ТЕОРІЯ І ПРАКТИКА
ІНТЕЛЕКТУАЛЬНОЇ ВЛАСНОСТІ

Науково-практичний журнал **3 (89) ' 2016**

ISSN 2308-0361 УДК 347.(77+78)

ЗАСНОВНИК
Науково-дослідний інститут інтелектуальної власності Національної академії правових наук України

Свідоцтво про державну реєстрацію КВ № 10573 від 07.11.2005 р.

Рекомендовано до друку вченою радою НДІ інтелектуальної власності НАПрН України (протокол № 07 від 31.05.2016 р.).

Адреса редакції:
03680, МСП, м. Київ-150,
вул. Казимира Малевича, 11, корп. 4
Тел.: 228-21-37, 228-22-16
Тел./факс: 200-08-76
www.inprojournal.org
e-mail: intprop.ua@ukr.net, letter@i.kiev.ua

Надруковано з оригінал-макета в ТОВ «НВП "Інтерсервіс"», вул. Бориспільська, 9.
Свідоцтво: серія ДК № 3534 від 24.07.2009 року.

Здано до набору 07.06.2016 р. Підписано до друку 21.06.2016 р. Формат 70x108/16. Папір офсетний. Друк офсетний. Наклад 300 примірників.

ЗМІСТ

Журнал внесено до бази даних Index Copernicus Journals MasterList. ICV Index 2014: 44.63

THEORY AND PRACTICE
OF INTELLECTUAL
PROPERTY

Scientific and practical journal

3 (89) ' 2016

ISSN 2308-0361

UDC 347.(77+78)

FOUNDER
The Scientific and Research Institute of Intellectual Property of the NALS of Ukraine

Certificate of state registration KV № 10573 issued 07.11.2005.

The issue is recommended by the Scientific Council of the S&R IIP of the NALS of Ukraine (Minutes № 07 of the 31.05.2016).

Editorial address:
11 Kazymyra Malevycha Str., 13th floor, Kyiv, Ukraine, 03680
Tel./fax: 200-08-76
Tel.: 228-21-36
www.inprojournal.org
e-mail: intprop.ua@ukr.net, letter@i.kiev.ua

Printed at "Interservis". 9 Boryspilska Str. Certificate DK № 3534 issued 24.07.2009.

Sended to the printer 07.06.2016. Passed for printing 21.06.2016. Format 70x108/16. Offset paper. Offset printing.
Circulaion 300 ex.

CONTENT

The magazine is founded in February 2002, renamed in November 2005, included in the list of specialized publications on legal sciences of HAC of Ukraine

ISSN 2308-0361

THE ROLE OF LEGAL SCIENCE IN THE PROCESS OF REFORMING INTELLECTUAL PROPERTY SPHERE IN UKRAINE: ACHIEVEMENTS, OBJECTIVES, MISSION

Olena Orliuk,
Doctor of Juridical Science, professor, corresponding member of the NALS of Ukraine, Director of the Intellectual Property Research Institute of the NALS of Ukraine; acting Head of the Department of Intellectual Property of Taras Shevchenko National University of Kyiv

Орлюк О. Роль правової науки у процесі реформування сфери інтелектуальної власності в Україні : досягнення, завдання, місія.

Автор аналізує кроки України у розвитку законодавства у сфері інтелектуальної власності. Крім цього, автор аналізує досягення Науково-дослідного інституту інтелектуальної власності НАПрН України у розбудові системи інтелектуальної власності України та знайомить читачів з цілями та завданнями його діяльності.

Ключові слова: інтелектуальна власність, освіта, наука, законопроекти, НДІ інтелектуальної власності НАПрН України, реформування законодавства

Intellectual property is an integral part of international trade and global economy. However, since intellectual property rights are private and regional by their nature, the question arises as to whether it is possible to provide effective protection of intellectual property rights during the era of globalization. The rapid pace of international trade, interconnection of economic systems and known consequences of ineffective protection at level of certain national legal systems force countries to rethink the nature and ways to improve protection of intellectual property rights.

The countries are searching for the opportunities to create a favourable climate to attract investments and stimulate economic activity to make it more intensive. For its achievement it is important to create a strong and balanced intellectual property mode, which should promote commercial and industrial activities in general. In support we can cite the report of the leader of the World Intellectual Property Organization in 2015 «Breakthrough innovation and economic growth», which states that «intellectual property is at the centre of innovative growth of the national economies» [1]. Currently the work of WIPO in the sphere of protection of rights is specified based on the Strategic goal VI, determined during the adoption of the Agenda for development [2]. According to the Strategic goal VI ensuring respect for IP in a sustainable manner is a broad concept, within which security and protection of intellectual property rights shall be performed taking into account the interests of socio-economic development and consumer protection.

European experience can be used as a model while viewing prospects for the development of protection of intellectual property rights. Nevertheless formation of a single European market requires the harmonization of respective national laws of the EU Member States, as well as improving the protection of intellectual property rights at the international level. The importance of the latter is proved by the provisions on the expansion of EU competence in the field of trade-related intellectual property rights in the Treaty of Nice of the EU as of February 26, 2001, which entered into force since February 1, 2003. Protection of intellectual property as an inalienable human right is proclaimed in part 2 of article 17 of the Charter of Fundamental Rights of the European Union. The text of the Charter was not included to the Lisbon Treaty as of December 13, 2007, but its provisions are mandatory. The article 6 of the EU Treaty stipulates that «The EU respects the rights, freedoms and principles set out in the Charter of Human Rights» [3].

For Ukraine, a member of most international treaties in the field of intellectual property, and country working towards European integration in the early 2000s, the issue of adequate protection and security of Intellectual Property rights has a particular meaning. Having concluded in 1994 Agreement on partnership and cooperation with the EU and the WTO after joining in 2008 (which caused application of Agreement on trade aspects of intellectual property rights [4]), Ukraine committed to ensure the protection of intellectual property at the level similar to the EU one.

Association Agreement between Ukraine, of the one part, and the European Union, the European Atomic Energy Community and their Member States, of the other part, was ratified as of September 16, 2014 by the Parliament of Ukraine and the European Parliament [5]; Chapter 9 is devoted directly to the intellectual property. Article 157 of the Agreement defines the main two objectives in this area: a) facilitate the production and commercialization of innovative and creative products in the Parties; and (b) achieve an adequate and effective level of protection and enforcement of intellectual property rights.

Necessity to create conditions for the proper protection of intellectual property is also understood at domestic political level. Sustainable Development Strategy «Ukraine–2020» was approved by the Decree of the President of Ukraine as of January 12, 2015. According to [6], IPR protection is defined as a vector of reform of national security direction. Understanding of the role of intellectual property is also defined in government documents.

Therefore, adequate and effective protection of intellectual property rights relates to strategic areas of reforming of national legislation and law enforcement with regard to European integration vector for development. In this direction substantial role belongs to professionals involved in the process of preparation of the updated legislation.

Such professionals in the country are experts of the Intellectual Property Research Institute of the National Academy of Legal Sciences of Ukraine, which recently celebrated its 15th anniversary [7]. Today it is recognized as a national centre of expertise in the field of intellectual property; it deals not only with the fundamental and applied scientific developments concerning law and economics of intellectual property, but also with the direct practice. Such combination of practical experience and theoretical research makes it possible to perform the tasks efficiently.

At this stage, Ukraine is at the point where legislation on copyright and related rights, in the field of industrial property shall be revised and new requirements and obligations shall be applied that are specified in the Association Agreement of Ukraine with the EU. Existing problems shall be also taken into account in the process of legislation re-

forms: ones associated with poor quality of protection documents, patent trolling phenomenon, and possibility of administrative appeal against protection documents, decrease of the load of the court system and so on. The country shall gradually introduce alternative methods of dispute settlement in order not to settle disputes solely in court.

Within each of these areas the experts of our Institute together with the specialists from the Ministry of Economic Development and Trade of Ukraine (hereinafter referred to as MEDT), national system of intellectual property protection, representatives of professional environment in this area are actively working on a comprehensive change of legislation in the field of copyright, industrial property, protection of intellectual property rights and so on.

An institutional reform of the national system of intellectual property protection is performed alongside with legislative reforms in Ukraine. Thus, the Institute involves the working group bringing together representatives of public authorities, patent office, professional institutions in the field of intellectual property, public organizations, etc., aiming at drawing of a draft law which will determine the principles of the National System of Intellectual Property Legal Protection. According to the Concept of reforming of this sector [8] approved by the Government of Ukraine, development and implementation of state policy in the field of intellectual property is the responsibility of MEDT. The National Office of Intellectual Property is formed on the basis of the State Intellectual Property Service being liquidated and the Ukrainian Intellectual Property Institute (Ukrpatent). Nowadays the working group is engaged in issues of determining the legal status and tasks that must be solved by national system of legal protection of intellectual property in Ukraine.

Joint efforts will hopefully lead to the legislative changes in the field of intellectual property, significantly enhance the protection of intellectual property, and create a much better basis for the compliance with the rights of owners, to a significant reduction in counterfeiting, to cease the mass violations of intellectual property rights on the Internet.

The Institute pays much attention to the issue of high quality legislative support. Since its establishment until now our irrevocable priority refers to researches, accumulation of unique knowledge and their continuous implementation, assistance to citizens, legal entities and state in solving practical issues related to creation and use of intellectual property.

The range of our scientific and practical interests includes among others traditional areas of intellectual property — copyright, related rights, trademarks for goods and services, geographical items, patents, utility models, industrial designs — but not limited to them. During 15 years the Institute performed 24 developments by fundamental and applied themes.

The results of Institute's activity cover more than 300 draft legal acts developed by the Institute independently or with involvement of other entities to perform development or review work. Legal examination of draft laws and other legal acts, development of recommendations and proposals is a form of implementation of the main results of our activity. Now the focus in legislative activities is the European integration towards the renewal of national legislation in the field of intellectual property.

This is due to the challenges faced by Ukraine. In particular, specialists of the Institute are actively involved in the activity of MEDT and other ministries (including the Ministry of Agriculture, Ministry of Health), involved in drawing the draft laws aimed at implementation of the Association Agreement between Ukraine and the EU. The developing laws include:

- Draft law «On amendments to some legislative acts of Ukraine relating to improvement of legal protection of

intellectual (industrial) property» (patent trolling)
- Draft law «On amendments to some legislative acts of Ukraine relating to enforcement of liability and protection of rights in the sphere of intellectual property)
- Draft law «On amendments to some legislative acts of Ukraine relating to improvement of legal protection of geographical items»
- Draft law «On amendments to some legislative acts of Ukraine relating to improvement of protection for layout of a semiconductor product» (integrated microcircuits — masswork)
- Draft law «On amendments to some legislative acts of Ukraine in the field of copyright and related rights»
- Draft law «On amendments to some legislative acts of Ukraine relating to improvement of protection of inventions (utility models)»
- Draft law «On amendments to some legislative acts of Ukraine (relating to improvement of protection of intellectual property rights)».

The agenda includes the issue of the development of amendments to the Criminal Code of Ukraine and the Customs Code of Ukraine.

Ad hoc committee of the Verkhovna Rada of Ukraine on Science and Education approved the IT environment draft law amending copyright and related rights in respect of the allocation of rights for the service objects of intellectual property rights.

However, in addition to specific legislation on intellectual property, changes shall be made also in the Civil Code of Ukraine, where volume 4 is dedicated to intellectual property rights. Intellectual property shall be recognized as a commodity in the Commercial Code of Ukraine. In addition, there shall be arranged the system of balance and off-balance accounting of intellectual property. It is also necessary to review the methodology for assessing the value of intangible assets, adopted by the State Property Fund of Ukraine more than ten years ago. Activity of the Institute supports these findings. As a certified evaluator the Institute is involved in assessment and audit of intellectual property. Specifically, certified evaluators developed over 60 assessment findings on proprietary rights for intellectual property, customers of which often were the leading national brands.

As for the practical component of the Institute, the first is the provision of oral and written consultations on issues relating to law and economics of intellectual property, civil, civil procedure, business, finance right and so on. Specialists of the Institute are involved to the registration of rights for works, objects of patent right, means of individualization, acting also as patent attorneys. In addition, during the years of work our experts prepared more than 100 scientific expert reports upon request of higher and central government authorities, carried out about 300 scientific researches ordered by public and private organizations and over 470 researches ordered by regional entities, including local self-government entities and local authorities. This experience is useful in the process of reforming of the intellectual property protection system. After all, now Ukraine initiates the issue of creation of a body to combat piracy and the possibility to attract the Anti-Corruption Bureau to strengthen the protection of intellectual property rights. Ensuring control over royalties and license fees shall be entrusted to the authorities of the State Fiscal Service of Ukraine, and thus there shall be a high quality financial legislation, which will properly reflect intellectual property issues.

The leading role in the practice of the Institute refers to the judicial and special studies of intellectual property. During the past period of time the legal experts certified by the Ministry of Justice of Ukraine carried out more than 1 700 research works. Our experts, including experienced lawyers and advocates repre-

sent the interests of entities of intellectual property rights within judicial and non-judicial settlement of disputes; represent interests of entities of intellectual property rights in case of illegal use of intellectual property, as well as at unfair competition in administrative and judicial bodies.

Thus nowadays this experience will be useful for the High Specialized Court for Intellectual Property [9] founded in Ukraine, which will start its activities in 2017.

Within the judicial reform being implemented in the country, there are significant alterations proposed to the civil and economic process applying directly to the protection of intellectual property. In particular, the Council for Judicial Reform presented the Draft amendments to the Civil and Commercial Procedure Codes, the Code of administrative proceedings [10]. Alterations include expansion of court remedies and evidence forms (including electronic evidence as the independent means). Protection of rights shall not be restricted by the manner specified by law or contract, but involve also another way, effectively protecting such rights. Effective mechanisms are offered to ensure the claim and evidence (including expanding the ways the claim provision, widely used counter injunction, compensation for damage caused by unreasoned claim or evidence). The court will perform the role of arbitrator only and will never act as investigator.

There are also proposed changes in order to simplify and accelerate the proceedings of simple and less significant cases; to ensure thorough preparation and review of complex cases; to ensure the timeliness of the case and legal certainty; introduction of «electronic court» and so on. In the course of reform there are the proposed mechanisms to prevent abuse of procedural rights. The latter involves prevention from «clone claims» and other manipulation tools for cases distribution, deliberate prolongation of the case, manipulation of jurisdiction and effective responsibility measures for abuse of rights. It is extremely important for intellectual property rights, because the disputes of intellectual property infringement can be settled during the long term (for years). In this sense we feel extremely positive to create a specialized court for intellectual property issues.

Moreover, the countries all over the world have a broad experience in this field. Typical samples of a special patent court are used in the United States of America, Austria, Germany, Sweden, Great Britain, South Korea, Taiwan and others. At the beginning of 2004 the European Commission proposed to found a patent court to settle disputes on intellectual property; it starts its activities now.

Effective, qualified settlement of dispute arising from infringement of intellectual property rights is crucial for Ukraine. After all, nowadays legal procedure has a prevailing role in the procedures relating to protection of the rights. Over the past decade the number of passed judgments is about 18 000. And a number of such disputes is growing.

To protect intellectual property rights a court shall implement tribunal and international commercial arbitration. In addition, mediation shall take at last its place. Country faces overdue need for active use of ways alternative to judicial one to protect intellectual property rights.

In addition, strengthening the role of the Antimonopoly Committee of Ukraine is essential in the process of suspension of unfair competition, inherent to the intellectual property. In this context the country shall also benefit from the experience of European countries and may be based on European directives in this area.

Ukraine has to aim at participation of its representatives in working groups of the European Committee on monitoring intellectual property rights infringement. Active cooperation shall be arranged with law enforcement agencies, including Europol, customs, special European organizations established to combat infringements of intellectual property rights.

However, in the future the decisive role in improving the protection of intellectual property, in our opinion, should be played not only by the state government (legislative, executive and judiciary), but also to science and education.

Role of legal science is extremely important in this process. Relevant directions for finding ways to protect intellectual property rights are reflected in the Priority areas of legal science development in 2016–2020, approved by the National Academy of Legal Sciences of Ukraine in March 2016 [11]. Experts of our Institute actively participated in their development.

