

Principles of enforcement and protection of IP rights

Принципи охорони й захисту прав інтелектуальної власності

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IP, IP rights, enforcement and protection of IP rights, principles of enforcement and protection of IP rights.

Ключові слова:

інтелектуальна власність, право інтелектуальної власності, охорона та захист прав інтелектуальної власності, принципи охорони та захисту прав інтелектуальної власності.

Results of intellectual activity impact on dynamics of modern development of society strongly. World community, including Ukrainian society, realized that the level of its social and economic development is directly proportional dependent on realization of results of intellectual activity in science, technology, production and culture. Such significance of the field of intellectual activity needs prudent legal regulation by the way of forming of multilevel system of legal acts. So, forming and development of effective and qualitative system of guard and protection (SGP) of IPR become very important in modern conditions.

Despite the large number of scientific researches¹, such important foundations of guard and protection of IPR as their principles stay not researched enough. That's why *the object* of this article is to formulate principles of guard and protection (PGP) of IPR and to open their essence.

The effectiveness of functioning of the SGP of IPR is depended on clear orientation and strategic focus of all legal norms and measures, which regulate relations in the field of IP and restore IPR, if its were broken. We can to provide this condition by the way of determining and strict adherence of PGP of IPR. To realize, formulate and systematize PGP of IPR, we assume that the *SGP of IPR* includes three interrelated elements: legal norms, which regulate relation of creating and using of IP objects; measures, which are directed on recognition and recovery IPR, if its were broken; and also authorities, which realize these measures.

The term "*principle*" from Latin means a "start", "ground" and "antecedence"².

During a determining of concept of principles of Law we can separate two conceptions which were formed in frames of legal doctrine. According the first concept (the theory of positivism), principles of Law are ideas, theoretical and regulatory guidelines of any kind of human activities, which are specified in contents of legal norms and caused by material norms of society existence objective. According the second concept (natural law), the principles of Law are leading ideas, starting positions which are inherent objectively to Law, and as undeniable requirements (positive obligations), which are made to participants of social relations to harmonic combination of personal, group and public interests, and determine the content and orientation of legal regulation and reflect the most important patterns of social and economic formation³.

For our research the most interesting is the approach by researchers who emphasize on ability of the principles of Law to impact both on norms of Law and on enforcement activities of authorities⁴. This, in turn, gives possibility to assume, that the principles of Law impact on character of named elements of SGP of IPR. At the same, there are separated groups of principles in the legal system of Ukraine. Review of them will facilitate to understand and to systematize PGP of IPR better, than before, because the first principles are initial to form the second.

¹ These scientific researches include researches by U. Boshuckyi, A. Havrylishyn, V. Ivashchenko, V. Zharov, R. Stephanchyk, O. Yastremska, S. Alekseev, A. Vengrov, V. Dozorcev, O. Ioffe, N. Matuzov, I. Pokrovskiy, I. Stryzhak, R. Khalphyna, G. Shershenevych, R. Shyshka.

² Поп-культура [Electronic resource]. – Access mode : <http://www.jnsm.com.ua/cgi-bin/u/book/sis.pl?Article=14621&action=show>.

³ Старчук О. Щодо поняття принципів права / О. Старчук // Часопис Київського університету права. – 2012. – № 2. – С. 40–44.

⁴ Солоненко О. Функціональний аспект принципів права у правозастосовній діяльності / О. Солоненко [Electronic resource]. – Access mode : <http://www.pravoznavec.com.ua/period/article/6739/%D1>.

All principles of Law are separated into two large groups – general and social, and specific and social (juridical). The first group includes economic, social, political and ideological, moral and spiritual etc. Another group includes general, sectoral and cross-sectoral principles. General principles are the most important, because they reflect human values⁵. Among the general principles, which have weight in the sphere of research, are the following: rule of law, unity of rights and obligations of subjects of social relations, prevalence of rights and freedoms of human under rights of a state, guaranty of rights and freedoms of citizens, mutual responsibility of a state and a person, presumption of innocence, inevitability of punishment for guilt so on, so on.

