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CURRENT ISSUES OF PUBLIC ADMINISTRATION IN THE FIELD OF INTELLECTUAL PROPERTY IN MODERN UKRAINE

Abstract

The article investigates issues of state administration in the sphere of intellectual property in Ukraine. The author analyses the current relative legislation and the intellectual property state policy legal provision.

The research suggests improving the existing system of intellectual property administration, harmonizing its parameters with the current and future market environment demands, optimizing the collective management organization.

The author proves that intellectual property efficiency is the source of additional profit during project realization, ensuring the product quality and competitiveness, expanding market possibilities and avoiding problems, arising in case of intellectual property rights infringement.

The article provides reasons for optimizing the legal protection of all intellectual property objects, broadening the range of the relative services in the sphere of intellectual property commercialization and developing the civilized market of intellectual property objects application.

Keywords

intellectual property – intellectual property administration – the intellectual property state service – the intellectual property legislation – intellectual property rights infringement

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The examples of successful development and economic growth in many countries of the world indicate that the most dynamic sectors of national economies are those associated with intensive activity in the sphere of knowledge and intellectual property. Such trends are important, not only for the effective legal protection of intellectual property as a strategic tool of the economy, but also for investments, which will have to increase to set the basis for national development and increasing the importance of intellectual property.

A specific feature of the development of the concept of intellectual property is an indivisible combination of its legal and economic aspects. For all its characteristics, intellectual property has an economic value. Therefore, an effective system of intellectual property management, which will be able to support actively the national economy based on knowledge, capable of making rapid and informed decisions, to react adequately to changes in the environment and complicated processes in the system being managed, has still to be created in Ukraine.

There is not a completely perfect method of management of intellectual property in our state today. A significant drawback of the existing system of management is that it actually lacks a comprehensive approach to the process of providing information, expertise, legal protection, economic evaluation and use of objects of intellectual property.

The management of intellectual property almost ends at the stage of the issuance of title protection and management system that decides issues related to the assessment of rights of use and introduction into the economic turnover, that is, from economic returns to profit or other benefit, the main thing for which, in fact, the evaluation procedure encompassing value of an object and possibilities of its use has not been developed.

The organization of the functioning of industrial property management in Ukraine is characterized by a lack of proper coordination in the work of state agencies, and a lack of efficiency of activity of the structures that ensure the protection of industrial property rights. Thus, today there is a need for improving the current system of intellectual property management, and harmonization of its parameters with the current and future requirements of the market environment.

In general the principles of the public administration of intellectual property are defined by the Constitution of Ukraine¹. According to § 6 Article 85 of the Basic Law, the Verkhovna Rada of Ukraine approves the program of scientific and technological development in the state. According to § 4 of Article 116 of the Constitution of Ukraine, the Cabinet of Ministers of Ukraine elaborates and implements national programs of economic, scientific-technical, social and cultural development, as well as the direct management of intellectual activity, and determines state policy in the field of public activity. The Cabinet of Ministers of Ukraine creates state bodies for the management of intellectual activity. We refer to almost all the state bodies of management of the national economy – the ministries, agencies, and state committees, managing intellectual activity in accordance with the competences defined by the Constitution of Ukraine.

Public administration of intellectual activity to a certain extent is also performed by public organizations, creative unions, funds, etc. Within their competence, they issue the appropriate regulations in the sphere of intellectual activity. However, the determining form of public administration of intellectual activity is still their governance.

Within the scope defined by the Constitution of Ukraine, the President of Ukraine determines the optimal structure of state administration, including intellectual activity. We consider it reasonable to address and outline the history of this issue. So, the Decree of the President of Ukraine № 250 of 13 March 1999 on Changes in the System of Central Executive Bodies of Ukraine² was created by the State Committee of Ukraine for Science and Intellectual Property (hereinafter – Derzhcomnauky) on the basis of the liquidated Ministry of Ukraine for Science and Technology, the State Patent Office of Ukraine, and the State Agency of Ukraine for Copyright and Related Rights. The Decree

¹ Constitution of Ukraine of 28.06.1996, № 254k/96-VR, Statements of the Verkhovna Rada of Ukraine 1996, No. 30, p. 141.

