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

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SUMMARY

In the article the author explores the development and genesis of criminal law protection of intellectual property rights in Ukraine. The author also pointed out the directions for solving a number of theoretical and practical problems related to finding out the place of norms aimed at preventing crimes against intellectual property in domestic legislation. The cases of the unequal approach of judges, prosecutors, investigators and other lawyers to the problem of qualification of crimes against intellectual property rights and ways of overcoming the problems of prosecution for crimes against intellectual property rights in Ukraine are analyzed.

Key words: crime, copyrights, intellectual property, copyright objects, related rights, criminal liability.

РАЗВИТИЕ УГОЛОВНО-ПРАВОВОЙ ЗАЩИТЫ ПРАВА ИНТЕЛЛЕКТУАЛЬНОЙ СОБСТВЕННОСТИ В УКРАИНЕ

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АННОТАЦИЯ

В статье автором исследовано развитие и генезис уголовно-правовой защиты права интеллектуальной собственности в Украине. Также автором указаны направления решения ряда теоретических и практических проблем, связанных с выяснением места норм, направленных на предотвращение преступлений против интеллектуальной собственности в отечественном законодательстве. Проанализированы также случаи неодинакового подхода судей, прокуроров, следователей и других юристов к проблеме квалификации преступлений против интеллектуальной собственности и путей преодоления проблем привлечения к уголовной ответственности за преступления против интеллектуальной собственности в Украине.

Ключевые слова: преступность, авторские права, интеллектуальная собственность, объекты авторского права, смежные прав, уголовная ответственность.

Introductory part (introduction). There is an urgent need to address a number of theoretical and practical problems related to the clarification of the place of norms aimed at preventing crimes against intellectual property in domestic legislation for today. Perhaps, this should be done by separating a new section in the Criminal Code of Ukraine (a special part of the Criminal Code of Ukraine) or by adopting a separate normative and legal framework for the criminal law protection of this category, since these crimes form their own independent separate group of criminal offenses other than crimes against property and other crimes constituting the structure. In addition, due to the current situation, cases of unequal treatment of judges, prosecutors, investigators and other lawyers on the problem of qualification of crimes against intellectual property rights often occur in legal practice.

The presentation of the main material. According to leading lawyers, using the notion of "property" with respect to intellectual property, the legislator implies possession of exclusive rights to the owner of protected objects. In addition, the law allows the use of these objects solely with the permission of the owner. It should be emphasized that the basis of the proposed opinion is that the intellectual property relations are part of a broader content of the generic object (property relations), is not based on the Civil Code of Ukraine, in which the third book and the fourth book are dedicated to the property right, other substantive rights and the intellectual property right. Also, the Civil Code of Ukraine (Article 419) defines the relation between the right of intellectual property and property rights, namely: the right of intellectual property and ownership of a thing do not depend on each other. Transferring the right to an intellectual property object does not mean the transfer of ownership of a thing. Transferring ownership of a thing does not mean transferring the right to an intellectual property object. The object of intellectual property is the right to the results of intellectual activity of a person. This right has a dual nature. On the one hand, the author of the immaterial and the author of the material property object have similar property rights, since the right to the result of creative activity provides its owner with an exceptional opportunity to dispose of this result at his own discretion, as well as to transfer it to other persons, that is, it is similar to the right of ownership to tangible objects. From the other, along with the property right there is a non-proprietary right of the author to the results of intellectual activity. Thus, the intellectual property right is the sum of the triad of property rights (the right to own, use rights, the right to dispose of) and non-proprietary rights (the right to authorship, the right to inviolability of a work, etc.) [8, p. 10]. Having analyzed the existing civilist approaches, it can be argued that between these two types of property rights there are many significant differences, among which: 1) the difference between objects. Objects of property are property (physical and inborn thing), which is limited in space, that is, the right of ownership determines the state of property belonging to material wealth to individuals,