Cross-sectoral principles are principles of Law which express specifics of few related sectors of Law, like the PGP of IPR are determined on the border between Constitutional, Civil, Criminal, Administrative and Customs Laws.

Although Ukrainian national legislation does not define directly PGP of IPR, but they can be formulated on the base of analysis of legislative novels which proclaim general grounds of guard and protection of IPR. First of all, the Constitution of Ukraine proclaims such axioms of providing of guard and protection of IPR⁶. They determine starting positions of guard and protection: to prevent to violation of IPR. The postulate about a safe using of IP has preventive nature for consumers of intellectual activity results, namely provides back relation in the system “provider – consumer”.

Besides general, and at the same time constitutional, principles of Law⁷, we propose to separate the next PGP of IPR: principle of guaranteed of right on results of own intellectual and creative activities; protection of IP, copyrights, moral and material interests which are appeared on the base of different kinds of intellectual activities; protection of IP by a state; inviolability of IPR; dominance of public interests in the process of using of IPR.

The Constitution postulates, which are named higher, also became the base to specify of PGP of IPR in other fields of legal regulation, particular in the field of Patent Law. We agree with the view about belonging to these principles such principles, as *territorial*⁸, *principle of the criteria of selectivity*⁹, *principle of “Novelty”*¹⁰, and *principle of exclusive right*¹¹, and *principle of coordination of interests of owners of patents and society in general* on the base of introduction of exclusion from the scope of the patent monopoly which are caused by public demands¹².

The Constitution postulates are developed in the Civil Code of Ukraine, besides general Constitutional principles, like a principle of inactiveness of IPR. Principle of coordination of IPR and property right¹³, principle of exclusive right of holder to use an object of IPR and to prevent to unlawful using of them, principle of responsibility for violation of IPR, principle of juridical protection of IPR are proclaimed by this Code¹⁴.

In our opinion, the Crime Code of Ukraine¹⁵ and the Code of Ukraine on Administrative Offences¹⁶ not only reveal the meaning of constitutional provisions on the PGP of IPR, like the Civil Code of Ukraine, as ensure the

⁵ Скаун О. Теорія держави і права : [підручник] / О. Скаун. – Х. – Консум, 2006. – С. 222–224.

⁶ Конституція України : Закон України від 28 червня 1996 р. № 254к/96-ВР [Electronic resource]. – Access mode : <http://zakon4.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80>.

⁷ Its include such principles as a supremacy of Law, unity of rights and obligations of subjects of social relations, prevailing of rights and freedoms of human on rights of a state, guaranteed of rights and freedoms of citizens, mutual responsibility of a state and a person.

⁸ It means that the patent is granted according to the national legislation, and all rights which are related with the national legislation are measured by borders of the state or region.

⁹ This principle means that the legal guard is provided exclusively to objects of IP, which are recognized a patentable on the base of the criteria of novelty, non-obvious and industrial availability.

¹⁰ Objects of industrial property have to be used without violation of others' patent rights.

¹¹ Exclusive right to using of patented objects of IP is recognized to an owner of patent, and penalties for violation of this right are established.

¹² Базилевич В. Охорона та захист прав інтелектуальної власності / В. Базилевич [Electronic resource]. – Access mode : http://pidruchniki.ws/11151212/ekonomika/ohorona_zahist_prav_intelektualnoyi_vlasnosti.

¹³ IP rights and property right on thing are not related.

¹⁴ Цивільний кодекс України : Закон України від 16 січня 2003 р. № 435-IV [Electronic resource]. – Access mode : <http://zakon2.rada.gov.ua/laws/show/435-15?test=qY4Mfbtc78fViiRUZi2r/.7uHl4v.s80msh8le6>.

¹⁵ Кримінальний кодекс України : Закон України від 5 квітня 2001 р. № 2341-III [Electronic resource]. – Access mode : <http://zakon4.rada.gov.ua/laws/show/2341-14>.