² The President of Ukraine Decree on Changes in the System of Central Executive Bodies of Ukraine of 13.03.1999, № 250/99, Uryadovyi Kurier [Governmental Courier] of 16.03.1999.

of the President of Ukraine № 987³, dated August 13, 1999, approved the regulation on the State Committee of Ukraine for Science and Intellectual Property. However, during 1999, Derzhcomnauky could not organizationally ensure the operation of the state system protection of intellectual property. There was no organizational structure, capable of performing all the functions of the current patent legislation properly. In this regard, the President of Ukraine signed Decree № 1573 of December 15, 1999 on Changes in the Structure of Central Bodies of Executive Power⁴, where p. 4 of March 13, 1999, № 250 is recognized as having lost its force. In accordance with the fourth paragraph on p. 1 of this Decree, it was agreed to establish the Ministry of Education and Science of Ukraine on the basis of the Ministry of Education of Ukraine and the State Committee of Ukraine for Science and Intellectual Property that were liquidated. According to this presidential Decree⁵, the Cabinet of Ministers of Ukraine by its order dated April 4, 2000, № 601 formed the State Department of Intellectual Property as a governmental body of state administration within the Ministry of Education and Science of Ukraine. And by the Decree of June 20, 2000, № 997⁶ the regulations on the State Department of Intellectual Property were approved.

By the Decree of the President of Ukraine № 436/2011⁷ from April 8, 2011 relating to the approval of the State Service of Intellectual Property of Ukraine it is stipulated that the State Intellectual Property Service of Ukraine (hereinafter – the State Service) is the Central Executive Body, whose activity is directed and coordinated by the Cabinet

³ Article 93 of the President of Ukraine Decree on Regulations on the State Committee of Ukraine for Science and Intellectual Property of 13.08.1999, № 987/99, Official Bulletin of Ukraine 1999, no. 33.

⁴ The President of Ukraine Decree on Changes in the Structure of Central Bodies of Executive Power of 15.12.1999, № 1573/99, Uryadovyi Kurier [Governmental Courier] of 17.12.1999.

⁵ Article 38 of the Resolution of the Cabinet of Ministers of Ukraine on Establishment of the State Department of Intellectual Property of 4.04.2000, № 601, Official Bulletin of Ukraine 2000, no. 14.

⁶ Article 140 of the Resolution of the Cabinet of Ministers of Ukraine on Approval of the Regulations on the State Department of Intellectual Property of 20.06.2000, № 997, Official Bulletin of Ukraine 2000, no. 25.

⁷ Article 76 of the President of Ukraine Decree on Approval of the State Intellectual Property Service of Ukraine of 8.04.2011, № 436/2011, Official Bulletin of the President of Ukraine 2011, no. 10.

of Ministers of Ukraine through the Minister of Education, Youth and Sports of Ukraine. The State Service is included in the system of executive bodies and provides implementation of state policy in the sphere of intellectual property. The primary goal of the State Service is defined as the state policy implementation in the sphere of intellectual property.

Thus, the State Service in accordance with its tasks makes more comprehensive the practice of application of legislation on issues relating to its competence, develops proposals for the improvement of legislative acts; in the established procedure organizes examination of intellectual property objects, grants patents/certificate on the objects of intellectual property; carries out the state registration and recording of intellectual property rights, conducts the registration of contracts on the transfer of rights to the objects of intellectual property protected on the territory of Ukraine, licenses contracts; defines the scope of examination by authorized institutions and instructs them as to how to conduct the examination. It is in charge of the keeping of state registers of objects of intellectual property; the organization and implementation of inspections of business entities in compliance with intellectual property legislation. The analysis of the observance of economic entities under all forms of ownership legislation in the sphere of intellectual property are also included to the competence of the State Service.

Another important activity of the Service is international cooperation in the sphere of the legal protection of intellectual property rights and representation of interests concerning the protection of rights to the objects of intellectual property in international organizations in accordance with legislation etc.

The functions of the State Service for the Coordination of the Activities of Collective Management Organizations include provision of the following services concerning and for collective management organizations: the identification of authorized collective management organizations, the analysis of their activities, the cancellation of registration of collective management organizations, the exclusion from the register of organizations for collective management, and authorized collective management organization, the cancellation of the relevant certificates etc.

In addition, the State Service issues documents for customs control and the customs clearance of goods transported through the customs

border of Ukraine; coordinates the grant of a certificate on the right of distribution and demonstration of audiovisual products on the observance of copyright and related rights; introduces measures on the legalization of software and its lawful use; maintains a register of producers and distributors of software; exercises state supervision (control over observance of economic entities under all forms of ownership legislation in the sphere of intellectual property); and carries out management of state property.

