish for means of individualization as the third category of intellectual property items. Therefore, no free use of the trademarks, trade names, geographical indications, don't recognized by the international treaties. This position is quite understandable, because themeans of individualization characterize the manufacturer and his products, and nobody else has a right to use them, if the rights holder would not allow it.

As stated above, the intellectual property law it's the exclusive (monopoly) rights. Therefore, we can conclude that a temporary monopoly of the copyright holders gives them the right to prohibit any using of objects, if the rights on them belongs to him. So, for the purpose of establishing a balance between the private interest of the right holders and the interests of the society and its individual

members, the laws establish the limitations and exceptions from this monopoly. But such limitations and exceptions do not create the essential barriers to the normal implementation of intellectual property rights and law-protected interests. It is possible to restrict the rights of the owner voluntarily (free license, denial of property rights etc).

In the view of the aforesaid, we can conclude that in the case of intellectual property rights provided for by the law or the contract, it's important to protect mentioned rights with established methods. In the case when the intellectual property right is not established, but the interested party has the need for an action that is not directly forbidden for by the law, or the need to committ the actions on restriction of holder's monopoly rights, there is arise the possibility of its protection by requiring or acting. Thus, when a right holder will deny the actions of the interested person, the author should prove the illegality of actions of the interested person, and such person could only deny the illegality of the copyright holders' requirements. In the case of a court dispute, the court decision will certify the legally protected interest of a particular person. Such document will contain which the way of implementation of the protected interest.

The public interests in the pharmaceutical industry and intellectual property rights (access to medicines). At the Fourth National Congress on bioethics (September, 2010) and on the Second all-Ukrainian Congress of health law, bioethics and social policy (April, 2011) the representatives of the medical and legal community have repeatedly expressed the opinion about the need for a clear distinction between the conceptions of «medical care» and «medical service». Not in the context of the already traditional approach of differentiation of medical activity in a medical institution, but depending on the property form of such institution and

through the prism of opportunities for commercialization of the intellectual property items in the specified sphere. The medicine institution, in turn, is fully impregnated by conflicts of interests of the inventor, patient, pharmaceutical companies and consumer of healthcare products. The compensation of spending on clinical cheking of medical products carried out by the applicant of the relevant medicinal product. The adequate legal protection of the intellectual property items is very important source of revenue for the medical institution in general and for the doctor in particular. Principles of intellectual property protection is in continual conflict with the principles of medical deontology. At different scales are the interests of the two people: inventor (with his monopoly unconditional right on his own intellectual result) and patient (with its inherent right of free access to the best medical achievements). We should agree that the interests of both are the absolute value of the modern society.

The methods of therapeutic and surgical treatment excluded from the list of patentability object in accordance with article 53 of the European patent Convention and the national laws in the field of industrial property of the member states of the European Union. Such situation is explained by ethical considerations or by the fact that these methods could not be industrially applicable. A similar approach is contained in the article 27 of the Agreement on the trade aspects of intellectual property rights, which established that member states could "not allow the patenting of diagnostic, therapeutic and surgical methods of treatment of humans or animals».

Opposed to the foreign and international legislation, the Law of Ukraine «On protection of rights on inventions and utility models» does not limit the list of objects of the medical designation that legally protection. In addition, in Ukraine you can get a patent for an invention and a utility model patent as for the ways of therapeutic

treatment and also for the ways of surgical treatment. For example, in accordance with the patent of Ukraine on a useful model №UA 71846 patented «The method of treatment of acute intestinal infections caused by opportunistic pathogens with using colloidal silver» [4], and the patent of Ukraine on a useful model №UA 71155 patented «The method of treatment of acute deep venous thrombosis of the lower extremities» [5] etc.

The Law of Ukraine «On protection of rights on inventions and utility models» should be changed with the aim of ensuring the balance between the rights of the treatment patent owner, with the interests of society or with the rights of a doctor,who has the ethical responsibility for the choice of the best treatment method. This approach supporting by L. Rybotyagova [6, p. 210] and O. Kashincev [7, p. 148].

There are another approaches of solving this problem: 1) the implementation of the civil legislation provisions concerning with compulsory licensing of inventions (utility models) as the trial limitations of patent rights; 2) the implementation and development of the legislative provisions on exhaustion of intellectual property rights on inventions and utility models and the possibilities of parallel imports as a legal tool to reduce the price on medicines; 3) use of inventions (utility models) that include medicines for experimental purposes; 4) the protection issues of the “non-public information” about preclinical and clinical testing; 5) the functions of the regulatory authority for registration of medicines in relation to the protection of intellectual property rigts; 6) the coordination of patent protection issues and isuues concerning with protection of pharmaceutical researchs results; 7) the harmonization of the inventors' rights in the field of medicine and patient's rights from the position of separation «medical care» and «medical services». This approach supports by A. Mindrul [8, p. 211], V. Selivanenko [9, p. 283].