Decisions taken at parliamentary and committee hearings on intellectual property for the past 15 years, were prepared with participation of specialists of the Institute. Most of the directions of reforms in this area as set out in numerous fundamental and applied researches of the Institute [7, 12]. Today, according to the Priority areas of legal science development the Institute is developing a strategy for the development for the next five years, taking into account the underlying problems requiring solving at the level of national policy. For example, the direction of legal maintenance of national security and international law stipulates the drawing of the draft law «On legal protection of secret inventions», which will include study of the experience of NATO countries, offer incentive mechanisms to encourage the creation and use of secret inventions and protection of the rights of inventors.

Currently the Institute continues working on a number of laws, including the draft law relating to issues of legal protection and enforcement of intellectual property rights in the field of national defense. Thus, it is offered to make amendments and alterations to the Commercial Code of Ukraine, Laws of Ukraine «On the State Defense Order», «On the assessment of property, property rights and professional valuation activities in Ukraine», «On state control over international transfers of military and dual-use» and so on.

In addition, within academic pursuits experts of the Institute focus their efforts upon scientific and practical developments in intellectual property field, coupled with issues of human rights; national security and defense; IT business; biotechnology, biosafety, green ecology; energy-saving technologies and so on.

From the start of its activity the Institute made efforts to create a national school of intellectual property rights. Today the results of scientific work of the Intellectual Property Research Institute include more than 50 monographs, 20 manuals and more than 20 comments and guidelines. Our Institute prepares the thesis for the degree of Doctor of Science in Philosophy (PhD) and Doctor of Science.

Currently, there are reasons to talk about intellectual property right as a shaped phenomenon (not just as an institution of civil law). Intellectual property is now perceived as a complex legal area, including knowledge of the history, theory of law, civil, criminal, administrative, financial, tax, customs and many other legal aspects. In fact, a scientific platform has been created for 15 years, gathering supporters of this trend. Over the years we have established close cooperation with all scientific and educational centres of Ukraine and many European (Polish, Slovak, German, and Baltic) institutions specializing in this area.

One of the basic problems for Ukraine is the building of legal culture of «fair user». Achieving of this objective shall be one of the educational tasks. It shall be taken into account at formation of new educational standards, including intellectual property ones.

Specialists of the Institute are involved to organization or teaching master programs on intellectual property throughout Ukraine. Today Intellectual Property education is available in Kyiv, Kharkiv, Dnipro, Odesa, Lviv, Sumy etc. It may refer to a degree of legal, econom-

ic, technical direction, with a focus on creativity, invention, law, management. Ukraine has founded special master programs on intellectual property, taking into account the experience in teaching of intellectual property disciplines in major European centres, including Munich, Turin, Bilbao and others.

Thus, Taras Shevchenko National University of Kyiv founded the Department of Intellectual Property three years ago. The department has three accredited master's programs: 1) for lawyers it is «Intellectual Property Rights»; 2) interdisciplinary master's program «Intellectual Property» (which includes law, economics, management of intellectual property disciplines for people with different education); 3) master's program «Intellectual Property» accredited jointly with the Baltic University — Mykolas-Romeris University (double diploma of Ukraine and the EU, in English). However, at this time less than 100 experts in the field of IP graduate in Ukraine per year. It absolutely does not reflect the real needs of the state, as it needs not just lawyers.

Institute initiated and conducts during the third consecutive year the Summer School on Intellectual Property in cooperation with National Taras Shevchenko University of Kyiv and the State Intellectual Property Service of Ukraine, which invite leading experts in this field. Ukraine actively conducts national student competitions and contents on intellectual property; for many years the Institute is also involved in their arrangement.

It should be noted that one of the activities of the Institute since its establishment is spreading knowledge on intellectual property in Ukraine. Today the Institute does its best to meet the needs of society for information on various aspects of law and economics of intellectual property. Specialists of the Institute are involved in educational projects aimed particularly at increasing legal awareness of citizens.

In this relation, we believe that one of the main objectives of science and education is systematic and continuous conduction of various scientific and educational activities, programs and active work with the media to expand the cultural level of the population at 180 degrees — to the direction corresponding to the view of the civilized world in relation to intellectual property rights. The international community is actually interested in adequate security and even more, in adequate protection of intellectual property rights: to stop infringement, to ensure royalty payment, to suspend sites with illegally produced items, to ensure that counterfeit is not the norm no more. If we try to make the country attractive to foreign investment, we have to ensure the appropriate level of protection. No one expects the changes to effectively start operating within six months, but the world shall see that we are making certain steps.

We consider the popularization of knowledge on intellectual property as the mission of our Institute. We are working on a strategy of national policies on intellectual property. Efforts are made to introduce in Ukraine the policy aimed at developing the creative economy, creativity and inventiveness. We believe that educational programs shall promote basic questions of intellectual creativity in mass media, on TV and radio. Mass media should present the achievements of science, because we have them and the problem is only their promotion and popularization. It shall be noted that it is much easier to work with the younger generation in Ukraine. After all, it is not necessary to argue with the youngsters that intellectual property rights shall also be respected. State «intellectual property» policies had been implemented for 20–30 years in developed countries of the world, countries that made economic breakthroughs. In our country, this policy also has its time lag. We have to act without waiting for immediate results, but seeing the ultimate goal ahead. ◆

Список використаних джерел / List of references

1. *World Intellectual Property Report 2015 «Breakthrough Innovation and Economic Growth», http://www.wipo.int/edocs/pubdocs/en/wipo_pub_944_2015.pdf.*
2. *The 45 Adopted Recommendations under the WIPO Development Agenda, http://www.wipo.int/ip-development/en/agenda/recommendations.html#f.*
3. *Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, 13.12.2007, http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=OJ%3AC%3A2007%3A306%3ATOC.*
4. *Угода про торговельні аспекти прав інтелектуальної власності (Угода ТРІПС) від 15.04.1994 р. [Електронний ресурс]. — Режим доступу : http://zakon4.rada.gov.ua/laws/show/981_018.*

Uhoda pro torhovelni aspekty prav intelektualnoi vlasnosti (Uhoda TRIPS) vid 15.04.1994 r. [Elektronnyi resurs]. — Rezhym dostupu : http://zakon4.rada.gov.ua/laws/show/981_018.

5. *Угода про асоціацію між Україною, з однієї сторони, та Європейським Союзом, Європейським Співтовариством з атомної енергії і їхніми державами-членами, з іншої сторони: ратифікована 16 вересня 2014 року Верховною Радою України та Європейський парламентом [Електронний ресурс]. — Режим доступу : http://www.kmu.gov.ua/kmu/control/uk/publish/article?art_id=246581344&cat_id=223223535.*

Uhoda pro asotsiatsiiu mizh Ukrainoiu, z odniiei storony, ta Yevropeiskym Soiuzom, Yevropeiskym Spivtovarystvom z atomnoi enerhii i yikhnimy derzhavamy-chlenamy, z inshoi storony: ratyfikovana 16 veresnia 2014 roku Verkhovnoiu Radoiu Ukrainy ta Yevropeiskyi parlamentom. [Elektronnyi resurs]. — Rezhym dostupu : http://www.kmu.gov.ua/kmu/control/uk/publish/article?art_id=246581344&cat_id=223223535.

6. *Указ Президента України № 5/2015 «Про Стратегію сталого розвитку «Україна — 2020» від 12.01.2015 р. [Електронний ресурс]. — Режим доступу : http://www.president.gov.ua/documents/18688.html.*

Ukaz Prezydenta Ukrainy № 5/2015 «Pro Stratehiiu staloho rozvytku «Ukraina — 2020» vid 12.01.2015, http://www.president.gov.ua/documents/18688.html.

7. *Науково-дослідний інститут інтелектуальної власності: 2001 — 2016 рр. Історія, досягнення, перспективи розвитку / за ред. О. П. Орлюк ; [уклала : Яшарова М. М.]. — К. : НДІ ІВ НАПрН України, Інтерсервіс, 2016. — 108 с.*

Naukovo-doslidnyi instytut intelektualnoi vlasnosti: 2001–2016. Istoriia, dosiahnennia, perspektyvy rozvytku / za red. O. P. Orliuk ; [uklala : Yasharova M. M.], K. : NDI IV NAPrN Ukrainy, Interservis, 2016, 108 s.

8. *Концептуальні засади реформування сфери інтелектуальної власності : Міністерство економічного розвитку і торгівлі України: презентація на круглому столі 16.05.2016 р. [Електронний ресурс]. — Режим доступу : http://www.me.gov.ua/Documents/Detail?lang=uk-UA&id=727fc030-84ff-4e45-acae-ccc412cd212f&title.*

Kontseptualni zasady reformuvannia sfery intelektualnoi vlasnosti : Ministerstvo ekonomichnoho rozvytku i torhivli Ukrainy: prezentatsiia na kruhlomu stoli 16.05.2016, http://www.me.gov.ua/Documents/Detail?lang=uk-UA&id=727fc030-84ff-4e45-acae-ccc412cd212f&title.

9. *Закон України «Про судоустрій і статус суддів», підписаний Президентом України 13.07.2016 р. [Електронний ресурс]. — Режим доступу : http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=59259*

Zakon Ukrainy «Pro sudoustrii i status suddiv», pidpysanyi Prezydentom Ukrainy 13.07.2016, http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=59259

10. *Рада з питань судової реформи: 13 головних змін в господарському та цивільному процесі: презентація на круглому столі 31 березня 2016 р. [Електронний ресурс]. — Режим доступу : jrc.org.ua.*

Rada z pytan sudovoi reformy: 13 holovnykh zmin v hospodarskomu ta tsyvilnomu protsesi: prezentatsiia na kruhlomu stoli 31.03.2016, jrc.org.ua.

11. *Стратегія розвитку наукових досліджень Національної академії правових наук України на 2016–2020 роки, затверджені Загальними зборами НАПрН України 03.03.2016 р. [Електронний ресурс]. — Режим доступу : http://www.aprnu.kharkiv.org/doc/strategiya.pdf.*

Stratehiia rozvytku naukovykh doslidzhen Natsionalnoi akademii pravovykh nauk Ukrainy na 2016–2020 roky, zatverdzheni Zahalnymy zboramy NAPrN Ukrainy 03.03.2016, http://www.aprnu.kharkiv.org/doc/strategiya.pdf.

12. *Архів науково-практичного журналу «Теорія і практика інтелектуальної власності» за 2006–2016 роки [Електронний ресурс]. — Режим доступу : http://ndiiv.org.ua/ua/journal-archive.html, http://www.inprojournal.org/uk/category/archiv-nomeriv.*

Arkhiv naukovo-praktychnoho zhurnalu «Teoriia i praktyka intelektualnoi vlasnosti» 2006–2016, http://ndiiv.org.ua/ua/journal-archive.html, http://www.inprojournal.org/uk/category/archiv-nomeriv.

Надійшла до редакції 18.06.2016 р.

Орлюк О. Роль правовой науки в процессе реформирования сферы интеллектуальной собственности в Украине: достижения, задачи, миссия. Автор анализирует шаги Украины в развитии законодательства в сфере интеллектуальной собственности. Помимо этого, автор анализирует достижения Научно-исследовательского института интеллектуальной собственности НАПрН Украины в развитии системы интеллектуальной собственности Украины и знакомит читателей с целями и задачами его деятельности.

Ключевые слова: интеллектуальная собственность, образование, наука, законопроекты, НИИ интеллектуальной собственности НАПрН Украины, реформирование законодательства

Orliuk O. The role of legal science in the process of reforming intellectual property sphere in Ukraine: achievements, objectives, mission. The author analyzes the steps taken by Ukraine in the development of legislation in the field of intellectual property. In addition, the author analyzes the achievement of the Intellectual Property Research Institute of the NALS of Ukraine in the development of intellectual property of Ukraine and acquaints readers with the goals and objectives of its activities.

Keywords: intellectual property, education, science, laws, Institute of Intellectual Property NALS of Ukraine, law reform

ISSN 2308-0361

MODERN VALUES OF HARMONIZATION OF HUMAN RIGHTS AND INTELLECTUAL PROPERTY RIGHTS IN HEALTH CARE

Oksana Kashyntseva,
Head of the Center for Harmonization of Human Rights and Intellectual Property Rights of the Intellectual Property Research Institute of the NALS of Ukraine, PhD in Law

Кашинцева О. Сучасні цінності гармонізації прав людини та прав інтелектуальної власності в сфері охорони здоров'я.

Стаття присвячена міждисциплінарним аспектам сучасних цінностей гармонізації прав людини і прав інтелектуальної власності в сфері медицини і фармації. Необхідність пошуку балансу прав людини та прав інтелектуальної власності виникла для України відповідно до міжнародних зобов'язань. Сучасні цінності прав людини розбалансовано сучасними установками і загальними принципами права інтелектуальної власності. Очевидно, що ця проблема постала не лише перед Україною. Дисбаланс між правами з прав людини і прав інтелектуальної власності складається з двох основних частин: порушення прав людини на етапі отримання наукових результатів в галузі біомедицини та фармації, які можуть бути захищені в режимі права інтелектуальної власності; та порушення прав людини на етапі захисту об'єктів інтелектуальної власності в біомедицині та фармації.

Національна патентна реформа націлена на гармонізацію прав людини та прав інтелектуальної власності, шляхом впровадження гнучких положень Угоди ТРІПС, впровадження виключення Болар, розробка дієвих механізмів примусового ліцензування, тощо.

Ключові слова: права людини, інтелектуальна власність, моральні та етичні цінності, медицина, фармація

The interdisciplinary sphere of ethical values of harmonization of human rights and intellectual property rights in the health care (medicine and pharmacy) has arisen for Ukraine in accordance with international obligations. While providing this research it was determined that the ethical values of human rights are systematically misbalanced by modern attitudes and general principles of intellectual property law (hereinafter — IP Law) in the sphere of medicine and pharmacy. It became obvious that ignorance of main ethical values of public interest is not only the features of Ukrainian national IP Law doctrine but of international IP Law doctrine as well. The misbalance between human rights and intellectual property rights has two main parts:

(i) violations of human rights on the stage of the obtaining of the scientific results in medicine and pharmacy which could be protected in the regime of IP Law; and
(ii) violations of human rights on the stage of protection of the intellectual property objects in medicine and pharmacy.

The biggest challenge is to determine the balance between the intellectual

property rights and human rights. We clearly understand that such balance has internal contraventions which demands absolutely new attitude to its resolve on the basis of the principle of «responsible innovation» in biomedicine and pharmacy.

Theoretical position of the research of the mentioned issues is based on the experience of the Center for Harmonization of Human Rights and IP Rights of Intellectual Property Research Institute of National Academy of Law Sciences of Ukraine (hereinafter — IP Research Institute of NALSU). The main achievement of the abovementioned Center in Ukraine is the creation of the opinion in Ukrainian scientific society that responsible innovations in the sphere of biomedicine and pharmacy are oriented not only towards competition and economic growth, but also towards values transcending an individual. The strategy of Ukrainian patent reform, in the sphere of medicine and pharmacy on the one hand has taken progressive European standards of protection of intellectual property objects in the sphere of medicine, but on the other — goes towards the rethinking of general principles of future of intellectual property doctrine on the basis of necessity of resolving of social and ethical concerns.

The Scientific Conception of Harmonization of Human Rights and IP Rights is an integral part of the National Policy of the Development of Law in Ukraine adopted in March 4, 2016 by the National Academy of Law Sciences of Ukraine. The author of the presented research is a scientific supervisor of PhD students of IP Research Institute of NALSU.

The methodology which should be used in the research of balance of human rights and intellectual property Rights is a comparative analysis of the various paradigms in ethics, deontology, philosophy of science, law and bioethics from the point of harmonization of the interests of researcher, inventor, individuals as an object of the biomedical research and public interest and its impact into the future IP Law.

And the objectives of the research are to consolidate modern morality, ethics of science and law on the basis of the secular background into the modern doctrine of IP Law in the sphere of biomedicine and pharmacy and to contribute such results into international doctrine of IP Law and bioethics. The main result of providing research could be transmuted into the new doctrine of IP Law which has to be based in the modern values of human rights.

It is possible to presume the successful cooperation between different scientific institutions which could create modern interdisciplinary paradigm of human values in IP Law.