With the purpose of organizing its activity, the State Service provides within its powers the implementation of measures for the prevention of corruption and for control over their implementation in the apparatus of the State Service, in enterprises, institutions and organizations, which are under its management, supervises the process of selection of personnel in the office of the State Service, in enterprises, institutions and organizations, which are under its management, keeps the register of the personnel reserve for positions in the State Service, organizes work for the preparation, retraining, and improvement of the professional skill of civil servants and staff; organizes financial planning work in the office of the State Service, and in enterprises, institutions and organizations, which are under its management, exercises control over the use of financial and material resources, etc.

For the effective decision about tasks assigned to it by the State Service, it has the authority to involve itself in the implementation of individual works, to participate in the study of specific issues relating to scientists and specialists, including on a contractual basis, the employees of the central and local executive bodies; and to use the relevant information databases of the state authorities, the state, including governmental, communications systems, and communications networks of special communication and other technical means.

It heads the civil service, supervises its activities, represents the State Service in relations with other bodies, enterprises, institutions, and organizations with terms of reference which are sufficient for effective management. In the State Service it is formed from a panel of the Chairman of the State Service, the First Deputy and the Deputy Chairman of the State Service who are as well officials of the Ukrainian Ministry of Education and Science, Youth and Sports. The panel discusses the most significant

issues within the scope of the competence of the State Service, in particular – the most important directions in its activity. If necessary, the Collegiums of the State Service may include heads of structural subdivisions of the State Service, and in an established order other persons.

The decisions of the Board are implemented by issuing an order of the State Service. In order to consider scientific recommendations and conduct professional consultations on major issues of the public service, it can create permanent or temporary advisory, consultative bodies.

The State Service of Intellectual Property of Ukraine consists of State-owned enterprises, which are under the institution's management. These are as follows: the State enterprise Ukrainian Institute of Industrial Property, the State enterprise "Intelzakhyst", the State enterprise Ukrainian Agency of Copyright and Related Rights, the Ukrainian Centre of Innovatics and Patent Information Services.

By the Presidential Decree № 549 dated October 8, 2013⁸, the subordination of the State Service of Intellectual Property of Ukraine gave the role of the Ministry of Education and Science of Ukraine to the Minister of Economic Development and Trade of Ukraine. So, paragraph 1 of the Decree states that the State Intellectual Property Service of Ukraine is directed and coordinated by the Cabinet of Ministers of Ukraine through the Minister of Economic Development and Trade of Ukraine. The Cabinet of Ministers of Ukraine was instructed to bring its regulations, and ensure ministries and other authorized Central Bodies of Executive power brought their normative-legal acts into conformity with this Decree.

It should be noted that man's creative activity in the scientific and technical spheres with effective state management or administration may make enormous profits. However, the optimization of the state administration in the sphere of intellectual property should be based on the following. It is necessary to manage the object of intellectual property comprehensively and consistently, both at the design stage and at the stage of the acquisition of rights, use of rights, protection

⁸ The President of Ukraine Decree on the Issues of the State Service of Intellectual Property of Ukraine of 8.10.2013, № 549/2013, Uryadovyi Kurier [Governmental Courier] of 10.10.2013, no. 185.

of rights and at the stage of recycling. Let us briefly consider the proposed stages of this administration.

Thus, the management of the object of intellectual property at the stage of its creation requires identification that the goods will be competitive and will be in demand on the market in the future, maybe in a few years. And only after this is it appropriate to start its development. It is necessary to develop strategy and planning investments in intellectual property, and to determine the resources necessary for the development of new technology and the competitiveness of the technology itself and the goods produced on its basis.

It is also important to assess the capability of major competitors. At this stage of the company's strategy on the development of objects of intellectual property, their legal protection and use, it is invaluable to make use of patent information in order to conduct preliminary patent research. Patent information is contained in official periodical publications, and intellectual property offices that are in all the countries where the law provides for legal protection of objects of intellectual property.

The use of technical information provides an opportunity to avoid superfluous expenses for duplication of studies; to identify and evaluate technology for licensing and technology transfer; to find alternative technologies; to be at a modern level in a certain area; to find ready-made solutions to technological problems; and to create ideas for further innovation.

The management of an object of intellectual property at the stage of acquisition of the rights provides it with the necessary legal protection. So, the results of intellectual activity that could meet the legal requirements of the invention, utility model, or industrial design, are in need of legal protection for a patent or certificate.