We believe that a compromise solution to this problem is to recognize the surgery or therapy methods of human or animal treatment and diagnostic methods that used in human or animal organism as the basis of the patent unability of inventions in the interest of public health. This provision shouldn't apply to products, particularly substances or mixtures, that are used in any of these methods. This approach is consistent with the European vectors of development of intellectual property law.

Thus, the specification of abovementioned material gives the opportunity to define the remedies of legitimate interests in legal relations on intellectual property: 1) in the case of presence of legitimate interest to use the already registered intellectual property item, the interested person have the right to recognize the invalidation of the protective document (on the basis if the right holder didn't use the item during last three year, or in the case of absence of novelty in the patented object); 2) to introduce the right of prior use or implement the possibility to use and distribute the intellectual property items to everyone after the recognizing the invalidation of the patent or certificate by setting the legal borders of the item's use; 3) in the case of temporary monopoly, for the purpose of establishing a balance between the private interest of the right holders and the interests of the society and its individual members, the laws establish the limitations and exceptions from this monopoly. But such limitations and exceptions do not create the essential barriers to the normal implementation of intellectual property rights and law-protected interests. It is possible to restrict the rights of the owner by voluntarily (free license, denial of property rights etc). In this case, the protection of the interests occurs by a claim making or taking specific actions. Thus, when a right holder will deny the actions of the interested person, the author should prove the illegality of actions of the interested person, and such person could only deny the illegality of the copyright holder'

requirements. In the case of a court dispute, the court decision will certify the legally protected interest of a particular person. Such document will contain which the way of implementation of the protected interest; 4) cancellation of the certificate of trademark registration or commonly known trade mark (on the basis if the right holder didn't use the item during last three year from the registration date); 5) in the case of the right holders' rightscompetitionand interests conflicts concerning with industrial designs and trademarks, the protection of all these rights and interests providing for by the law by sharing the rules of priority of the industrial design with respect to the registration of commercial names (thus, the creative results have the priority); 6) filing the case about the cancellation of the disputed law enforcement documents (for example, a claim to cancel the state registration and recognition the patent invalidation in case of absence of eligibility criteria and thus receiveing the possibility to use a specific result); 7) bringing the fact of previous use without registration, in this case, the permissive activity applied, until the court's establishing of the prohibition in the its act.

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ОКРЕМІ АСПЕКТИ ЗАХИСТУ ЗАКОННИХ ІНТЕРЕСІВ У ПРАВІ ІНТЕЛЕКТУАЛЬНОЇ ВЛАСНОСТІ

Венедіктова І. В.

Статтю присвячено аналізу реалізації та захисту законних інтересів шляхом обмеження й вичерпання прав інтелектуальної власності правоволодільцев і заінтересованих осіб. На підставі дослідження законодавства, доктрини і судової практики зроблено висновок щодо способів захисту охоронюваних законом інтересів у таких правовідносинах.

Ключові слова: законний інтерес, право інтелектуальної власності, захист законних інтересів.

ОТДЕЛЬНЫЕ АСПЕКТЫ ЗАЩИТЫ ЗАКОННЫХ ИНТЕРЕСОВ В ПРАВЕ ИНТЕЛЛЕКТУАЛЬНОЙ СОБСТВЕННОСТИ

Венедиктова И. В.

Статья посвящена анализу реализации и защиты законных интересов путем ограничения и исчерпания прав интеллектуальной собственности правовладельцев и заинтересованных лиц. На основе исследования законодательства, доктрины и судебной практики сделан вывод о способах защиты охраняемых законом интересов в таких правоотношениях.

Ключевые слова: законный интерес, право интеллектуальной собственности, защита законных интересов.

SELECTED ASPECTS OF LEGAL INTERESTS DEFENSE IN LAW OF INTELLECTUAL PROPERTY

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This article examines the implementation and protection of legal interests by limiting and exhaustion of intellectual property rights of owners and related parties. The author defined the remedies of the legal interests in such relationships based on the study of law, doctrine and

jurisprudence. The intellectual property determined as the exclusive right and as a kind of absolute rights, with all the objective features characteristic, namely: 1) all rights in the results of creative work, arising independently of the will of third parties, 2) all others third parties are persons of incidence, and 3) owner can make a complaint against the persons of incidence, if they committed illegal acts regarding entities them. Also, there is an analysis of the provisions of the Law on Copyright and Related Rights in this article. This analysis concerning with the issues of property rights of the authors of works, describes the types of property rights of the author's intellectual property rights, including the rights to reproduce and to distribute the results of intellectual activity. The analysis on "issues of exhaustion of intellectual property rights" is contained in this article. The author examines the implementation of legally protected interests in the context of limits on intellectual property rights. The author believes that this limits are necessary in order to reduce the negative effects of legal protection of intellectual activity (monopolization). The author gives examples of free-use of copyright based on "three-tier criteria" for objects of copyright and related rights, or on the basis of "two-tier criteria " - to the subject of patent rights. Analysis of the public interest in the pharmaceutical and intellectual property rights (access to medicines) are also contained in this article.

Keywords: legal interest, law of intellectual property, legal interest defense.