To achieve the mentioned goal the Center for Harmonisation of Human Rights and IP Right determines the strategy which includes the following issues:

(i) ethical justification and scientific validity of biomedical researches involving human beings (ethical responsibility in a protocol design) and the protection of the result of such research in the object of IP Law;
(ii) the social and law-making role of ethical review committees;
(iii) ethical review of external sponsored research including the ethics of ensuring risks and potential benefits;
(iv) ethical and legal aspects of organization of biobanks;
(v) ethical and psychological aspects of individual informed consent (comprehension, renewing, cultural consideration, use medical records and biological specimens collected for other purposes, wave of consent requirements, consent of vulnerable individuals);
(vi) ethics of using identifiable and non-identifiable materials of human beings;
(vii) ethics of researches using health-related registries (databanks of genetic, cancer registries etc.);
(viii) ethical and moral requirements of the patentability of the intellectual property objects;

(ix) the world experience in the field of working out of national legislation in the sphere of protection of Human Rights in biomedicine and pharmacy from the point of the principles of the main international conventions, in particular, the legislation regulating aspects of prenatal genetic researches and legal status of human embryo and public interest;

(x) comparative analysis of the legal protection of the objects of biotechnologies (in particular human beings) as the objects of the Patent Law in EU countries, USA and Canada;

(xi) comparative analysis of the legal protection of assessments to treatments and pharmaceuticals on the basis of avoiding the economical discrimination.

The modern Ukrainian situation, the existence of political will and international support give the big chance to reform Ukrainian patent system in the sphere of medicine and pharmacy in accordance with the highest standards of rule of human rights.

Let us pay proper attention to changes which take place in the international legal doctrine of Intellectual Property.

The World Intellectual Property Organization Committee on the Law of Patents was meeting this summer. Among the agenda items: updates to the international patent system, exceptions and limitations to patents, quality of patents, patents and health, confidentiality of client-patent advisor communications, and technology transfer. A recent developed country proposal relates to increased work-sharing among patent offices. Also on the table this week is a new proposal to study the assessment of inventive step by patent practitioners [1].

This is only the first step in the frame of EU. Regarding the least-developing countries history has deeper legal roots.

The main international document in the frame of WTO which in one hand strictly regulated intellectual property sphere and in other hand gives the liberal flexibilities for the least-development countries in the health care sector.

So on the one hand the TRIPS Agreement [2] sets out detailed obligations in respect of the protection of inventions, including:

- to recognize patents for inventions in all fields of technology, with limited exceptions;
- not to discriminate with respect to the availability or enjoyment of patent rights;
- to grant patent rights for at least 20 years from the date of application;
- to limit the scope of exceptions to patent rights and to grant compulsory licenses only under certain conditions;
- to effectively enforce patent rights.

But in other hand the country-members of WTO should comply with the minimum standards of the TRIPS Agreement. Moreover, they can adopt measures which are conducive to social and economic welfare (Article 7 of the TRIPS Agreement), such as those necessary to protect public health, nutrition and the public interest in sectors of vital importance for their socio-economic and technological development. Countries can also adopt measures to prevent the abuse of intellectual property rights (Article 8.1 and 8.2 of the TRIPS Agreement) [3].

The strategy of Ukrainian patent reform in the sphere of health care should be harmonized to the European Legislation, the legal protection shall not extend to such technology objects:

- therapeutic and surgical methods of treatment of humans and animals;
- methods of diagnostic and prevention of diseases that may be used for treatment of humans and animals;
- human organism on the different stages of growth and development and simple discovery of elements of a human being, for example sequence or partial sequence of the genes;
- new use of known substance;
- new forms of previously known substances such as: salts, esters, ethers, polymorphs, metabolites, isomers,

isomers mixtures, combination of known compounds and other derivate forms of previously known substances.

We also would like to use the Polish experience of modern understading of the abuse of intellectual property rights. Thus, according to Article 68 of Idustrial Property Law of Poland: «Uprawniony z patentu lub z icencji nie może nadużywać swego prawa, w szczególności przez uniemożliwianie korzystania z wynalazku przez osobę trzecią, jeżeli jest ono konieczne do zaspokojenia potrzeb rynku krajowego, a zwłaszcza gdy wymaga tego interes publiczny, a wyrób jest dostępny społeczeństwu w niedostatecznej ilości lub jakości albo po nadmiernie wysokich cenach» [4].

So we shall not ignore the possibility to determine the abuse of rights deriving from the patent in medical field. The person who owns the intellectual property rights for an invention (utility model) in a medical sphere on the basis of a patent or a license agreement, has no the right to prevent third parties to use the invention (utility model) for public health protection when it leads to a violation of the human right of access treatment due to lack of medicine in Ukraine or high prices.

The dispute about the abuse of intellectual property rights shall be settled in a court on the basis of claim of any person who considers that his rights or legitimate interests affected by the abuse of intellectual property rights or the suit of the central body of executive power, which formulates and implements policies in the field of healthcare.

The dispute about the abuse of rights deriving from the patented invention in medical field as a result of the issuance of a supplementary protection certificate shall be resolved in court at the suit of any person who considers that his rights or legitimate interests affected by the abuse of intellectual property rights or the suit of the central executive body that forms and implements policy in health care.

The other important modern value of IP Law is the Bolar provision. In patent law, the research exemption is an exemption to the rights conferred by patents, which is especially relevant to medicines. According to this exemption, despite the patent rights, providing the researches and tests for preparing regulatory approval, for instance by the FDA in the United States or by the State Expert Center of Ministry of Health of Ukraine does not constitute infringement for a limited term before the expired of paten validity.

«The principle behind the Bolar exemption is that generic companies should be in a position to take the necessary preparatory measures in order to be able to enter the market without delay once patent protection expires» [5].

This exemption allows generic manufacturers to prepare generic drugs in advance of the patent expiration.

The next important mechanism to implement modern values in IP Law is to use the mechanism of compulsory licensing in *ordre public* by the legal instruments of intellectual property and antimonopoly legislation.

Summarizing mentioned above we declare our openings for all scientific discussions regarding the experience of implementation of ethical norms and moral standards into the legislation in the sphere of harmonization of human rights and intellectual property rights, legal regulations of biomedical researches on human beings with the purpose of legitimization of such scientific results. ◆

Список використаних джерел / List of references

1. *WIPO Patent Law Committee Undertakes Many Issues This Week [in]: Intellectual Property Watch, http://www.ip-watch.org/2016/06/27/wipo-patent-law-committee-undertakes-many-issues-this-week.*
2. *Agreement on Trade-Related Aspects of Intellectual Property Rights, https://www.wto.org/english/docs_e/legal_e/27-trips.pdf.*
3. *Correa Carlos. Integrating public health concerns into patent legislation in developing countries, University of Buenos Aires, Argentina, South Cinter, 2000, P. 20.*
4. *Ustawa z dnia 30.06.2000 r. Prawo własności przemysłowej, www.uprp.pl/uprp/redir.jsp?place=GalleryStats&id=37064.*
5. *Decision T 0223/11 dated 22 May 2012 of the Board of Appeal 3.3.02 of the European Patent Office.*

Надійшла до редакції 29.05.2016 р.

Кашинцева О. Современные ценности гармонизации прав человека и прав интеллектуальной собственности в сфере здравоохранения. Статья посвящена междисциплинарным аспектам современных ценностей гармонизации прав человека и прав интеллектуальной собственности в сфере медицины и фармации. Необходимость поиска баланса прав человека и прав интеллектуальной собственности возникла для Украины в соответствии с международными обязательствами. Современные ценности прав человека разбалансированы современными установками и общими принципами права интеллектуальной собственности. Очевидно, что данная проблема возникла не только перед Украиной. Дисбаланс между правами по правам человека и правам интеллектуальной собственности состоит из двух основных частей: нарушения прав человека на этапе получения научных результатов в области биомедицины и фармации, которые могут быть защищены в режиме права интеллектуальной собственности; и нарушения прав человека на этапе защиты объектов интеллектуальной собственности в биомедицине и фармации.

Национальная патентная реформа нацелена на гармонизацию прав человека и прав интеллектуальной собственности, путем внедрения гибких положений Соглашения ТРИПС, внедрение исключения Болар, разработка действенных механизмов принудительного лицензирования и т. д.

Ключевые слова: права человека, интеллектуальная собственность, моральные и этические ценности, медицина, фармация

Kashyntseva O. Modern values of harmonization of human rights and intellectual property rights in health care. The article is devoted to interdisciplinary aspects of modern values of harmonization of human rights and intellectual property rights in the sphere of medicine and pharmacy. The necessity to find a balance between human rights and intellectual property rights arose in Ukraine in accordance with international obligations. Modern human rights values unbalanced by modern facilities and the general principles of intellectual property rights. It is obvious that the problem arose not only for Ukraine. The imbalance between the rights of human rights and intellectual property rights consists of two main parts: the human rights violations at the stage of obtaining scientific results in biomedicine and pharmacy, which can be protected in the mode of IP rights; and human rights violations during the protection of intellectual property in biomedicine and pharmacy.

National patent reform aims to harmonize rights and intellectual property rights, by implementing flexible provisions of the TRIPS Agreement, implementation Bolar exception, development of effective mechanisms for compulsory licensing, and so on.

Keywords: human rights, intellectual property, moral and ethical values, medicine, pharmacy

ISSN 2308-0361

PROTECTION OF TRADE SECRETS IN INTERNATIONAL LEGAL DOCTRINES: STRATEGIES TO ACHIEVE EMPLOYEE LOYALTY

Hennadiy Androshchuk,
head of Laboratory for legal support for science and technology development of the Intellectual Property Research Institute of the NALS of Ukraine, PhD in economics, associate professor

Андрощук Г. Захист комерційної таємниці в зарубіжній правовій доктрині: стратегії забезпечення лояльності працівників.

Комерційна таємниця нерозривно пов'язана з поняттям конкуренції, тому що саме конкуренція є одним з найважливіших факторів ефективного розвитку ринкової економіки. Конкурентна боротьба неминуче припускає забезпечення збереження в таємниці відомостей, оволодіння якими сторонніми особами призведе до послаблення економічних позицій підприємства або завдання значної шкоди.

Законодавство, що регулює питання комерційної таємниці (в більшості країн ці правовідносини регулюються законодавством про захист від недобросовісної конкуренції), запобігає промисловому шпигунству (несанкціонованому доступу до такої інформації) завдяки тому, що воно передбачає притягнення до відповідальності осіб, винних в отриманні доступу до інформації незаконними способами.

Сьогодні окремі суперечливі норми, що регулюють питання, пов'язані з комерційною таємницею, містяться в різних нормативно-законодавчих актах. Спеціального закону про охорону комерційної таємниці в Україні й досі немає. Водночас, окремі спеціальні закони з охорони комерційної таємниці сьогодні діють в Молдові (1994 р.), Киргизстані (1998 р.), Туркменістані (2000 р.), Азербайджані (2001 р.), Росії (2004 р.), Таджикистані (2008 р.), Білорусі (2013 р.).

У сучасних умовах жорсткої конкуренції вирішальну роль в охороні інтелектуальної власності (ІВ) підприємства відіграють його працівники. Незважаючи на існування цілої низки юридичних і технічних механізмів охорони ІВ, одним з найскладніших завдань, яке доводиться вирішувати підприємствам в сфері охорони ІВ, є, як і раніше, забезпечення лояльності з боку працівників. Працівники — найбільша загроза. Відома статистика (дані Інтерполу), згідно з якою 25 % службовців фірми готові продати її секрети в будь-який час кому завгодно, 50 % йдуть на це залежно від обставин і лише 25 % є патріотами цього підприємства. У статті роз'яснюється необхідність включення до стратегії охорони комерційної таємниці підприємств такого ключового елемента, як висока лояльність з боку працівників. Розглянуто основні шляхи та способи забезпечення довіри і відданості з боку працівників, що запобігає несанкціонованому розголошенню ними комерційних секретів підприємства.

Щодо роботодавця працівник автоматично зобов'язаний зберігати конфіденційність. Однак в умовах високої мобільності робочої сили, «психологічні договори» виявляються ненадійними. Це означає, що офіційні юридично оформлені контракти набувають все більшого значення. Такі контракти або положення, що в них містяться, зміцнюють юридичну охорону комерційної таємниці і забезпечують підприємству безпеку у разі виникнення судового спору.

Статистичні дані свідчать, що майже 80 % працівників малих і середніх підприємств лояльні до своїх підприємств, тоді як у великих компаніях цей показник становить менше 50 %. Законодавство про охорону комерційної таємниці покликане забезпечити баланс між різними варіантами політики в галузі конкуренції. З одного боку,

необхідно заохочувати інновації і творчість та забезпечити охорону компаніям, що інвестують кошти в інноваційну і творчу діяльність. З іншого, необхідно заохочувати здорову конкуренцію і свободу зайнятості. Про складність таких різних і нерідко конфліктуючих політичних підходів свідчить застосування в країнах загального права «доктрини неминучого розкриття» і «доктрини трампліна».

Саме тому організаційні та адміністративні заходи захисту конфіденційної інформації необхідно поєднувати з соціально-психологічними. Серед соціально-психологічних заходів захисту можна виділити два основних напрямки: це, по-перше, правильний підбір і розстановка кадрів і, по-друге, використання матеріальних і моральних стимулів.

Західні фахівці з економічної безпеки вважають, що від правильного підбору, розстановки і стимулювання персоналу збереження фірмових секретів залежить, як мінімум, на 80 %!

Ключові слова: конкуренція, комерційна таємниця, конфіденційність, економічна безпека, лояльність працівників

Introduction. Trade secret is closely connected with the notion of competition, because competition is one of the most important factors of effective development of a market economy. Competition will inevitable involve the need to ensure confidentiality of information which, if becomes known to outside parties, may lead to the weakening of the economic position of the enterprise or cause it a substantial harm.

With the transition of our state towards the market economy, the new terms associated with the market economy terms have come into use in the Ukrainian legislation, such as «confidential information», «commercial secret», «bank secret» and «know-how». Whereas issues relating to protection of state secrets are thoroughly regulated by the Ukrainian legislation, the issues relating to commercial secrets and protection thereof are among the least developed in the Ukrainian economics and law science. In fact there is no any practical experience concerning application of provisions of the existing legislation relating to commercial secrets. Over the last 6 years the bodies of the Antimonopoly Committee of Ukraine have eradicated only 11 cases infringements specified in articles 16–19 (illegal collection, disclosure and use of commercial secrets) of the Law of Ukraine «On protection from unfair competition» [1]. And it is understandable, because the prevailing majority of such cases are of a latent (hidden) nature.

Presently there are assorted conflicting provisions which regulate issues concerning commercial secrets and which are contained in different regulatory and legal acts. Ukraine still does not have a single law dedicated to protection of commercial secrets. However, separate laws on protection of commercial secrets are currently in force in Moldova (1994), Kyrgyzstan (1998), Turkmenistan (2000), Azerbaijan (2001), the Russian Federation (2004), Tajikistan (2008), Belarus (2013) [2].

In the modern conditions of harsh competition, it is employees of an enterprise who play a decisive part in protecting its intellectual property (hereinafter — IP). Despite the availability of a series of legal and technical mechanisms of IP protection, one of the most challenging tasks that businesses face in the area of IP protection is (as it has been in the past) to ensure employee loyalty. In this paper we explain the need to include in the strategy of protection of commercial secrets of enterprises such a key element as high degree of loyalty of employees. Let's look at the principal ways and means of achieving trust and commitment on the part of employees and preventing, by doing that, the unauthorized disclosure of commercial secrets of the enterprise by its employees.

A saying «he who controls information controls the world» is very well suited for the entire concept of strategic use of commercial secrets. Using commercial secrets for strategic purposes, an enterprise often achieves a significant competitive edge on the market. Besides, owing to such secrets the enterprise may create a market niche that will be practically inaccessible for competitors. Frequently enough, enterprises attain competitive advantages because they do not disclose strategic information or maintain its confidentiality sufficiently long, since laws (of most countries) normally prohibit third parties to use or copy secrets or confidential information without its owner's permission. Legislation that regulates issues relating to commercial secrets (in most countries such legal relationships are regulated by laws on protection from unfair competition) prevents commercial espionage (unauthorized access to such information) by establishing responsibility of individuals gaining access to information by illegal means [3, 4, 5]. Commercial secret is not the only instrument for IP protection, and, if used properly, it will complement and step up efficiency of other means of protection. By successfully protecting their commercial secrets, enterprises also strengthen their other IP assets, for example, Coca-Cola Company by protecting its secret formula as a commercial secret also strengthens its trademark*.