The provision of legal protection is appropriate. If the object of protection was previously unknown and it is of technical level and susceptible of industrial application; protection provides an exclusive right to the object of the intended protection; the object of protection is commercially important; the object of protection will help to reduce the company's expenses; the object of protection helps to meet the needs of the consumer; the object of protection will be perceived by the market and have its demand; the object of protection is such that potentially it can

be licensed; the costs of legal protection will be less than the income from its use, etc.

At the same time, if the potential object of protection meets the above criteria, it is important to provide an alternative variant of protection of trade secrets. Protection of this type is appropriate in the case where patent protection or evidence is insufficient and the competitor can bypass it, by such means as receiving a similar patent.

You should not be granted a patent on the initial stage of development of an idea or when the production base is not yet ready for its implementation. Competitors, after reviewing the description of the invention, may surpass the developer of the object of intellectual property with the release of an innovative product on to the market. The best time to obtain a patent is when the solution or invention is ready to be put on to the market, since in this case the competitor will not have time to work in advance.

Management of an object of intellectual property at the stage once the protection is granted and the object can be used has its peculiarities. At this stage, the company making use of the rights to objects of intellectual property can apply certain tactics. These tactics can be divided into four areas.

This is, first of all, defining the direction of protection against competition through obtaining exclusive rights to manufacture new products for the period of selling them in the market. The tactics consist of determining the optimal method and specifying the territory of registration of the exclusive rights. It is important to publish articles on the object of patent protection the aim of which is to divulge the invention or the solution to the public in order to avoid considerable expenses in case of violation of rights.

The following is the course of licensing on the basis of acquiring exclusive rights to the technology of production, which compels other manufacturers to buy permission to use the technology under a license agreement from the copyright holder. It will provide control of the market and pursue unfair competitors.

Obtaining legal protection of objects of Intellectual Property Law is also significant in terms of gathering authorized capital of an enterprise. Exclusive rights to the objects hold certain value, thus, they give

an opportunity to form a considerable quantity of authorized capital and occupy an active position on the market without the use of money.

The last direction is connected with the creation of the image of the company. It aims to manage intellectual property so as to increase the investment attractiveness of the company.

The management of an object of intellectual property at the stage of protection of rights consists of the following activities. So, the growth of competition in markets for goods and services automatically affects the growth of the number of violations of the rights to objects of intellectual property by unfair competitors. To combat this phenomenon enterprises create security services which are involved in the prevention and detection of offences and the protection of intellectual property. In this situation, the most effective protection is a court procedure for protection of rights. However, as shown by the analysis of judicial practice and relevant statistics, only a small percentage of disputes about the infringement of intellectual property objects is decided in court. In most situations, the parties agree to solve a controversial issue before the trial to avoid the risk of losing their business and significant financial costs.

Management of an object of intellectual property at the stage of recycling is as follows: after the end of the legally specified period of validity of intellectual property rights it disappears as an object of property and goes into the public domain. This means that the invention, utility model or industrial design may be used without the permission of the patent holder.

In this case, the entity should predict all the consequences of the exhaustion of rights on objects of intellectual property. This also opens the possibility of the free use of scientific-technical and technological developments, the rights which belong to other owners of rights before their exhaustion. For many businesses it is the endless and often the only possibility to use scientific and technical progress achievements in their activities.

CONCLUSIONS

The effective administration of intellectual property is a source of additional income during the implementation of projects, and makes it possible to provide quality and competitiveness of production, to expand market opportunities, as well as to prevent problems arising in case of the infringement of intellectual property due to the lack of strategies for solving them. Today there is no perfect methodology of management of intellectual property in our country. In this regard, the objects of intellectual property are used inefficiently and do not bring the expected result. We need to upgrade the system of administration in this sphere. First of all it is necessary to create a comprehensive approach to management, and develop the methodology of economic assessment of the value and use of objects of intellectual property, since evaluation is one of the leading principles of governance.

It is necessary to optimize the protection of all objects of intellectual property, to improve the system of accounting of intangible assets, to create the basis of adequate information support, and to expand the system of provision of services in the field of intellectual property.

Given all the above, we emphasize the need for further improvement of public administration in the sphere of intellectual property and legislation aimed at the creation of favourable conditions for objects of intellectual property, and the development of a civilized market in these objects. Public administration and state assistance in the protection of intellectual property require the introduction of new organizational and legal measures. For their implementation it is necessary to unite efforts of different state authorities, non-state institutions and public organizations, and identify further ways of development of the national system of legal protection of intellectual property in Ukraine. The economic revival of our country, its orientation to development of market relations, its longing to enter as a full-fledged member into the world community need to be clearly defined perspectives of development and improvement of social relations in this important field.