its use and disposal. The object of intellectual property is the results of creative activity, which are intangible (have an ideal nature) and can not be limited in space. The economic value of objects of intellectual property right does not depend on the material carrier on which they are located, since the medium is considered only as a way of transferring ideas, opinions and conclusions of the author to other persons. The designated status of intellectual property objects makes them very vulnerable to unfair use without the consent of the owner and is often the subject of offenses against intellectual property rights; 2) distinction in the direction of ownership and intellectual property rights. Ownership – the approval of the owner's domination over the things that belong to him and the authority to own, use and dispose of these things. The prohibition on the interference of third parties in this right is additional, of a protective nature. Exclusive intellectual property rights are directed at the prohibition of non-permissive use of intellectual property by third parties; 3) the difference in the methods of acquiring and termination of rights to the results of intellectual activity. The acquisition of prescription, find, alienation (the author does not completely lose contact with the object of creative activity, the latter continues to exist in the form of non-proprietary rights of the author), privatization cannot be applied to the intellectual property rights. The termination of the right is in accordance with the destruction, requisition, confiscation; 4) difference in duration of rights. Thus, according to the law, property rights have no time limits, while the duration of exclusive rights is clearly regulated; 5) distinction in action in a certain territory. Ownership recognizes the right of purchase of things in all countries of the world, that is, it does not affect the residence of the owner and the location of the property. At the same time, intellectual property rights are territorial in nature. This means that the rights acquired on the territory of one country are not recognized on the territory of another. To acquire exclusive rights in the territory of another state, you must first conclude relevant international agreements, and then properly register; 6) the difference in the application of legal instruments for protection. Ownership is based on property rights, and intellectual property rights on property and personal non-proprietary rights. For example, the owner of intelle–ctual property rights can not demand his rejection because such thing does not exist. Consequently, on the basis of the foregoing, it can be concluded that the right of ownership and intellectual property law, in terms of civil law, belong to different legal categories, but in both cases the only system-forming term – property is used.

As it is known, scientifically substantiated systematization of the norms of the Special Part of the Criminal Code is essential, in particular, for the search of the norm to be applied, the clarification of the content of certain features of the syllables described by the prohibitive norms, the delimitation of related crimes, and also for the elucidation of the opinion of the legislator about the value of certain objects of criminal law protection [9, p. 3]. As V. Tatsiy correctly notes, "scientifically substantiated systematization in the Criminal Code of criminal and legal norms on the responsibility for individual crimes is essential for the application of this law, the clarification of its actual content, delimitation of related offenses, as well as orientation in the Criminal Code itself" [10, p. 14].

Traditionally, there are three main concepts of the notion "property". The first is social perception at the level of common sense, in which property is something belonging to anyone. The second is a legal one, in which property is treated as property relations (right of use, possession, disposal). The third is economic, that is understood as a system category, where the property is not the relation of a person to any object, but the relationship between people regarding the appropriation (alienation) of this object. It should be noted that in all three approaches to the concept there are criminal law features. In the first case, the property acts as a subject of a criminal offense. By the way, this subject has a criminal-law significance in the first place. The second and third of the selected concepts consider this category as the object on which the crime is directed. Violation of the existing procedure for alienation of property is always an offence. If, however, such alienation is carried out by means of the most dangerous means, there is a crime envisaged by the relevant articles of the Criminal Code of Ukraine [1, p. 47–49]. Modern intellectual property research also covers it in economic, legal, sociological and other fields. This again proves the lack of a unified approach in the theory of intellectual property at the stage of its formation. Using the work of Marxism, European thought has developed a number of theories of intellectual property. Comparing the views of scientific schools of different times on the essence of intellectual property, it should be noted that it was the quintessence of the neoclassical, Marxist, neo-institutional approaches and laid the basis for the modern theory of intellectual property in the new economic conditions [2, p. 20]. Lawyers in defining the concept of "intellectual property" use such categories and concepts as "reason", "invention", "creativity" and others like that [3], which gives grounds to assert that the concept of "intellectual property" is much more complicated than "property" at least because it has structurally a non-material category such as "intelligence (reason)".