Considering volatility of market conditions and taking into account that commercial secrets can be disclosed by third parties themselves, businesses are advised not only to protect already existing commercial secrets, but also work constantly on creating new know-how to maintain their competitiveness. Besides, it may also prove useful in the event of unforeseen disclosure of commercial secrets, because the enterprise will be able in such a case to switch to manufacturing a new and better product or to implementing a more effective business plan.

Definition of commercial secrets. To be regarded as commercial secret and, consequently, to qualify for legal protection, information must meet the following three principal requirements: 1) this information must be confidential or must be distributed on conditions of confidentiality; 2) the information must have commercially valuable due to its confidentiality; 3) under certain conditions, the owner of the information must apply necessary steps to maintain its confidentiality. A commercial secret may be any kind of information, including formulas, methods, models, financial data, business plans, client lists, undisclosed products, etc., which the enterprise deems valuable and which gives the enterprise an advantage over its competitors [3].

Positive and negative aspects of protection of commercial secrets. When making a decision on whether or not to apply the mechanism of protection of commercial secrets, one must consider advantages and drawbacks of such pro-

* There are well-known international examples where extensive and reliable protection of production secrets is ensured by developers themselves. Thus, the Coca-cola extract production secret is known only to two persons and has been kept undisclosed since 1886. This secret has been insured against commercial espionage in the amount of 43 million dollars. The secret of production of Cologne № 4711 in Germany has been under protection already for 190 years; it has been seventy years as the secret of composition of the world's best French perfume Chanel № 5, which includes over 100 different fragrance oils and essences; also protected are the secret tobacco mix of Marlboro cigarettes, the secret ingredients of French liqueurs Benedictine and Chartres. The same holds true for Pepsi cola. Back in 1903 the obscure pharmacist Braham from North Carolina (the USA) invented the dark-brown syrup that he dubbed Pepsi, which means energizing or invigorating. This syrup is currently used by 1300 PepsiCo plants located in all parts of the world. Its production secret is known only to 3 members of the board of directors of PepsiCo. Only they hold the keys to the safe where the recipe of this concentrate is kept; they can open the safe only together and they are not allowed to be together in one airplane, train or car — if anything happens to one of them, two others will stay alive. And just in case a copy of the safe key is held at the bank which finances the company [6].

tection relative to other methods of IP protection. The advantages of commercial secrets are as follows: 1) they entail no registration costs; 2) such protection is not limited in time; 3) protection of commercial secrets becomes effective immediately; 4) to establish such protection, the commercial secret does not have to disclosed or registered in a government agency. On the other hand, it has the following disadvantages: 1) if the secret is embodied in a product, third parties may themselves disclose the embodied in this product secret information and use it legitimately by way of «reverse engineering»; 2) if a commercial secret has been disclosure to the general public, no protection shall be granted; 3) protection shall be granted only from the illegal access, use or disclosure of confidential information; 4) protection of commercial secrets is weaker than patent protection; 5) commercial secret does not ensure protection from those who independently reaches an idea that is analogous to the one kept as secret. The result is that unpatented commercial secret could be patented by a person who independently develops it. In this respect a commercial secret is different from a patent on inventions which protects the owner of the patent from those who managed to independently develop an analogous technical solution. A law does not stipulate a punishment for a bona-fide disclosure, including such legitimate methods of discovery as: 1) independent creation; commercial secret does not involve exclusivity, therefore potentially anybody can discover your commercial secrets independently and use or patent them; 2) reverse engineering; this is a usual technique used to understand the mechanism of operation or component parts of a product and which means that a competitor examines the product with a view to reproducing it or even manufacturing a better product [3].

However, many analysts believe that protection of the results of intellectual activities in the regime of a commercial secret has a more promising perspective than patent protection. From the very beginning patents were meant to stimulate not making inventions commercial secrets. For instance, in [7] it is indicated that: «... in the hierarchy of methods of improving competitiveness of innovative businesses, patent protection for many companies comes only fifth after protection in the form of know-how, reducing the length of the period for implementation of the innovation, of production itself, selling accompanying goods or services».

It should be noted that the costs associated with obtaining a patent for an invention of medium complexity and enforcing this patent during the first three years (including patent attorney's fees) may amount to 3 000–4 000 euros in European countries, 7 500 euros in the USA, and 9 600 euros — in Japan. The cost of a European patent in eight countries is estimated at 40 000 euros. Patenting the inventions under the Patent Cooperation Treaty system involves additional, compared to the national patenting procedure, cost of 2 100 euros (3 800 euros if patent analysis is carried out) [8]. Besides, due to the high level of uncertainty in patent protection and also high costs of obtaining and enforcing a patent, judicial costs relating to judicial settlement of disputes in the area of patent law and their complexity, the «patent wars» make sense only as a last-ditch effort for a financially able claimant.

Legal protection under the commercial secret regime has a string advantages compared to other forms of legal protection. Such advantages include absence of a mandatory registration requirement at the patent office, indefinite term of protection, fast achievement of the status of protected result of intellectual activities, universality of objects of protection, no need to pay a duty or disclose the essence of the product subject to protection. Of course, these particular features of commercial secrets (know-how) make them a rather attractive instrument of legal protection of the re-

sults of intellectual activities for enterprises of any ownership form. However, working with a production secret has its difficulties relating to the uncertain mechanism for the accounting of know-how and additional costs which accompany this stage of working with it. On the one hand, under par. 4 of the Regulation on financial accounting «Accounting of intangible assets» (RFA 14/2007), «provided certain conditions are met ... intangible assets will include, for instance, scientific, literary and artistic creations; programs for computers, inventions; utility models ... production secrets (know-how); trade and service marks». This means that in theory financial accounting of know-how is possible [7].

Protection of commercial secrets. Due to the modern achievements in the area of communication technologies and the speed at which information can be copied and distributed, protection of commercial secrets requires continuous daily efforts. To achieve this, an enterprise must:

- identify all valuable commercial secrets and develop and implement a policy and program for protection of the commercial secrets;
- communicate to the employees the importance of protection of commercial secrets and explain the developed protection policy and program to them;
- make a balanced decision on which employees *«need to know or use»* the information, and periodically revise the list of such employees, and also restrict access to commercial secrets based on what exactly the employees *«need to know»* or *«need to use»*;
- install devices limiting physical and technical access to commercial secrets; • limit public access to the room where commercial secrets are kept and ensure control over such access;
- in order to prevent incidental or unintentional disclosure of information, mark *secret* or *confidential* all documents containing commercial secrets;
- sign confidentiality agreements with all relevant employees, as well as third persons who in one way or another may gain access to commercial secrets of the enterprise.

Employees are the major risk. There are sad Interpol statistics, according to which 25 % of companies personnel are prepared to sell their secrets to anybody and anytime, 50 % may do it depending on circumstances and only 25 % are true patriots of their enterprises [3].

Competitive advantages that an enterprise do badly needs can be ensured by new and more advanced products and processes which cannot be copied. An incessant quest for creative and innovative ideas is an all-time problem. Some enterprises even directly «steal» the employees form their competitors in order to exploit their creative and innovative capabilities, as well as their knowledge of secrets of successful activities of the competitor for their own advantage. In most cases confidential information is disclosed or used by the existing and particularly by former employees of the enterprise. When a person is working for an enterprise, it always has some «psychological accord» with the employer. Unlike an officially executed contract, such an accord is made up of a set of mutual expectations in respect of the employee's contribution to the operation of the enterprise, on the one hand, and of his reward for his contribution, on the other hand. Such expectations, as a rule, develop and become understood in the course of the work for the company. As employees integrate into the company's culture, they learn what exactly is acceptable and what is not, what their duties are and what they owe the company and what the company owes them. In respect of the employee an employee is required to maintain confidentiality automatically. However, under conditions of high level of freedom of employment, «psychological accords» turn unreliable. This means that officially executed legal contracts are gaining greater importance. Such contracts or

provisions contained therein strengthen the legal protection of commercial secrets and ensure enterprise's security if a judicial dispute arises. There exist several kinds of contract provisions which an enterprise may include in employment contracts with its employees with a view to ensuring protection of one's confidential information.

- Firstly, it is the provision on mutual nondisclosure obligations, where both parties agree not to disclose any confidential information subject to the contract. Such provisions should be included in contracts of any kind, be it a contract with full-time staff employees, interns, temporary hire, shareholders, clients, or anybody else who can gain access to the commercial secrets of the enterprise.
- Secondly, there is an equally important competition waiver clause, under which employees give up their rights to carry out similar activities or hold a similar job position with competitors of the employer and even to start up one's own business using for this purpose the information of the employer enterprise. A provision on competition waiver should include the following obligations: not to hold several jobs, not to compete with the employer, not to set up a competing company and not to entice one's colleagues to start working for a competing company. However, in certain countries it is not allowed to include such provisions, whereas in most other countries it is required that such limitations must be reasonable.

Such a provision exists, in particular, in German competition law. A similar article was included in the draft Law of Ukraine «On protection from unfair competition». However, in the course of the preparation of the draft law for the second reading this provision was not backed by the deputies, because, in their view, it was infringing on human rights. The result is that now in Ukraine it is rather common for former employees to start work for competitive entities, such as banks, insurance companies, etc. The author believes that it is time to revise this legislative provision in the light of the existing international expertise and national experience.

Confidentiality agreements: absence of full guarantee. The task of preserving commercial secrets is ever present due to the constant fear of their possible disclosure. As a rule, major risks are posed by employees themselves, since there are no guarantees that signing with them *«non-disclosure agreements»* and *«agreements on competition waiver»* will suffice to prevent use or unauthorized disclosure of confidential information by the employees who quit working for the company. In any case, the competition waiver clause does not ensure full guarantee here, because often it is subject to limitations regarding its duration and geographical coverage.

In the past two decades the world of business and work conditions have been through substantial changes. In the past, a hired employee used to be sure work for the company for the rest of his life, whereas the employer would expect from him full loyalty to the enterprise. Besides, employees in those times were committed to their employer. However, with the onset of «globalization», when employees began to be confronted with problems of restructuring, relocation of companies to other regions and their fragmentation, the attitude toward employee started changing sharply [9]. Employers have began to «infringe on the rules», mutual obligations stopped being observed and were revised, an employee was no longer expected to provide services and show commitment indefinitely, job hopping became usual as people constantly sought higher-pay jobs or better working conditions. Under modern conditions it is difficult to achieve loyalty and trust in the work place. According to the study of American labor market carried out in 2000 by human resource consul-

tants for the Fortune Company, employees' loyalty to their employers depended on the size of the enterprise. The statistics demonstrated that almost 80 per cent of employees of medium-sized enterprises were loyal to their enterprise, whereas in large companies this ratio is less than 50 per cent. The legislation protection of commercial secrets seeks to ensure a balance between different policy versions in the area of competition. On the one hand, it is necessary to encourage innovation and creativity and to ensure protection for the companies investing funds in innovation and creativity. On the other hand, it is necessary to encourage healthy competition and freedom of employment. Complexity of such different and often conflicting political approaches is reflected in the fact that common law countries apply the *«inevitable disclosure»* and *«springboard» doctrines*.

The «inevitable disclosure» doctrine emerged in connection with the need to resolve a problem of employees' migrating to other similar companies. The doctrine's major principle is that the employees who had access to confidential information would inevitably disclose this information to their future employers, provided the latter operate in the same area. What follows from this doctrine is that even if an employee has good intentions, he will automatically or instinctively pass the information, skills and knowledge acquired on his previous job to his next employer, id the latter carries out his activity in the same area. In this case the policy factors mentioned above come into play. On the other hand, the society needs to protect confidential information of its enterprises, although it may not restrict freedom of employment for its members. Judicial rulings passed in this area depend on facts and circumstances of each specific dispute. As a rule, an injunction on the employee's starting work for another company is issued if it is established that there is a high probability of the former employee's passing to his new employer the information that is not generally known or cannot be easily «deduced» by the competitors in the respective sector. One must distinguish between specific confidential information and the usual skills and knowledge acquired by an employee in the course of his work for the previous company. The employee may not be deprived of the right to use such acquired skills and knowledge.

A case *PepsiCo Inc. v Redmond* presents an example of application of this doctrine to prevent work of the employee for the competing company. PepsiCo Inc. sought to obtain an injunction for the employment of its former employee Redmond by the Quaker Oats company, which at the time was a direct competitor of PepsiCo Inc. PepsiCo Inc. won in this dispute because it was found that Redmond would inevitably disclose PepsiCo's commercial secrets and confidential information to his new employer given the nature of the job offered to him at the Quaker company. The court also ruled that Redmond may never disclose PepsiCo's commercial secrets.

The «springboard» doctrine is applied to prevent a former employee who had access to the former employer's confidential information from using such information in his own interests to achieve an unfair advantage over his former employer.

An example of the use of this doctrine is a case *Rodger Bullivant Ltd. v Ellis,* where a managing director went to work for the rival company and brought technical and commercial documents, trade secrets and information about clientele of the former employer. In this case of was beyond doubt that using this information the former employee would get an unfair advantage and therefore the court prohibited such use of the information.

The springboard doctrine may also be used even if relevant information has already entered the public domain, in order to ban the former employee, who acquired from his former employer specific production knowledge and technical

skills, to use these skills / knowledge to manufacture a competing product. This is because such knowledge would give a former employee an «unfair head start» in respect of those who have access to the published information.

It is not easy, however, to obtain a court injunction, because the issue of confidentiality is of a complex nature: it is difficult to clearly identify and delineate the knowledge that the employee already had at the time of his being hired by the company, and the knowledge that he acquired during his work for the company.

In the last several decades changes occurred in working conditions and, as a result, in the degree of employee loyalty, which made incompliance with the psychological accord more likely. Therefore, greater attention must be paid to the task of improving employee loyalty as a way of ensuring protection of commercial secrets. An employer will only benefit from this, because the taking of appropriate measures will improve productivity and, even more importantly, will tie employees to their jobs, reduce personnel turnover and, as a result of this, minimize the risk of disclosure of commercial secrets.

Raising the level of employee loyalty. In the opinion of foreign experts, probability rate of a leak of data constituting commercial secrets in connection with bribery, blackmail, hiring competition's personnel, planting of one's agents is 43 %; by obtaining information through communication with colleagues — 24 %. Therefore, the firm's personnel are, on the one hand, the most important resource for entrepreneurial activities, and, on the other hand — certain employees due to various circumstances may cause significant losses and even bankruptcy of the firm. Thus, in Western Europe and in the USA the loss of 20 % of confidential information usually leads to the firm's collapse within a month [3].

That is why organizational and administrative measures aiming to protect confidential information must be combined with socio-psychological measures. The socio-psychological measures of protection have two primary components: firstly, it is the proper selection and placement of personnel, and secondly — use of material and moral incentives. Western economic security experts believe that minimum 80 % of protection of company secrets depends on proper selection, placement and motivation of the personnel!

Companies such as «Southwest Airlines», «Toyota» and «Sysco», which seek to raise profits by caring of their employees, have come to realize that ensuring employee loyalty to the company's cause need be well integrated with its policy in the area of human resources and common business strategies. Loyalty on the part of employees is not less important than loyalty on the part of customers, because enterprises entrust their customers to their employees, and therefore it is important to collect, summarize and interpret information about employees to be able to have a clear understanding of their needs and expectations. Relationships between the employer and employees must be based on mutual respect and understanding, fair and just treatment of employees regardless of their job positions. An important step on the way to the higher employee loyalty to the enterprise's cause is communication. Expectations of management may differ from expectations of employees, and therefore it is necessary to clarify mutual expectations in order for the both parties to understand what exactly is needed, from whom and in what amount. Where managers enjoy their subordinate employee's respect and trust — it is good for the interests of the business. Therefore, organizing manager qualification improvement programs may help improve personnel management skills and facilitate problem solving in specific sectors. It is useful to maintain proper communications inside the company and it is important to listen to the employees' opinion, since in this case the latter may feel that

they are involved in the common cause and the enterprise may benefit from this in terms of improved management and inside problem solving. Organization of programs such as inside forums, where employees would be given an opportunity to freely express their views and recommendations, could facilitate creation of a favorable work atmosphere. Besides, listening to the employee's views, company managers could identify *«weak points»* and *«cells of dissatisfaction»* and take action to eliminate them.