¹⁶ Кодекс України про адміністративні правопорушення : Закон України від 7 грудня 1984 р. № 8073-X [Electronic resource]. – Access mode : <http://zakon3.rada.gov.ua/laws/80731-10>.

implementation of these principles¹⁷. Named principles are realized by the way of installation of criminal and administrative responsibility for: violation of copyright and related rights; infringement of an invention, utility model, industrial design, integrated circuit topography, plant variety, efficiency proposal; illegal collecting and divulging of information which is a trade secret, including data, which are related with objects of IP; illicit trafficking of disks for laser reading systems, matrices, equipment and raw materials for their production.

Postulates of the Customs Code of Ukraine¹⁸ also provide realization of PGP of IPR by the way of establishing of features of executing of customs control and customs clearance of goods, containing objects of IP. These features forecast: keeping the register of customs goods that are objects of IPR; suspension of such goods; decisions about utilization of such goods on suspicion of violation of IPR, changing of labeling on products and their packaging to eliminate evidence of violations or the continuation of customs clearance in order after harmonization of conflict between owner of IPR objects and owner of the goods.

We propose to formulate the next PGP of IPR on the base of content of Postulates of the Customs Code of Ukraine: priority rights and interests of subjects which transporting IP objects across the customs border of the rights and interests of the state, which derives from the meaning of issue 4 of article 3 of the Customs Code of Ukraine; central control on abidance of rights of subjects of IP, essence of which expresses in creating and using of the Customs Register; principle of initiative of holder, the essence of which is executing of majority of activities to protect subjects of IPR at the time of goods crossing the customs border of Ukraine on application of holder. Exception to the rule is the ability to suspend customs clearance of goods at the initiative of Customs. It can be has done subject to available of the list of grounds to consider that the IPR can be violated because of crossing the customs board, is ordered by Government of Ukraine.

This list of principles is not exhaustive. Other PGP of IPR can be formulated in the process of studding of concepts of the Customs Code of Ukraine. Starting point to formulate them can be principles of activities of state bodies, which realize state customs policy, and are ordered by Section XX of Customs Code of Ukraine. But Ukrainian legislation does not declare such principles today. That's why we propose to define principles of activities of state bodies, which realize state customs policy, similarly these principles are ordered in laws of Ukraine¹⁹.

Besides, PGP of IPR are defined on the level of international legislations. PGP of IPR are separated into principles of guard and principles of protection on the criteria of main goal of guard and protection of IPR in international legislations.

The aim of legal guard is an intensification of a legal mechanism of legislative prevention on possibility to use results of intellectual activities by the third persons on commercial goal. Protection of IPR is executed in administrative and court order to restore a status of holders of IPR if such rights were violated. In light of the above, describe the PGP of IPR are declared in the international legal acts.

For example, according Paris Act of 24 July 1971 amended October 2, 1979 of the Berne Convention for the Protection of Literary and Artistic Works, the principles of "national regime", principle of "automatic guard" and principle of "independence of guard" and presumption of authorship are principles of guard of IPR²⁰.

The principle of "national treatment" means protection of creations as objects of IP created in one of the Parties to the Convention shall be carried out in other Member States at the same level and to the same extent as with respect to objects IP created in these and other countries. It does mean that the each Member State of the Convention destines to citizens of other Member States at least the same copyrights as to own citizens. Settlement of issues regarding the use of copyright IP held under the laws of the Member in whose territory they

¹⁷ These principles are: guarantee the rights and freedom of citizens; providing of protection of IP by a state; mutual responsibility of a state and a person; inevitability of responsibility for; presumption of innocence in the process of determining of personal guilt.

¹⁸ Митний кодекс України : Закон України від 13 березня 2012 р. № 4495-VI [Electronic resource]. – Access mode : <http://zakon1.rada.gov.ua/laws/show/4495-17>.