At the same time, the key to understanding the intellectual property institute is the fact of creating new knowledge. We emphasize that from the point of view of law, intellectual property is not the result of human intellectual activity as such, and the right to this result. According to the Civil Code of Ukraine, the right of intellectual property is a person's right to the result of intellectual, creative activity or other object of intellectual property rights. The results of intellectual activity of a person and commercial designations, unlike material objects, can not be protected from the use by third parties only on the basis of the fact that someone owns the right to them. Legislation in the field of intellectual property tries to protect the interests of right holders by providing them with appropriate time-limited rights that allow them to control the use of their objects of intellectual property rights. At the same time, these rights are acquired not in relation to material objects, which can be embodied in the results of creative work, but in relation to the generation of the human mind as such. Thus, it can be said with certainty that intellectual property rights is general term for certain results of intellectual activity of a person and commercial notations, which are intellectual values of non-material nature, and which may acquire rights similar to property rights that promote market activity [4, p. 6–7]. Consequently, intellectual property constitutes the law enshrined the right to the results of intellectual activity in the production, scientific, literary and artistic spheres. Intellectual property rights are exclusive (absolute) rights. This is due to the fact that the state

gives the owner of the intellectual property rights the full range of rights regarding the use and disposal. In this case, other entities (including the state) are not entitled to such use and should refrain from actions that may violate the absolute rights of the owner. Of course, ownership also refers to absolute rights, however, in our opinion, these terms differ a little. Although some scholars disagree with this approach, they recognize the property as a generic concept, which, in turn, is divided into two types: ownership of things (property) and intellectual property [5, p. 14–16; 6, p. 204]. Others hold a compromise position on this issue and point out that intellectual property in its material terms can in certain cases act as an object of ownership in its traditional (civil) sense. [7] Thus, a comparative analysis (from the point view of civil law), first of all, provided an opportunity to show and justify the differences between the object of ownership and intellectual property. This is done in order to understand the position of the legislator, who during the construction of the Special Part of the Criminal Code of Ukraine placed criminal and legal prohibitions, designed to protect intellectual property, outside of Section VI of the Special Part of the Criminal Code of Ukraine "Crimes against Property". It is the features of the generic facility that allows for a scientifically based classification of crimes against property and crimes against intellectual property, and therefore, it is logical to place the relevant criminal law in the Criminal Code. Taking into account the said proposal on the transfer of criminal offenses against intellectual property to Section VI of the Special Part of the Criminal Code of Ukraine [11], it means that its direct object is part of a more general concept – a generic object (property relations). We are going to analyze these categories. The conducted research [12, p. 165–169] gives grounds to assert that the generic object of crimes against property is a set of social relations in the sphere of property, where property is a "primary property", that is, the relation of a concrete person to one's and another's as a key value of law. The legal expression of these relationships is the right of ownership, which gives all owners equal conditions for the acquisition and protection of these rights, that is, ownership in the objective sense as a set of legal rules that regulate and protect property relations. Direct object is property – "secondary property", that is, the materialized attitude of man to the world. The legal expression of these relationships is the subjective right to own, use and dispose of property belonging to specific subjects of property rights. In the course of the study, the point of view was grounded, which formed the basis of the estimated opinion that the intellectual property relations are part of a broader content of the generic object (property relations), not primarily based on the Civil Code of Ukraine, in which the third and fourth books are devoted respectively to the right of ownership and other material rights and intellectual property rights.

This shows that scientists distinguish intellectual property relations in a separate independent group of social relations. The scientists have developed specific features of these relationships: a special, clearly defined object – the result of intellectual creativity; special reason for occurrence; a combination of imperative and dispositive elements in determining the scope of rights and obligations of intellectual property subjects; their target character; a combination of material and obligatory elements in the process of the realising of rights and responsibilities, etc. [13, p. 332]. The object of intellectual property relations is the results of intellectual, creative activity, means of individualization and unfair competition and other objects that meet the requirements of the law established for them, and which, as a result, ensures criminal law protection. Thus, on the basis of the above it can be argued that the generic object of crimes against intellectual property is the social relations that constitute personal non-property and (or) proprietary intellectual property rights for objects of intellectual property rights protected under the criminal law (however not all of them, but only that which is protected by the norms of the Criminal Code of Ukraine (Articles 176, 177, 203, 229, 231, 232). In the plane of the generic object there are direct objects of crimes against intellectual property that are correlated with generic as a part and whole, they have social relations: 1) on the results of intellectual, creative activity; 2) in the sphere of established procedure of circulation of means of individualization of participants in the economic process; 3) regarding the protection of exclusive rights of individuals and legal entities from unfair competition. The subject of a crime against property is a particular thing (in the aspect of the obligation-real concept [14, p. 78–79]), and the subject of crimes against intellectual property – the results of conscious intellectual creative activity of a human. Consequently, unlike things as an object of crime against property, the subject of a crime against intellectual property is always of non-material form.