In the culture where there is «little alienation from authorities», managers treat their subordinates with respect and do not mistreat them, employees are entrusted with implementation of important assignments, and responsibility is borne by both parties or by the manager alone, who often assumes it singlehandedly as a person responsible for management, and managers are often in touch with the employees after work. Such a more collegial culture and the democratic and decentralized atmosphere in the work place greatly encourage higher loyalty among employees and strengthen mutual trust by facilitating communication between managers and employees. Employers, in their relationships with employees, need to do their best to demonstrate their care of the latter. Besides, collegial environment and «little alienation from authorities» form a sort of a «family» atmosphere inducing a sense of involvement. This, in its turn, helps strengthen loyalty with respect to the enterprise. When developing a strategy for ensuring employee loyalty to the cause of the enterprise, it is important to make sure that every employee understands what his role in the company is and how he can contribute to achievement of the overall success, because this will strengthen his sense of involvement, self-respect and doing something meaningful, and will also step up his level of loyalty with respect to the company.

Also very important for employees are proper work compensation, bonuses and benefits. From the financial point of view, wages of employees must fairly reflect their work contribution. One of the methods of reconciling interests of the enterprise and interests of its employees is the application of the profit-sharing mechanism, under which employees are paid bonuses which depend on the company's profits. Ultimately, both employees and employer are working on their common objective of ensuring mutual benefits. For example, Procter and Gamble offers its employees a very attractive share of its profit, and many employees of the company own its share worth thousands dollars. This makes employees feel involved and gives them certain financial benefits.

Also important is to motivate employees by ways other than material, for instance, in the form of announcing gratitude, granting a leave, placing a photograph on the best employee board, making available for them training programs, etc. The world's largest private software developing company, SAS Institute Inc., has the personnel turnover rate of 4 per cent. This relatively low rate is achieved also due to such employee benefits as daytime childcare service for working mothers, organization of leisure and recreation activities, full health insurance coverage, as well as a 35-hour work week.

Controlling employees activities. Despite the importance of measures aiming to strengthen employee loyalty, employers should not forget of protection of commercial secrets. For this purpose they must constantly control activities of employees. However, in doing this employers must not step outside the established limitations and must always respect privacy of employees. At the same time, excessive control may undermine employee's trust, because they may feel that they are not trusted themselves.

Speaking to a resigning employee. As an employment contract expires, it is important for the employer to have a conversation with the resigning employ-

ee and remind him of the obligation of non-disclosure of commercial secrets to which the employee had access in the company, after termination of the employment, and of the consequences of incompliance. Such conversations may also be of value for the employer, who may find out about the plans of the former employee for the future, for instance, as to his intended place of employment. This information could let the employer more accurately evaluate the existing and potential risks of disclosure of his commercial secrets and identify his competitors.

Conclusion. As enterprises make a decision to keep certain information confidential, they must create a dependable system for protection of such information [10, 11]. Also enterprises should take measures to ensure psychological loyalty on the part of the employees to step up the effectiveness of the signed non-disclosure agreements and competition waivers and thus protect their commercial secrets. Therefore, enterprises are advised to fully integrate measures aimed to strengthen psychological loyalty of employees with their strategies in the field of IP protection and their general business strategies. ♦

Список використаних джерел / List of references

1. *Андрощук Г. О. Захист комерційної таємниці: методика розслідування злочинів / Г. О. Андрощук // Інтелектуальна власність. — 2008. — № 7. — С. 21–33, № 10. — С. 22–31, № 11. — С. 21–33.*

Androshchuk H. O. Zakhyst komertsiinoi taiemnytsi: metodyka rozsliduvannia zlochyniv [in]: Intelektualna vlasnist, 2008, № 7, S. 21–33; № 10, S. 22–31; № 11, S. 21–33.

2. *Андрощук Г. Институт коммерческой тайны в странах СНГ: правовой режим и защита // XVII Международная научно-практическая конференция «Актуальне проблемы интеллектуальной собственности», Львов, 21–25.02.2011 г. — С. 224–241.*

Androshchuk G. Institut kommercheskoy tainy v stranah SNG: pravovoi rezhym i zashchita, XVII Mezhdunarodnaia nauchno-prakticheskaia konferentsiia «Aktualnye problemy intellektualnoi sobstvennosti», Lvov, 21–25.02.2011, S. 224–241.

3. *Андрощук Г. А. Экономическая безопасность предприятия: защита коммерческой тайны : монография / Г. А. Андрощук, П. П. Крайнев. — К. : Ин Юре, 2000. — 400 с.*

Androshchuk H. A., Krainev P. P. Ekonomicheskaia bezopasnost predpriatia: zaschita kommercheskoi tainy, K. : In Yure, 2000, 400 s.

4. *Андрощук Г. О. Конкурентне право: захист від недобросовісної конкуренції : навч. посібник / Г. О. Андрощук. — 3-є вид. стереотипне. — К. : ЗАТ «Ін-т інтел. власн. і права», 2004. — 304 с.*

Androshchuk H. O. Konkurentne pravo: zakhyst vid nedobrosovisnoi konkurentsii, K. : ZAT «In-t intel. vlasn. i prava». 2004, 304 s.

5. *Андрощук Г. А. Правовое регулирование защиты коммерческой тайны за рубежом / Г. А. Андрощук, П. П. Крайнев // Экономическая безопасность, разведка и контрразведка — 2002. — № 1. — С. 18–45.*

Androshchuk H. A., Krainev P. P. Pravovoe regulirovanie zaschity kommercheskoi tainy za rubezhom [in]: Ekonomicheskaia bezopasnost, razvedka i kontrrazvedka, 2002, № 1, S. 18–45.

6. *Андрощук Г. Комерційна реалізація ноу-хау: зарубіжний досвід та вітчизняна практика / Г. Андрощук // Міжнародний форум «Трансфер технологій та інновацій», Київ, 20–21.11.2008. — С. 90–108.*

Androshchuk H. Komertsiina realizatsiia nou-khau: zarubizhnyi dosvid ta vitchyzniana praktyka, Mizhnarodnyi forum «Transfer tekhnolohii ta innovatsii», Kyiv, 20–21.11.2008, S. 90–108.

7. *Чайков М. Коллизии секрета производства (ноу-хау) / М. Чайков, А. Майкова. [Электронный ресурс]. — Режим доступа : http://www.avtonews.net/005/kollizii-sekreta-proizvodstva-nou-khau?page=0,1.*

Chaikov M., Maikova A. Kollizii sekreta proizvodstva (know-how), http://www.avtonews.net/005/kollizii-sekreta-proizvodstva-nou-khau?page=0,1.

8. *Андрощук Г. Зарубіжне патентування винаходів / Г. Андрощук // Теорія і практика інтелектуальної власності. — № 6. — 2011.*

Androshchuk H. Zarubizhne patentuvannia vynakhodiv [in]: Teoriia i praktyka intelektualnoi vlasnosti, № 6, 2011.

9. *Андрощук Г. Управление интеллектуальной собственностью при офшоринге: аспекты экономической безопасности / Г. Андрощук // Наука та інновації. — № 1. — 2011. — С. 48–66.*

Androshchuk H. Upravlenie itellektualnoi sobstvennostiu pri ofshoringe: aspekty ekonomycheskoi bezopasnosti [in]: Nauka ta innovatsii, № 1, 2011, S. 48–66.

10. *Марущак А. І. Правові основи захисту інформації з обмеженим доступом / А. І. Марущак. — К. : КНТ, 2007. — 208 с. .*

Marushchak A. I. Pravovi osnovy zakhystu informatsii z obmezhenym dostupom, K. : KNT, 2007, 208 s.

11. *Носік Ю. В. Право на комерційну таємницю в Україні : монографія / Ю. В. Носік. — К. : КНТ. — 2007. — 240 с.*

Nosik Yu. V. Pravo na komertsiinu taiemnytsiu v Ukraini, K. : KNT, 2007, 240 s.

Надійшла до редакції 31.05.2016 р.

Андрощук Г. Защита коммерческой тайны в зарубежной правовой доктрине: стратегии обеспечения лояльности работников. Исследуется роль коммерческой тайны в конкурентной борьбе. Разъясняется необходимость включения в стратегии охраны коммерческой тайны предприятий такого ключевого элемента, как высокая лояльность со стороны работников. Рассмотрены основные пути и способы обеспечения доверия и преданности со стороны работников, что предотвращает несанкционированный разглашению ними коммерческих секретов предприятия.

Ключевые слова: конкуренция, коммерческая тайна, конфиденциальность, экономическая безопасность, лояльность работников

Androshchuk H. Protection of trade secrets in international legal doctrines: strategies to achieve employee loyalty. The article investigates the role of trade secrets in the competition. It is explained the need to include into strategies for the protection of trade secrets of enterprises of such a key element, as the high loyalty of employees. The basic ways and means to ensure the credibility and dedication on the part of employees, which prevents unauthorized disclosure of these commercial secrets of the enterprise are considered.

Key words: competition, trade secret, privacy, economic security, employee loyalty

ISSN 2308-0361

PROBLEMS OF IDENTIFICATION OF A COPYRIGHT INFRINGER FOR WORKS POSTED ON THE INTERNET

Kostiantyn Zerov,
postgraduate student of the Taras Shevchenko National University of Kyiv; junior researcher of Intellectual Property Research Institute of the NALS of Ukraine.

Зеров К. Проблеми ідентифікації особи-порушника авторського права на твори, розміщені в Інтернеті.

У публікації розглянуто проблеми ідентифікації особи — порушника авторських прав на твори, розміщені в мережі Інтернет. Автор класифікує таку ідентифікацію на види залежно від особливостей протиправної поведінки особи на: 1) ідентифікацію особи-власника веб-сайту; 2) ідентифікацію особи-користувача веб-сайту, що розмістив твір; 3) ідентифікацію особи-користувача P2P-мережі; кожна з яких має свої особливості. Проаналізовано, що процес ідентифікації особи, що вчинила пряме порушення авторських прав (користувача веб-сайту, що розмістив твір, та користувача P2P-мережі), поділяється на три стадії: 1) визначення і збирання IP-адрес; 2) знаходження відповідності IP-адреси визначеним абонентам (користувачам) окремих інтернет посередників; 3) інформування чи направлення претензій особам щодо порушення ними авторських прав та можливості подання (чи безпосередньо подання) проти них позовів. Автором зроблено висновок, що для ідентифікації особи-порушника (а не місця, дескоєно порушення) авторських прав на твори, розміщені в мережі Інтернет-виключно використання IP-адреси недостатньо, тому необхідно використовувати додаткові докази в сукупності для встановлення причинново-наслідкового зв'язку між особою-абонентом (кінцевим користувачем), якому делеговано певну IP-адресу, та порушенням авторського права.

Ключові слова: Інтернет, піратство, авторське право, ідентификація

Topicality. Problem of identification of an alleged infringer of copyright within the relative anonymity of Internet users remains pending and unsolved problem of copyright protection for works posted on the Internet. Without solving this issue it is almost impossible to determine the entity of appropriate legal relationship.

The relative anonymity of users has a dual meaning. On the one hand, such activity in some way contributes to copyright infringement. Ye. Mykhailenko emphasizes that the problem is the main source of negative phenomena on the Internet [1, 9]. However, as fairly noted by O. Pastukhov, such anonymity is not a specific problem of a copyright law, though it applies to all crimes and torts occurring through the Internet network [2, 57]. For example, distribution of pornographic works, the legal relationship associated with protection against defamation, combating terrorism and separatism manifestations indicate the systemic nature of specified problem. However, we shall note that anonymous character of connections does not prevent from socially useful actions at all (*e.g.*, legal distribution of works).

On the other hand, the issue of anonymous nature of Internet users shall be considered with the principle of proportionality of intellectual property rights

(as well as other rights that may be subject of infringing activity) and the right for freedom of expression, respect for private and family life. Thus, the Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, which was presented to the UN Council on Human Rights at XXIX meeting (as of May 22, 2015) emphasized that encryption and anonymity, and the security concepts behind them, provide the privacy and security necessary for the exercise of the right to freedom of opinion and expression in the digital age [3, clause 56].

Specified principle of proportionality shall not interfere with measures taken to search persons responsible for criminal acts under national law, the European Convention on protection of Human Rights and other fundamentals, and other international agreements in the field of justice and policing, as noted, in particular, in the «Declaration on freedom of communication on the Internet» of the Committee of EC Ministers [4].

The relevance of the specified problems concerns the fact that in copyright-based relations (as civil relations) proving of a causal connection between the unlawful conduct of the person and caused damage as one of conditions for liability on violation of intellectual property rights is vested upon the plaintiff, *i.e.,* copyright holder (or a person authorized to act on the holder's behalf).

Within this study the author **specified the objective** to analyze the main approaches to identification of the person — an alleged infringer of copyright for works posted on the Internet.

Analysis of key studies and publications. The indicated problems almost have not been studied within study of problems of intellectual property in Ukraine. Still, there are respective researches within information law field; specifically, M. Gutsaliuk paid attention to the introduction of ID-web as a prerequisite for the Internet security.V. Butuzov, V. Gavlovsky, V. Golubev, R. Kaliuzhny, V. Tsymbaliuk draw attention to the need of development the Information Code, building of appropriate institutional structures of law enforcement agencies to detect and investigate crimes related to the use of the Internet and etc. The issues of identification of users of social networks on the Internet involved S. Bartunov and A. Korshunov. The issue of identifying the end-users of the Internet in copyright legal relationship has been the subject of a number of studies of foreign authors, among which we can emphasize T. Harding, D. Goldschlag, M. Reed, P. Syverson, M. Robert Filby, and M. Piatek.

Summary of basic material. In our opinion, problem of identification of a person — infringer of copyright for works posted on the Internet — at the logical level of the Internet network structure* shall indicatively considered depending on kinds of the illegal behaviour of a person.

1. Identification of a person — owner of the website.

2. Identification of a person — user of the website who posted the work.

3. Identification of a person — user of the P2P network.

Each of the above situations has own characteristics, which are discussed below.

As of May 2016 in Ukraine the possibility to identify an individual — an infringer of copyright for works posted on the Internet within the civil protection is provided only within the judicial form of protection, namely in accordance with part 1 article 133 of the Civil Procedure Code of Ukraine for the person (hereinafter — the CPC of Ukraine), through evidence provision. In accordance with

* The author shares the approach proposed by J. Benkler; according to which there are defined the following hierarchical levels of information environment: level of content (information available to be viewed by a user); logic level (regulation of software, Internet protocols) and physical layer (hardware both of users and Internet service providers) [5, 561–563].

part 1 article 134 of the CPC of Ukraine, the statement on evidence provision shall contain the following: evidence subject to provision; circumstances to be substantiated by the evidence; circumstances indicating that provision of required evidence may be impossible or complicated, and case that requires the evidence or the purpose of their provision [6]. The specified institution is used mostly for «domain disputes» to identify the registrant of the domain name*.