¹⁹ Let ourselves don't emphasize on this problem, because, in our opinion, it is an object of separate research. Detail: Про державну службу : Закон України від 16 грудня 1993 р. № 3723-XII [Electronic resource]. – Access mode : <http://zakon4.rada.gov.ua/laws/show/3723-12>.

Про міліцію : Закон України від 20 грудня 1990 р. № 565-XII [Electronic resource]. – Access mode : <http://zakon2.rada.gov.ua/laws/show/565-12>.

Про Державну прикордонну службу України : Закон України від 3 квітня 2003 р. № 661-IV [Electronic resource]. – Access mode : <http://zakon2.rada.gov.ua/laws/show/661-15>.

²⁰ Паризький Акт до Бернської конвенції про охорону літературних і художніх творів : міжнародний документ від 24 липня 1971 р. (змінений 2 жовтня 1979 р.) [Electronic resource]. – Access mode : http://zakon2.rada.gov.ua/laws/show/995_051.

are issued, publicly performed, transmitted on the air more. No import of foreign law in copyright law relations in the country not allowed: copyright law of a particular country Parties to the Convention shall apply to any works used in its territory, regardless of where these works were created.

The principle of “automatic protection” means that the protection of IPR is granted automatically and is not driven by formal terms of registration, deposit, etc. Copyright does not require the use of any preliminary formalities and occurs automatically at the time of fixation of the work in a tangible form (for citizens of member countries of the Convention) or the first publication (published for these countries works of foreign authors).

Under the principle of “independence of protection” granted ownership rights and their implementation does not depend on the existence of protection in the country of origin. Action of this principle does not expand on works, dates of guard of which have finished in the country of origin.

The content of the presumption of authorship is that in the absence of evidence to the contrary, the author is the one whose name or alias specified on the cover of the book. The authorship of the work is determined by the laws of the country of origin.

Paris Convention for the Protection of Industrial Property of 20 March 1883, including Stockholm Act²¹, which for the international community entered into force March 26, 1970, and for Ukraine – December 25, 1991, determines such principles of guard of IPR, as: *principle of formal reciprocity* (states mutually provide specific inequality of rights and equality in rights of foreigners nationals. Aliens receive the same rights provided to citizens); *principle of statutory protection of trademarks in intact (telle quelle)* (every trademark duly registered in the country of origin is stated in other Member States of the Convention and is protected as it is); *convention priority of trademark* (the person, who applied for trademark registration in one of the Member States of the Convention, uses priority in others Member States. So, this person has priority to register his trademark during six months in others Member States. Duly completed application which has completed in one of the Member States, is a ground to use priority right. The applicant is not required to apply for a trademark at the same time in all countries in which it wishes to receive its legal guard); *principle of independence of national registration of a trademark* (registration becomes independent on possible registration of a trademark in any state, including state of origin, after registration has done in one of the Member States. So, termination or cancellation of registration of the mark in one of the Member States shall not affect the validity of the registration of the mark in other Member States).

The Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations of 26 October 1961 includes principle of “*national regime of guard*”. It means, that the legal regime of guard of performers on executions committed in broadcasts or recorded for the first time, producers of phonograms first fixed or first published, broadcasting organizations the headquarters of which are located in the territory of Parties to the Convention in respect of broadcasting carried out using transmitters located on the territory of the Member, is established by national legislation of Member States²².

The list of international legal acts defining principles of protection of IP includes three acts only.

The first, Geneva Convention for the Protection of Producers of Phonograms against Unauthorized Duplication of their Phonograms of October 29, 1971 establishes the principle of “*national regime*”. According to this principle, each Member States is obligated to protect interests of Producers of Phonograms, whose are citizens of another Member States against Unauthorized Duplication of Phonograms and against importation of such duplications every times, when referred to the production or importation is for the purpose of distribution to the public, and also against distribution these duplications to the public²³. The same principle is declared in Treaty WIPO Performances and Phonograms Treaty (Geneva Agreement) of 20 December 1996²⁴.