Conclusions. Having explored the development of criminal legal protection of intellectual property rights in Ukraine, it should be concluded that, despite the changes made to the Criminal Code after Ukraine gained independence, the problem of criminal legal protection of intellectual property rights remained quite relevant. And the most important step in solving problems in this area was the adoption on April 5, 2001 by the Verkhovna Rada of Ukraine of the new Criminal Code of Ukraine. Criminal legal protection of intellectual property rights in the current Criminal Code of Ukraine is carried out by Art. 176, 177, 229 and others. However, according to the findings of international experts, the issue of criminal legal protection of intellectual property rights remains complex and relevant to the science of criminal law of Ukraine.

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ПРАВОВОЕ РЕГУЛИРОВАНИЕ ИНВАЗИВНЫХ ЧУЖЕРОДНЫХ ВИДОВ РАСТЕНИЙ ПО ЗАКОНОДАТЕЛЬСТВУ МОЛДОВЫ, БЕЛАРУСИ И УКРАИНЫ (СРАВНИТЕЛЬНЫЙ АНАЛИЗ)

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АННОТАЦИЯ

В статье проводится сравнительный анализ правового регулирования распространения и численности инвазивных чужеродных видов растений в Украине, Беларуси и Молдове. Раскрывается соотношение терминов «инвазивные чужеродные виды растений» и «вредные организмы» в законодательстве этих стран. Исходя из того, что распространение таких объектов и вредное воздействие, которое они наносят биоразнообразию и окружающей природной среде в целом, тяжело контролировать, обосновывается необходимость принятия мер, в том числе и правового характера, для регулирования их численности в Украине, учитывая нормотворческую практику других государств в этой сфере.

Ключевые слова: объекты растительного мира, инвазивные чужеродные виды растений, вредные организмы, карантин растений.

PLANTS INVASIVE ALIEN SPECIES LEGAL REGULATION BY LEGISLATION OF MOLDOVA, BELARUS AND UKRAINE (COMPARATIVE ANALYSIS)

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SUMMARY

The article gives a comparative analysis account of the plants invasive alien species expansion and multitude legal regulation in Ukraine, Belarus and Moldova. The correlation of terms "the invasive alien species of plants" and "noxious organisms" in the corresponding countries' legislation is also shown. Proceeding from the fact that the expansion of such organisms, and their noxious impact on the biodiversity and on the environment, as a whole is difficult to be controlled, the necessity of taking appropriate measures, including the legal ones, is substantiated for regulating their multitude in Ukraine, taking into account the other countries' standardization practice in this field.

Key words: flora world objects, invasive alien species of plants, noxious organisms, quarantine of plants.

Постановка проблемы. В начале XXI века мировое сообщество столкнулось с глобальными проблемами, а именно: постоянно возникающие угрозы как планетарного, так и регионального масштабов, катаклизмы, вспышки эпидемий, что, естественно, является своеобразным вызовом человечеству. Исходя из этого, в последнее время и ученые-экологи, и представители власти и общественности активно обсуждают распространение инвазивных чужеродных видов растений, что, по их мнению, может привести к экологической катастрофе, масштабы которой настораживают. Учитывая это, в настоящее время, как никогда, возникает необходимость в проведении анализа правового обеспечения и регулирования как распространения, так и численности инвазивных чужеродных видов растений в Украине и других государствах, среди которых Беларусь и Молдова.

Актуальность темы исследования подтверждается тем фактом,