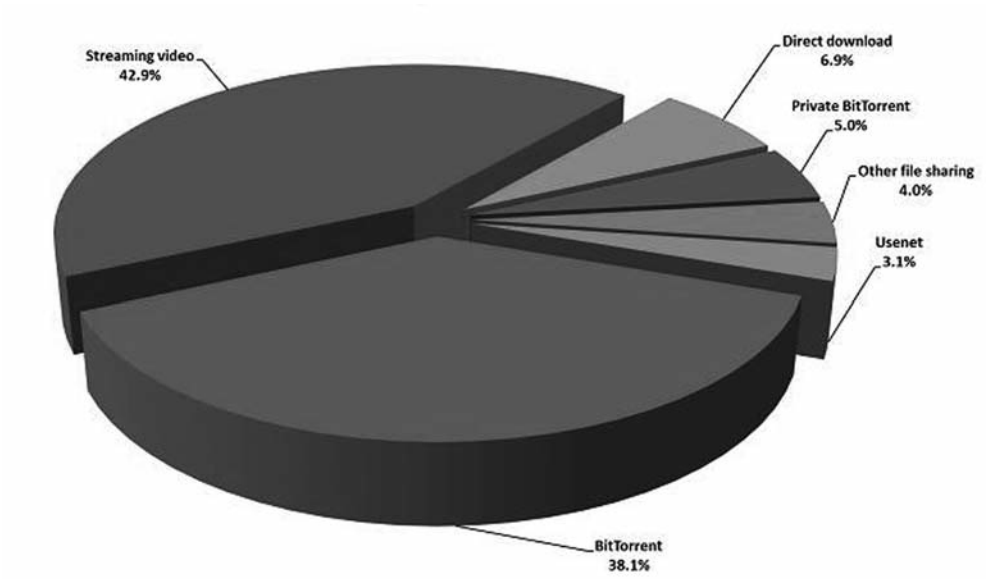
The draft law «On amendments to some legislative acts of Ukraine on protection of copyright and related rights on the Internet» as of May 10, 2016 № 4629 specifies provision of the copyright holder with an opportunity to receive the following:

1) from the owner of the website - information that identifies a user of the website, who, according to the entity possessing copyright and (or) related rights or its authorized representative, has posted on the website information violating the copyright and (or) related rights, and under condition of availability of contact details of the userof the website, required to send a petition to the court to consider the dispute in the court concerning illegality of the actions of such user at posting information on the website;
2) from the hosting service provider - information that identifies the owner of the website, using hosting services of the provider to host and provide access to information, that according to the copyright and (or) related rights, violates copyright and (or) related rights, and contact information required to send a petition to the court to consider the dispute in the court concerning illegality of the actions of such owner of the web site [7, article 52-2].

We shall note that owner of the website in accordance with the provisions of the draft law № 4629 is recognized by domain name registrant or other person who defines the procedure and conditions for use of the website and (or) procedure of information posted there. In author's opinion, such approach is justified, becauses it is unconditionally imprudent to equate the website owner and domain name registrant, since the legal nature of a website relates to copyright and domain name delegation relates to the contractual relationship; the registrant of the domain name is not necessarily the same person as the owner of the website (for example, contract on the use of the domain name has been concluded).

The problem of identification of the owner of the website through a domain name registrant is the subject to be solved by ICANN at self-regulation level. Thus in December 2015 the GNSO council of ICANN adopted recommendations «Illustrative Disclosure Framework», which provisions offer the procedure of receipt of information by the copyright holders about registrants of domain names (suspected of piracy), stored in a WHOIS — base from proxy — and privacy registrars accredited by ICANN. In addition, the registrar cannot refusethecopyright holderas for disclosure of such information because of the lack of a judgment, court summons, a civil suit or arbitration of the domain dispute according to the UDRP or URS procedures. Moreover, refusal to disclose information about the registrant cannot be based solely on the fact that the request relates to infringement of intellectual property by objectsposted on such website, not to the domain name. The registrar of such domain name shall be notified about a complaint and within 15 days may either abandon the domain name, or provide evidence of them being uninvolved to in-

* However, if the website is in domain zone .ua it is enough to see the field «license» in WHOIS-service to identify the registrant. The value of this field corresponds to the certificate of Ukraine for trademarks and services.



Picture 1. Estimate of online piracy methods, March 2016 by number of users

fringements of intellectual property, referred to in the complaint. If they prove convincingly, access will be denied to personal information of the registrant of the domain name [8].

However, in the draft law № 4629 the problems of identification of a person who is the user of P2P-network (direct infringer of copyright) are not taken into account, what, in our opinion, is a significant drawback. Thus, according to the MPPA, in March 2016 copyright infringement via P2P-networks accounted to 38.1 % of the total number of infringement of copyright for the works posted on the Internet *(see the picture above)* [9].

The process of identification of the person who committed direct copyright infringement (user of website who posted the work and user of P2P network) in foreign scientific literature is usually divided into three stages [10, 36, 37].

The first stage consists of actions of the copyright holder (or a person authorized to act on the holder's behalf) in order to identify and collect IP-addresses (numerical sequence that serves as an identifier of the Internet-server [11]). Without IP-address the user can neither send nor receive packets of data and other information useful for identification ofan alleged infringer.

The copyright holders use the following methods to identify and collect IP-addresses of infringers ofcopyright within operation of P2P networks:

- Indirect identification of users, based on a set of data about peers, returning from torrenttrackers.
- Direct identification of users. According to Tom Harding, is based on connection with a torrent tracker to users distributing certain files and further exchange of files with them. Direct identification looks to demonstrate that users are actually engaging in the file sharing [12, 8].

Both methods do not exclude the possibility of errors and mistakes. Thus, according to research by American scientists M. Piatek, T. Kohno and A. Krishnamurthy, any Internet user can get a warning for copyright infringement because of an artificial substitution of IP-address. Researchers received hundreds of actual reports on copyright infringe-

ment under DMCA law for computers and devices (including network printers) which have never been used (and could never been used) for spreading dissemination of works on the Internet [13, 7].

In addition, there are certain technical features that allow end-users to complicate their identification, while both of the above methods provide that users connect to the torrent server using IP addresses delegated personally to them. For example:

1) use of VPN or PROXY servers. In addition, such services are generally subject to foreign law and do not keep log files [10, 92] (files, containing information about time, actions and connections of certain persons);
2) D. Goldschlag, M. Reed, P. Syverson and M. Filby also note the possibility of usingDarknet (Onion Routing / TOR) *i.e.*, a sequence of intermediate networknodes with encryption of transmitted information [14; 10, 93].

However, we shall note that there are technical means by which we can detect the actual IP address of the user, even such user uses TOR browser [15], but it seems extremely complicated to use such means in private legal relations.

3) also, according to Michael Piatek, users of P2P- networks use «blacklists» of known IP-addresses of copyright holders (or their representatives) to prevent from such monitoring [13, 4; 10, 95].

The second stage of identification is to establish the matching of IP-address to certain subscribers (users) of certain Internet intermediaries.

Foreign jurisprudence applies different approaches to solve the specified issue.

According to a research by S. B. Karunaratne, for judicial practice in the USA, since 2003, the copyright holders applysubpoenas to an Internet intermediary for identification of an alleged infringer to protect against copyright infringement of works posted on the Internet via torrent trackers (so-called «John Doe» in the countries of the Anglo-Saxon law) — users of Bittorent trackers involving Internet intermediaries for further identification of such users [16, 284–288; 17]. In some cases the number of respondents totalled more than 2 000 [18]. In addition, according to the provisions of paragraph 5 part (h) § 512 of the DMCA law the Internet intermediary shall expeditiously disclose to the copyright holder or person authorized by the copyright holder the information required by the subpoena, notwithstanding any other provision of law and regardless of whether the service provider responds to the notification [19].

In the UK, in order to match the IP-address of a person the Norwich procedure is applied (it was first used in patent case of Norwich Pharmacal Co. against Customs and Excise Commissioners [20]), which is a court order for disclosure of documents or information available to the third party regarding the identity of an allegedinfringer of intellectual property rights. Adoption of the Digital Economy Act (DEA) in 2010 [21] specified a special procedure of informing of the Internet intermediary by the copyright holder about online copyright infringement (copyright infringement report, CIR); procedure of notification about received complaints performed by the Internet intermediary towards its user; procedure to provide a list of infringers to the copyright holder (copyright infringement list, CIL). In addition, the specified list under the provisions of article 124 — under DEA law *shall not contain information that directly identifies the user*. Only after specified actions the copyright holder may apply for receipt of the order of Norwich.

According to provisions of article 15 of Directive 2000/31/EU «On electronic commerce» the Internet intermediaries are charged neither with general obligation to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity. However, national legislation of EU Member States may establish obligations

for information society service providers promptly to inform the competent public authorities of alleged illegal activities undertaken or information provided by recipients of their service or obligations to communicate to the competent authorities, at their request, information enabling the identification of recipients of their service with whom they have storage agreements [22, article 15].

From 2006 to 2014 there was in force the EU Directive 2006/24/EU «On the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks» [23], provisions of which were applied to traffic and data about location of both legal entities and individuals, as well as relevant data necessary to identify the subscriber or registered user. According to provisions of articles 5 and 6 of this Directive, the Internet intermediaries kept, in particular, information about access to the Internet, e-mail and Internet telephony: date and time of connection and disconnection of access to the Internet with the IP-address assigned by the provider of access to the Internet as well as ID of the subscriber or registered user; date and time of connection and disconnection of the service of email, over the Internet, or Internet telephony. However, they have to be kept for at least six months and not more than two years. Such information was provided upon the request of state authorities.

However, the European Court of Justice within the joint case of C-293/12 and C-594/12 admitted the specified Directive void from the date of its adoption, as its provisions interfered in a particularly serious manner with the fundamental rights of humans and citizens:the right for freedom of expression, respect for private life and the right for personal data protection [24].

In 2010 there was adopted the Law of Ukraine № 1819-VI «On Amendments to Certain Legislative Acts of Ukraine on combating the spread of child pornography» which introduced amendments to the Law «On Telecommunications», in particular part 2 article 39 «The operators, telecommunication providers keep and provide information aboutconnection of its subscriber in the manner prescribed by legislation». In addition, pursuant to the provisions of parts 1 and 3 of article 34 of the specified law, the telecommunication operators and service providers are obliged to provide and be responsible for the safety of information about the user received at the conclusion of the contract, provided telecommunication services, including receipt of services, their duration, subject, route of transmission, etc. [25]. Regarding the above mentioned, following shall be emphasized:

First, the above provisions shall be considered within system connection with part 2 of article 32 of the Constitution of Ukraine, according to which the collection, storage, use and dissemination of confidential information about a person without its consent are not allowed, except in cases specified by law, and only for interests of national security, economic prosperity and human rights.

Second, there is no special lawful procedure concerning demanding information about connections of the subscriber from Internet intermediary under civil law protection as of May 2016 (there are only general provisions for evidence provision in accordance with part1 of article 133 of the CPC of Ukraine; collection of evidence in case of criminal proceedings or investigative proceedings (article93 of the Criminal Procedural Code of Ukraine, clause6, part 1 of article 8 of the Law of Ukraine «On Operative Investigation Activities»), the draft № 4529 also does not specify such procedure. In our opinion, the legislation of Ukraine shall include a procedure for the possibility of extra judicial claiming of the copyright holder (or a person authorized to act on the holder's behalf) to an Internet intermediary with the requirement to

provide a list of infringers of copyright — subscribers of such intermediary, taking into account the principle of proportionality, specifying the list of information required for filing such claim and liability for such information misuse.

In addition, it seems necessary to point out certain features of this stage in Ukraine. According to article 24 of the Rules on provision and obtaining of telecommunication services,approved by the Cabinet of Ministers of Ukraine as of April 11, 2012 № 295 (hereinafter referred to as the Rules) [26], while connecting terminal equipment of the user to telecommunication network the operator shall assign it a number or other network identifier (unique sequence of numbers and/or symbols assigned to the subscriber's terminal equipment and/or user in the telecommunication network or the Internet); and/or apply the personal number of the subscriber. However, these Rules do not specify the obligation of the Internet intermediary to provide «external» unique identifier (IP-address). According to some rate plans of certain Ukrainian Internet intermediaries the allocation of fixed static IP-address is optional paid service.That is in relation to the outside world such end-users can have the same IP-address — the IP-address of Internet intermediary — it extremely complicates matching of certain IP-address and certain subscribers (end-users) of such Internet intermediaries. For that matter it is appropriate to provide in the Rules the duty of telecommunication operator to assign to its subscribers «external» fixed static network ID.

The third stage is to inform or send claims to persons as for infringement of copyrights by them and the possibility of filing (or direct filing) of claims against them.

As noted by M. Filby, this stage is the most complicated because it requires evidence for two components, namely:the establishing of a connection between person — subscriber of the Internet intermediary and the infringement, and proving that the IP-address has in fact participated in unauthorized distribution of works to a legally significant degree [10, 40].

In our opinion, certain caution shall be ensured with respect to identification of a person — infringer of copyright exclusively by IP address because IP address provides information only about the source of connection — a particular place (not the person), using which the uncertain number of hardware can connect to the Internet. For example, mailbox or telephone number may also be used by unspecified number of users.

Also an additional problem for end-users' identification by IP-address is the active development of the Internet of things. Thus, various stationary devices with an access to the Internet can make connections to the network offline, without participation of individuals themselves. Identification of the person who could program the respective devices for illegal activity scenarios, according to the author, is even more difficult task than to identify the person accessing the Internet in «normal» mode.

Foreign experience shows that courts in foreign countries also pay attention to the examined problem:

In the UK the England and Wales High Court considering case of Golden Eyeand others against Telefonica [2012] EWHC 723 (Ch) specified that subscriber with certain delegated IP-address was not necessarily the person who participated in the infringement of the copyright using P2P-network. There is a number of alternatives, including:

- the IP-address identifies a computer and someone else in the same household (whether a resident or visitor) was using the computer at the relevant time (which might be with or without the knowledge of the subscriber);
- the IP-address identifies a router and someone else in the same household (whether a resident or visitor) was using a computer communicating via the same router (which might be with or without the knowledge of the subscriber);

- the IP-address identifies a wireless router with an insecure (either open or weakly encrypted) connection and someone outside the household was accessing the Internet via that router (in all probability, without the knowledge of the subscriber);
- the IP-address identifies a computer or router, the computer or a computer connected to the router that has been infected by a Trojan and someone outside the household was using the computer to access the Internet (almost certainly, without the knowledge of the subscriber);
- the IP-address identifies a computer-which is available for public use, for example in an Internet cafe or library [27, clause 103].

In the USA, for case of K-Beech, Inc. against John Does 1-37 (CV 11-3995 (DRH)(GRB) the District Court of Eastern District of New York concluded that some IP-addresses could be delegated to organizations providing Internet access to their employees, clients or uncertain members (library, cafe) [28, 6–7].

In this regard it shall be noted that IP-address is not the only possible ID of the user of the Internet. In particular, there is a MAC-address in addition to IP-address. While the IP-address can provide information about the location, the MAC-address is a unique hardware address for each unit which is connected to the Internet [29]. In this case, one IP-address can at the same time have only one correspondent MAC-address of the device connected to the Internet, such as router of the user (indicated the technical information is available at information intermediaries). MAC-addresses of certain devices connecting the router are usually not stored, that is a problem for public use networks. In addition, the MAC-address, as well as the IP-address, can be technically changed.

Additional evidence required to confirm identification of a person-infringer of copyright, in addition to IP and MAC-address, can include, for example, the conclusions of a comprehensive examination (computer and technical expertise and intellectual property items) as for availability of respective copies of works on hardware of persons-infringers of copyright that is confirmed with materials of Ukrainian court practice in the article176 of the Criminal Code of Ukraine [30].

Conclusions

1. Performed study indicates the absence of effective, reliable and prompt mechanism of identification in the current actual legal regulation of the person violating copyright for works postedon the Internet.

2. Identification of aperson-infringer of copyright as for works posted on the Internet can be indicatively considered depending on the characteristics of unlawful behaviour of a person: 1) identification of the person-the owner of the website; 2) identification of the person-the user of the website where the work was posted; 3) identification of the user of P2P network

3. The process of identification of the person who committed direct copyright infringement (the user of the website who posted the work and user of P2P network) is usually divided into three stages: 1) identification and collection of IP-addresses; 2) detection of correspondence of the IP-addresses of to the specified subscribers (users) of certain Internet intermediaries; 3) informing or sending claims to individuals regarding infringement of copyright and the possibility of filing (or direct filing) of claims against them.

4. In the decree of the Cabinet of Ministers of Ukraine «On approval of rules of provision and receipt of telecommunication services» dd. April 11, 2012 No. 295 it is appropriate to specify the duty of the telecommunication operator to assign to its subscribers the «external» fixed static network ID, as far as the procedure of allocation of fixed static IP-address as additional paid service significantly complicates detection of correspondence of IP-address to certain subscribers (end-users) of such Internet intermediaries.