²¹ Паризька конвенція про охорону промислової власності : міжнародний документ від 20 березня 1883 р. [Electronic resource]. – Access mode : http://zakon4.rada.gov.ua/laws/show/995_123.

²² Міжнародна конвенція про охорону інтересів виконавців, виробників фонограм і організацій мовлення : міжнародний документ від 26 жовтня 1961 р. [Electronic resource]. – Access mode : http://zakon4.rada.gov.ua/laws/show/995_763.

²³ Конвенція про охорону інтересів виробників фонограм від незаконного відтворення їхніх фонограм : міжнародний документ від 29 жовтня 1971 р. [Electronic resource]. – Access mode : http://zakon5.rada.gov.ua/laws/show/995_124.

²⁴ Договір Всесвітньої організації інтелектуальної власності про виконання і фонограми, прийнятий Дипломатичною конференцією 20 грудня 1996 р. [Electronic resource]. – Access mode : http://zakon5.rada.gov.ua/laws/show/995_769.

Principles of *more favorable requirements and the lack of regulation of substantive patent law* are proclaimed by Geneva Agreement on Patent Law of June 01, 2002 also are principles of protection of IPR. It means that the Contracting Party is free to make demands which, in applicants' and holders' opinion, are more favorable than requirements forecasted in the Agreement and in the Instruction, exception of date of application. Content regulation no substantive patent law is that only by a Contracting Party the right to set stored on your own requirements applicable substantive law on patents²⁵.

So, PGP of IPR are separated on the level of international legal acts. We agree in general with this assumption and propose the next list of PGP of IPR: 1) *principle of inviolability* – legal protection is realized on the base of concept about inaction of IPR. Nobody can't be voided of IPR or limited in its' realization, except of cases are forecasted by law; 2) *suitability for perception* – legal protection is realized on result of intellectual creative activity (for instance, scientific research, literature or art work etc.) if it was created and formed as a suitable for perception of compliance; 3) *compliance with legislation* – legal protection is realized on result of intellectual creative activity (inventions, utility models, and industrial designs) if it meets the requirements of Ukrainian legislation in the sphere of IP; 4) *chronological constraints* – legal protection of objects of IP is realized during some term, which is determined by legislation; 5) *delineation of property rights and IPR* – legal protection is realized exclusively on one or another object of IPR, but it is not expanded on property rights on physic carrier in which creative result is embodied. A property right on the thing in which creative result is embodied is not dependent on IPR on this result.

Outlined material gives possibility to classify PGP of IPR by the help of such criteria: 1) on reflection of essence of principles in sources of law – principles are reflected in international sources and that are reflected in national sources (constitutional principles, principles essence of which is inclusive in Codes of Ukraine, and principles essence of which is inclusive in laws); 2) on the level of generalizing – common and special; 3) on the goal of measures – principles of guard and principles of protection of property rights.

In summary, we note that analysis of the relevant sources of law for the first time made it possible to: 1) identify PGP of IPR, 2) determine the criteria for their classification, 3) classify these principles. The study also found a gap right in the regulation of bodies exercising public customs, which is no legal definition of the principles of their activities in the Customs Code of Ukraine. An articulate those principles and keep them in Chapter XX of Customs Code of Ukraine.

Summary

The principles of enforcement and protection of IP rights are determined and their content is disclosed based on the analysis of national and international legal acts in the article. Criteria for the classification of the principles of protection and enforcement of IPR are determined and they are classified.

Анотація

У статті визначено принципи охорони й захисту прав інтелектуальної власності та розкрито їх зміст на основі аналізу міжнародного й національного законодавства. Запропоновано критерії класифікації принципів охорони та захисту прав інтелектуальної власності, а також надано авторську їх класифікацію.

²⁵ Договір про патентне право : міжнародний документ від 1 червня 2000 р. [Electronic resource]. – Access mode : http://zakon3.rada.gov.ua/laws/show/895_002.

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