5. Use of IP-address only is not enough for identification of the persons-infringers of copyright (rather than the place where the infringement is committed) for works posted on the Internet, thus it is necessary to use additional evidence to establish a causal connection between the person-subscriber (end-user), with certain delegated IP address, and copyright infringement. ♦

Список використаних джерел / List of references

1. *Михайленко Е. В. Проблемы Информационно-правового регулирования отношений в глобальной компьютерной сети Интернет : автореф. дис. на соиск.уч. степени канд. юр. наук : спец. 12.00.14 «административное право, финансовое право, информационное право» / Михайленко Евгений Владиславович — М., 2004. — 25 с.*

Mihajlenko Ye. V. Problemy Informacionno-pravovogo regulirovanija otnoshenij v global'noj komp'juternoj seti Internet : avtoref. dis., M., 2004, 25 s.

2. *Пастухов О. М. Авторське право у сфері функціонування всесвітньої інформаційної мережі Інтернет : дис. канд. юр. наук : 12.00.03 / Пастухов Олександр Миколайович — К., 2002. — 173 с.*

Pastukhov O. M. Avtorske pravo u sferi funktsionuvannia vsesvitnoi informatsiinoi merezhi Internet : dys., K., 2002, 173 p.

3. *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression[Electronic resource]. — Access mode : http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session29/Documents/A.HRC.29.32_AEV.doc.*
4. *Declaration on freedom of communication on the Internet (Adopted by the Committee of Ministers on 28 May 2003 at the 840th meeting of the Ministers' Deputies) [Electronic resource]. — Access mode : http://www.osce.org/fom/31507?download=true.*
5. *Benkler Y. From Consumers to Users: Shifting the Deeper Structures of Regulation Toward Sustainable Commons and User Access / Yochai Benkler // Federal Communications Law Journal. — 2000. — № 52. — P. 561–579.*
6. *Civil Procedure Code of Ukraine from 18.03.2004 № 1618-IV // Vidomosti Verhovnoyi Rady, 2004, № 40–41, 42, Art. 492 (with amendments).*
7. *The draft law of Ukraine «On amendments to some legislative acts of Ukraine on protection of copyright and related rights on the Internet» № 4629 from 10.05.2016 [Electronic resource]. — Access mode : http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=59024.*
8. *Final Report on the Privacy & Proxy Services Accreditation Issues Policy Development Process [Electronic resource]. — Access mode : http://gnso.icann.org/en/issues/raa/ppsai-final-07dec15-en.pdf.*
9. *Ukrainian Anti-Piracy Association / Internet piracy [Electronic resource]. — Access mode : http://apo.kiev.ua/internet.phtml.*
10. *Filby M. Regulating File Sharing: Using Law, Internet Architecture, Markets and Norms to Manage the Non-Commercial Sharing of Digital Information / M. Filby. — Lexington, KY, USA, 2015. — 248 p.*
11. *Ip address. (n.d.). The American Heritage® Science Dictionary [Electronic resource]. — Access mode: http://dictionary.reference.com/browse/ip address.*
12. *Harding T. BitTorrent tracking as a means of detecting illegal file-sharing / Tom Harding // E-Commerce Law & Policy — 2013. — № 2. — P. 08–09.*

13. *Piatek M. Challenges and Directions for Monitoring P2P File Sharing Networks — or — Why My Printer Received a DMCA Takedown Notice [Electronic resource] / M. Piatek, T. Kohno, A. Krishnamurthy — Access mode : http://dmca.cs.washington.edu/uwcse_dmca_tr.pdf.*
14. *Goldschlag D. Onion Routing for Anonymous and Private Internet Connections [Electronic resource]/ D. Goldschlag, M. Reed, P. Syverson — Access mode : http://www.onion-router.net/Publications/CACM-1999.pdf.*
15. *Judge Confirms Carnegie Mellon Hacked Tor and Provided Info to FBI [Electronic resource]. — Access mode : http://gizmodo.com/judge-confirms-carnegie-mellon-hacked-tor-and-provided-1761191933.*
16. *Karunaratne S. The Case Against Combating BitTorrent Piracy Through Mass John Doe Copyright Infringement Lawsuits / Sean B. Karunaratne // Michigan Law Review. — 2012. — №111:283. — P. 283–309.*
17. *Borland J. RIAA sues 261 file swappers [Electronic resource]. — Access mode : http://www.cnet.com/news/riaa-sues-261-file-swappers/.*
18. *United States District court Northern district of California San Jose division. Case №: 10-CV-5865-PSG. Diabolic video productions, inc. V. Does 1-2099 [Electronic resource]. — Access mode: http://cases.justia.com/federal/district-courts/california/candce/5:2010cv05865/235553/16/0.pdf?ts=1428874690.*
19. *Digital millennium copyright act Oct. 28, 1998 [H.R. 2281] [Electronic resource]. — Access mode : https://www.gpo.gov/fdsys/pkg/PLAW-105publ304/pdf/PLAW-105publ304.pdf.*
20. *Norwich Pharmacal Co v Customs and Excise Commissioners [1973] UKHL 6 (26.06.1973) [Electronic resource]. — Access mode : http://www.bailii.org/uk/cases/UKHL/1973/6.html.*
21. *Digital Economy Act 2010 CHAPTER 24 [Electronic resource]. — Access mode : http://www.legislation.gov.uk/ukpga/2010/24/pdfs/ukpga_20100024_en.pdf.*
22. *Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce') [Electronic resource]. — Access mode: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32000L0031.*
23. *Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC [Electronic resource]. — Access mode http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:105:0054:0063:EN:PDF.*
24. *Court of Justice of the European Union press release № 54/14 Luxembourg, 08.04.2014 Judgment in Joined Cases C-293/12 and C-594/12 Digital Rights Ireland and Seitlinger and Others [Electronic resource]. — Access mode : http://curia.europa.eu/jcms/upload/docs/application/pdf/2014-04/cp140054en.pdf.*
25. *The Law of Ukraine»Onamendments to severallegislative acts of Ukraine on combating the spread of child pornography» from 20.01.2010 № 1819-VI. // Vidomosti Verhovnoyi Rady — 12.03.2010 — № 10. — Art.105.*
26. *The Decree of the Cabinet of Ministers of Ukraine «On approval of rules of provision and receipt of telecommunication services» from April 11, 2012 № 295.// Uriadovyi kurier. — 2012. — № 109 (with amendments).*
27. *Golden Eye (International) Ltd & Anor v Telefonica UK Ltd [2012] EWHC 723 (Ch) (26.03.2012) [Electronic resource]. — Access mode : http://www.bailii.org/ew/cases/EWHC/Ch/2012/723.html.*
28. *K-Beech, Inc. v. John Does 1-37, CV 11-3995 (DRH)(GRB) [Electronic resource]. — Access mode : http://www.technollama.co.uk/wp-content/uploads/2012/*

05/92100289-K-Beech-Order-amp-Report-amp-Recommendation-Ordered-5-1-12.pdf.

29. *Mac address. Dictionary.com. The Free On-line Dictionary of Computing. Denis Howe. [Electronic resource]. — Access mode : http://dictionary.reference.com/browse/mac address (accessed: January 09, 2016).*
30. *The sentence of the Nakhimov District Court of Sevastopol on the case № 765/3456/13-к from 11.09.2013 [Electronic resource]. — Access mode : http://reyestr.court.gov.ua/Review/33485818.*

Надійшла до редакції 29.05.2016 р.

Зеров К. Проблемы идентификации лица — нарушителя авторского права на произведения, размещенные в Интернет. В публикации рассмотрены проблемы идентификации пользователя — нарушителя авторских прав на произведения, размещенные в сети Интернет. Автор классифицирует такую идентификацию на виды в зависимости от особенностей противоправного поведения лица на: 1) идентификацию лица — произведение; 3) идентификацию лица — пользователя P2P-сети; каждая из которых имеет свои особенности. Проанализировано, что процесс идентификации лица, совершившего прямое нарушение авторских прав (пользователя сайта, разместившего произведение, и пользователя P2P-сети), делится на три стадии: 1) определение и сбор IP-адресов; 2) нахождение соответствия IP-адреса определенным абонентам (пользователям) отдельных интернет посредников; 3) информирование или направление претензий лицам о нарушении ими авторских прав и возможности представления (или непосредственно представления) против них исков. Автором сделан вывод, что для идентификации личности — нарушителя (а не места, где совершено нарушение) авторских прав на произведения, размещенные в сети Интернет-только использование IP-адреса недостаточно, поэтому необходимо использовать дополнительные доказательства в совокупности для установления причинно-следственной связи между лицом-абонентом (конечным пользователем), которому делегирован определенный IP-адрес, и нарушением авторского права.

Ключевые слова: Интернет, пиратство, авторское право, идентификация

Zerov K. Problems of identification of a copyright infringer for works posted on the Internet. This publication examines the problems of identification of an alleged infringer of copyright for works posted on the Internet. The author divides types of such identification depending on the characteristics of wrongful conduct on the person: 1) identification of the person — the owner of the website; 2) identification of the person — the user of the website where the work was posted; 3) identification of the user of P2P network, where each has its own characteristics. According to analysis, the process of identification of the person who committed direct copyright infringement (the user of the website who posted the work and user of P2P network) is usually divided into three stages: 1) identification and collection of IP-addresses; 2) detection of correspondence of the IP-addresses of to the specified subscribers (users) of certain Internet intermediaries; 3) informing or sending claims to individuals regarding infringement of copyright and the possibility of filing (or direct filing) of claims against them. The author concludes that use of IP-address only is not enough for identification of a person — infringer of copyright (rather than the place where the infringement is committed) for works posted on the Internet, thus it is necessary to use additional evidence to establish a causal connection between the person — subscriber (end-user), with certain delegated IP-address, and copyright infringement.

Keywords: Internet, piracy, copyright, identification

THE COURT ORDER PROCEEDINGS OF CIVIL PROCEDURAL LAW OF UKRAINE: SCIENTIFIC ISSUES AND PRACTICES

Andrey Shabalin,
lawyer, researcher of the Intellectual Property Research Institute of the NALS of Ukraine, scientific assistant of the department research of judicial studies and expert practice

Шабалін А. Наказне провадження в цивільному процесі України: наукові питання та практика. Стаття присвячена дослідженню процесуальних аспектів інституту судового наказу в українському цивільному процесуальному праві. У статті досліджуються підстави запровадження наказного провадження в цивільний процес України, серед яких є й європейський правовий досвід щодо запровадження спрощених судових процедур. Також у статті вказується, що на сьогоднішній день у країнах Європейського Союзу діють єдині спрощені судові процедури (Регламент ЄС 861/2007 — єдиний європейський судовий наказ; Регламент ЄС 861/2007 — єдина європейська судова щодо вирішення невеликих (дрібних) спорів). У зв'язку із тим, у роботі вказується, що перед Україною стоїть питання пов'язане з необхідністю адаптацією національного процесуального законодавства до вказаних єдиних європейських судових процедур, особливого значення дане питання набуває у світі підписання Угоди про асоціацію між Україною та ЄС (2014 р.).

У статті детально досліджуються структура наказного провадження. Так, зокрема, структура наказного провадження складається з стадій та етапів. Саме етапи і складають основний зміст наказного провадження. Зазначається, що саме етапи наказного провадження саме реалізуються на першій стадії цього провадження. У цій статті вказується, що серед науковців існують різні точки зору щодо основних стадій та етапів наказного провадження. Так, О. Штефан виділяє 3 етапи наказного провадження, а А. Шабалін виділяє саме 3 стадії наказного провадження, до яких вказаних автор відносить і стадію виконання судового наказу, що не виділяють інші дослідники-процесуалісти, зокрема й О. Штефан.

У роботі досліджуються порядок подачі заяви для видачі судового наказу, встановлюються підстави видачі судового наказу (ст. 96 ЦПК України). Зазначається, що цей перелік підстав є вичерпним.

Розглянута процедура повідомлення боржника про виданий судовий наказ. Вказується, що боржник повідомляється письмово судом про виданий судовий наказ, разом із судовим наказом боржник повинен отримати й копію заяви про видачу судового наказу та додані до неї документи.

Досліджена процедура апеляційного оскарження у справах наказного провадження. Аргументується, що така процедура оскарження судового наказу в апеляційному порядку має свої особливості, з урахуванням особливості наказного провадження (ст. 103 ЦПК України).

Автором наголошується, що набрання судовим наказом законної сили залежить від строків його оскарження.

У статті досліджуються також й практичні аспекти наказного провадження. Так, зокрема зазначається, що на сьогоднішній день існує необхідність меж застосування наказного провадження. Судовий наказ може бути досить ефективним при стягненні фінансової заборгованості, поверненні банківського депозити, ліцензійних виплат пов'язаних з використанням об'єкта інтелектуальної власності. Такий підхід є викраденим з токи зору української судової практики.

Вказується, що запровадження процедура спрощеного судочинства повною мірою відповідає єдиній європейський правовій політиці.

Ключові слова: справи наказного провадження, судовий наказ, цивільний процес, наказне провадження, спір про право

The court order proceedings (writ proceedings) fully corresponds with the European judicial system.

Today, Ukraine needs to adapt its own legislation in accordance with European law. Especially it is relevant in view of the Agreement of Ukraine and the European Union — 21.03.2014 and 27.06.2014).

Europe has the European Federal court order proceedings: Regulation (Directive) EU 1896/2006 and Regulation (Directive) EU 861/2007 — small litigation.

Ukraine has the national court order proceedings of civil procedural law. Let's look at this type of the procedure.

Part 1 of Article 124 of the Constitution of Ukraine stipulates that justice in Ukraine is administered exclusively by the courts. Part 2 of the mentioned constitutional provisions says: the jurisdiction of the courts shall extend to all legal relations that arise in the State. [1] Part 1 of Article 2 of the Law of Ukraine «On the Judicial System» provides that the court shall administer justice based on the rule of law, ensure everyone's right to a fair trial and respect for the rights and freedoms guaranteed by the Constitution and laws of Ukraine, as well as international treaties ratified by the Verkhovna Rada of Ukraine.

The formation of Ukraine as a social, democratic and based on the rule of law principles state is not possible without an effective mechanism for the protection of rights and freedoms, rights and interests of legal entities, as well as the interests of the state. Constitution of Ukraine adopted in 28.06.1996, and the Law of Ukraine «On the Judicial System and Status of Judges» of 07.07.2010 № 2453-VI gives a significant role in this mechanism to justice as to the most effective and democratic way of protecting the rights and interests secured by law.

It should be noted that for a long time civil litigation proceedings were made in Ukraine by the Civil Procedure Code of the Ukrainian Soviet Socialist Republic in edition of 1963 (hereinafter — the CPC 1963.), that led to inconsistent legal standards, inconsistencies to realities and needs of their political and socio-economic life and complications of litigation. In this connection in 18.03.2004 the Verkhovna Rada of Ukraine adopted a new Civil Procedural Code of Ukraine (hereinafter — the CPC of Ukraine), which came into force on 01.09.2005. It was the result of a long legislative process, incorporated the latest achievements of domestic and foreign legal thought and jurisprudence [2, 3].

According to the CPC of Ukraine amendment to rules and availability of new procedural institutes unknown in the CPC 1963 are characteristic features of legal regulation of civil proceedings. One of such institutes is writ proceedings (court order proceedings).

In modern national legal literature court order proceedings is defined as an independent kind of civil procedure, performed by courts of general jurisdiction and aimed to enact the court order (a writ) [3, 315].

Consolidation in the current civil procedural legislation of Ukraine of the institute of simplified proceedings is fully consistent with modern European legal practice and the objectives set by the Law of Ukraine «On the National Program for Adaptation of Ukraine to the legislation of the European Union» of 18.03.2004 № 1629-IV, and Article 12 of the Law of Ukraine «On the basis of domestic and foreign policy» 01.07.2010 № 2411-VI. In particular, the Recommendation № R (81) 7 of 14.05.1981 of the Committee of Ministers to member states on measures facilitating access to justice and Recommendation № R (84) 5 of 28.02.1984 on the principles of civil procedure designed to improve the functioning of justice listed that for cases related to an undisputed right should be provided particular rules for accelerated litigation of civil cases.

At present, the issuing of a writ has certain stages. Thus, in the theory of modern civil procedure of Ukraine such stages inherent to acting institute pro-

ceedings are following: 1) logging of application for a writ, and 2) consideration of the application for the writ, and 3) the abolition of a writ (court order) [4, 140].

We must say that in modern legal science of Ukraine there are other positions about the stage of court order proceedings. Thus, A. Shabalin specifies the target at such stages: 1) the court for issuance of the court order (a writ); 2) the court of appeal court order; 3) execution of court order (a writ) [5, 9].

Let us consider the procedure for issuing court order (a writ) more detailed.

Legal regulation of the writ proceedings was provided in Chapter II of the CPC of Ukraine.

Thus, according to Article 95 of the CPC of Ukraine a writ court order is a special form of the judgment, issued after consideration of requirement under Article 96 of the CPC of Ukraine. Part 2 of this procedural rule provides that an application for a writ may be filed by the person who has the right to claim, as well as agencies and persons who legally have the right to protect the rights and interests of others. The list of reasons for issuing a writ is mentioned in Article 96 of the CPC of Ukraine. Thus, under this provision a writ can be issued, if there is: 1) the claim for the recovery of accrued but not paid amount of wages, and 2) the claim for compensation costs for the detention of a defendant, a debtor, a child or vehicles of a debtor; 3) the claim on debt recovery for housing and communal services, telecommunications services, TV and radio broadcasting services based on inflation and 3 % per annum, accrued by an applicant on debts, and 4) the claim to award child support in the amount of thirty percent of the subsistence minimum for children of appropriate age, if this requirement is not related to the establishment or contesting paternity (maternity) and the need to involve other stakeholders, 5) the claim for refund defective goods, if there is an adjudication which came into force , establishing the fact of selling defective goods, which was adopted in favor of an indefinite number of consumers [6].

An application for a writ court order shall be lodged according to the general rules of jurisdiction (Article 97 of the CPC of Ukraine).

According to Part 2 of Article 102 of the CPC of Ukraine delivering of a writ is made without court sitting and summons of the debtor for hearing of their explanations. Just these procedural rules show the main features of simplicity of this form of civil proceedings.

Issued by a court, a writ must have a form and content provided by Article 103 of the CPC of Ukraine. In particular, a writ must state: 1) the date of a writ delivering; 2) the name of the court, the name of the judge who issued the writ (court order); 3) name (title) of a creditor and a debtor and their place of residence or location, and 4) reference to the law under which subject the claim shall be met, and 5) the amount of funds to be recovered, and the account of a debtor (legal entity) in a banking institution, who must pay the costs, if it was notified by the applicant; 6) the amount of costs paid by the applicant and subject to forfeiture in its favor of the debtor; 7) information about the order and timing of application for cancellation of a writ (court order).

Part 2 of Article 103 of the CPC of Ukraine contains a provision according to which the writ must comply with the enforcement document, established by the Law of Ukraine «On Enforcement Proceedings» At the same time, according to paragraph 3 part 2 of Article 17 of the Law of Ukraine «On Enforcement Proceedings» a writ is mentioned in the list of executive documents subject to enforcement by the state enforcement service (bailiffs) [6].

Thus, we can say that a writ combines procedural features of adjudication and of an enforcement document simultaneously.

Prescription of Article 103 of the Civil Procedure Code of Ukraine stipulates that a writ is composed and signed by a judge in two copies, one of each remains

in the file of the case, and the second one is sealed and issued to the plaintiff after its entry into force [6].

The procedure is following.

According to the prescriptions of paragraph 1 of Article 104 of the CPC of Ukraine, after the delivering of a writ, a court shall no later than the next day send a copy to the debtor by a registered letter with notification. Part 2 of this article states that with a copy of a writ the debtor shall receive a copy of the application of a plaintiff with copies of documents attached to it. The CPC of Ukraine establishes clear requirements on fixing the receipt of a copy of a writ by a debtor and the enclosed documents. Thus, in accordance with paragraph 4 of Article 104 of the CPC of Ukraine the day of receiving of a writ copy by the debtor is considered to be the date specified in the notice of postal delivery. Another provision of the stated procedural rule stipulates that if a debtor refuses to receive a copy of a writ or is missing by the mentioned address, the day of receiving of a writ copy by the debtor is considered to be the date written in a mail message of note about the refusal of the debtor to obtain a copy of a writ or a note about the absence of debtor by the specified address.

The debtor, who does not agree with an issued writ, within ten days after receiving a copy of a writ and the enclosed documents, may apply for its cancellation. This statement shall be filed to the court which issued the writ in writing (Part 2 of Article 105 CPC of Ukraine). Procedural law provides that the application for cancellation of a writ shall include: 1) name of the court to which application is made, and 2) the name (title) of the claimant and the debtor and the name (title) of a representative of the debtor if the statement is filed by a representative, their place / residence or location, and 3) the writ that is challenged, and 4) a reference to the circumstances indicating a complete or partial invalidity of plaintiff's claims; 5) reference to evidence that the debtor proves his objection to the plaintiff's claims, and 6) list of documents attached to the application.

The court fee for filing an application for cancellation of a writ should not be paid.

Procedural law sets deadlines for a decision on acceptance or not by a court an application for cancellation of a writ — one day after the acceptance (Part 4 of Article 105-1 of the CPC of Ukraine). Part 3 of Article 105-1 of the CPC of Ukraine stipulates that the submitted application for cancellation of a writ is not considered, if it does not comply with the law, and if an application is accepted for consideration the court issues a ruling. A court shall send to a creditor and debtor a copy of the court ruling on the adoption of an application on the abolition of a writ not later than the next day after its adoption, both parties shall be notified of the time and place of consideration of this application (Part 5 of Article 105-1 CPC of Ukraine) [6].

Application for cancellation of a writ shall be considered by the court within ten days of the enactment of the court ruling of adoption of this application for consideration in open court hearing (Part 6 of Article 105-1 CPC of Ukraine). The procedure for the examination of the application is provided by Section 7 of Article 105-1 of the CPC of Ukraine. Thus, in accordance with this provision a chairman opens the hearing and finds out who of the summoned persons are present, establishing their identity, examines the credentials of representatives and then notifies about the content of the application for cancellation of a writ and listens to opinions of the persons involved in considering of such an application. From the above mentioned it is not difficult to see that the phase of cancellation of a writ is the only stage of acting proceedings in which there is a trial.

According to the results of consideration of the application for cancellation of a writ the court may make such decisions (judgments): 1) to leave the application on cancelling of a writ without satisfaction; 2) to cancel the writ and explain

that requirements stated by a plaintiff can be considered in action proceedings in compliance with the general rules on filing a claim, and 3) to change a writ. This list is exhaustive.

The current procedural law provides for the possibility of an appeal in cases of writ proceedings the civil cases.

The right of appeal is provided by the Constitution of Ukraine, in particular, paragraph 8 of Part 2 of Article 129. Article 125 of the Basic Law stipulates that appellate courts act under the law. Appellate courts constitute the second tier of the system of courts of general jurisdiction.

At the same time the procedure of appeal in writ proceedings has its own characteristics. According to the CPC of Ukraine, a collector and a debtor have the right to appeal. The objects of appeal in simplified proceedings include: 1) a ruling to refuse to accept the application on delivering of a writ, and 2) a ruling to refuse to accept the application on cancellation of a writ, and 3) a writ with a court ruling on refusal to cancel a writ, and 4) an amended writ (court order).

A form and a content of the complaint must comply with the article 295 of the CPC of Ukraine. The appeal shall be filed by the trial court to the Court of Appeal within five days of the trial court proceeding ruled on writ proceeding.

General criteria on which the Court of Appeal issues a ruling extend to the proceedings of the writ proceedings except for the grounds for cancellation of a writ, which were separately regulated. Thus, part 1 of Article 309-1 of the CPC of Ukraine stipulates that a writ shall be cancelled in appeal if the Court of Appeal finds no legal dispute between a creditor and a debtor, by which the claim was made under the first paragraph of Article 96 of the CPC of Ukraine. In this case a writ is cancelled on the basis of studying of substantive and legal composition.

The ruling of a court of appeal on a writ shall come into force upon its adoption (declaration), as in other types of civil proceedings. According to the CPC of Ukraine, appeal ruling is final in simplified proceedings.

The law on civil procedure establishes a special moment of a writ entry into force. Thus, in the case of filing of an appeal, a writ (an amended writ) shall come into force after the adjudication of such complaints, if not cancelled (part 2 of Article 106 of the CPC of Ukraine). At the same time, part 1 of Article 106 of the CPC of Ukraine stipulates that in case of non receipt of the debtor's application for cancellation of a writ within three days after the expiration of the filing, a writ shall come into force and the court issues it to a collector to further its implementation.

Describing the court order proceedings in Ukraine, it is worth saying that there are differences between the European court order proceedings Regulation (Directive) EU 1896/2006 and Regulation (Directive) EU 861/2007 — small litigation). The European court order proceedings contains no court of appeal, there is no accurate list of judicial decisions for the sharing of the court order proceedings. The issues of implementation of procedures of European law are needed to be studied.

It is necessary to increase the number of reasons for issuing of court order. These lawsuits may be financial debts, the return of the bank deposit, license fee (pay for a license for the intellectual product). Ukrainian court practice itself shows relevant court order proceedings in such court cases.

Summarizing all the above mentioned, we would like to emphasize, the institute of court order proceedings raised the priority of the judicial forms of defense and considerably simplified the procedure of civil rights protection. The court order proceedings (writ proceedings) included in the one orbit with European legal policy and the fundamental objectives of democracy. Heightening of the case of court cases examined in order court order proceedings (writ order proceedings) increases the efficiency of protection of the rights and economic rights. ◆

Список використаних джерел / List of references

1. *Конституція України (The Constitution of Ukraine) прийнята на п'ятій сесії Верховної Ради України 28.06.1996 р. // Офіційний Інтернет-сайт Верховної Ради України [Електронний ресурс]. — Режим доступу: http://zakon1.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80.*

The Constitution of Ukraine.

2. *Черноченко С. І. Цивільний процес : вид. 2-ге; перероб. та доп. : навчальний посібник / С. І. Черноченко. — К. : Центр навчальної літератури, 2005. — 472 с.*

Chernochenko S. I. Civil Procedural of Ukraine. The textbook. Kyiv, 2005. — 472 total pages.

3. *Штефан М. Й. Цивільне процесуальне право України: Академічний курс : підруч. для студ. спец. вищ. навч. зал. / М. Й. Штефан. — К. : Ін Юре, 2005. — 624 с.*

Shtefan M. I. Civil Procedural Law of Ukraine. The Academic tutorial. Kyiv, 2005. — 624 total pages.

4. *Штефан О. О. Цивільне процесуальне право України : навч. посіб. / О. О. Штефан. — К. : Юринком Інтер, 2009. — 360 с.*

Shtefan O. O. Civil Procedural Law of Ukraine. The textbook. Kyiv, 2009. — 360 total pages.

5. *Shabalin A. V. The court order proceedings in the civil trail: The dissertation for the scientific degree of candidate of science in law, speciality 12.00.03 — Civil law and civil process; family law; international private law. — The F. G. Burchak Scientific-Research Institute of Private Law and Business of National Academy of Law Sciences of Ukraine, Kyiv, 2015 — 213 total pages.*

6. *Цивільний процесуальний кодекс України від 10.03.2004 р. № 1618-IV // Офіційний Інтернет-сайт Верховної Ради України [Електронний ресурс]. — Режим доступу : http://zakon1.rada.gov.ua/ laws/show/1618-15.*

The Civil Procedural Code of Ukraine.

Надійшла до редакції 05.06.2016 р.

Шабалин А. Приказное производство в гражданском процессе Украины: научные вопросы и практика. В статье исследованы теоретические вопросы приказного производства, в частности генезис приказного производства в украинском процессуальном законодательстве.

Отмечается, что в ЕС приказное производство идёт по пути унификации, что обусловлено действием единых европейских судебных процедур (Регламент ЕС 861/2007 — единый европейский судебный приказ; Регламент ЄС 861/2007 — единая европейская судебная процедура относительно разрешения небольших (мелких) споров).

Отмечается, что в структуре приказного производства выделяются как стадии (рассмотрения дела судом первой инстанции, пересмотр судебных решений по делам приказного производства, исполнения судебного приказа), так и этапы, которые проявляют свою особенность и реализуются исключительно на первой стадии, являющейся стадией рассмотрения дел в суде первой инстанции. Отмечается, что на сегодняшний день в процессуальной науке существует несколько подходов в вопросе модели приказного производства, а именно его структуры. Так, одни ученные указывают на существования трёх этапов приказного производства (Е. Штефан), другие указывают на наличие трёх стадий данного производства (А. Шабалин), к которым относится и стадия исполнения судебного приказа.

В работе непосредственно исследованы процессуальные особенности возможности разрешения дел приказного производства, а именно: порядок подачи заявления о вынесении судебного приказа, открытия приказного производства, выдача и отмена судебного приказа судом первой инстанции, а также уделено внимание особенностям пересмотра судебных решений, постановляемых судом в делах приказного производства.

Также в статье были исследованы и практические вопросы приказного производства, в частности возможности применения судебного приказы к взысканию финансовой задолженности, взысканию лицензионных платежей за использования объекта интеллектуальной собственности, возвращения банковского депозита.

Ключевые слова: дела приказного производства, судебный приказ, гражданский процесс, приказное производство, спор о праве

Shabalin A. The court order proceedings of civil procedural law of Ukraine: scientific issues and practices. In the article the theoretical issues of court procedure, in particular the genesis of the court order in Ukrainian procedural legislation are investigated.

It is noted that in the court order proceedings of the EU is moving towards unification, which is caused by the action of the common European judicial proceedings (EU Regulation 861/2007 — European single judicial order; ЄS Regulation 861/2007 — European single judicial procedure for resolution of small (small) disputes).

It is noted that in the structure of the court order procedure stand out as stages (examination of the case by the court of first instance, the revision of judgments in cases of court order procedure, the court order of execution), and steps that show the feature and implemented exclusively in the first stage is the stage of consideration of cases in court of first instance. It is noted that today in the procedural science, there are several approaches to the issue of court order procedure models, namely its structure. For example, some scientists point out the existence of the three stages of production clerk (O. Shtefan), others point out the presence of three stages of production (A. Shabalin), which include the stage of execution of a court order.

The article directly investigates the procedural peculiarities of the possibility of solving cases of court order procedure, namely, the order of submission of the application for a court order, the opening of court order procedure, issuance and cancellation of a court order by the court of first instance, but also focus on the peculiarities of judicial review of decisions, decides court in matters of court order procedure.

Also in the article it has been investigated practical issues of court order procedure, in particular the possibility of using court orders to collect financial debt collecting royalties for the use of intellectual property, the return of the bank deposit.

Keywords: civil cases of the court order proceedings, court order proceedings (writ proceedings), court order (a writ), doctrines of civil procedure, controversy about claim

ISSN 2308-0361

УДК:347.121.2

DUTY OF CONFIDENTIALITY AND DUTY OF OPENNESS IN HEALTH LAW OF UKRAINE AND THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

Olena Chaban,
applicant for PhD of the Kiev University of Law of the NALS of Ukraine, civil and labour law department

Чабан О. Обов'язок зберігати відомості про стан здоров'я конфіденційними та обов'язок надання інформації про стан здоров'я пацієнту в Україні та Сполученому Королівстві Великої Британії та Північної Ірландії.

Стаття присвячена аналізу двох обов'язків: зберігати інформацію про стан здоров'я конфіденційною та надавати інформацію про стан здоров'я пацієнта; проведено порівняльний аналіз зазначених обов'язків в законодавстві України та Сполученого Королівства Великої Британії та Північної Ірландії; розроблено пропозиції щодо доповнень існуючого законодавства України з метою приведення його у відповідність до найкращих європейських практик та гуманістичних цінностей.

Ключові слова: біоетика, обов'язок конфіденційності, право на інформацію, медичне право, приватність, розкриття інформації, порушення конфіденційності, баланс прав

Ethical rules and principals play vital role in any profession as they form a ground for professional codes and later even for legal norms. Ethics in medicine is especially important as medical profession deals with the individuals, their health and the health of the nations in general.

A lot of researchers and practitioners devoted important part of their scientific works to the ethical issues in medicine and in particular to the confidentiality issues in health care system. As examples of this researches we would like to refer to the article of J. De Bord, W. Burke and D. M. Dudzinski, who give a general overview of confidentiality issue, analyze the influence of privacy on public health, examine cases when confidentiality can be legally broken [1], M. Beech who scrutinizes cases when the dilemmas might arise between the necessity to maintain the patient's confidentiality and the necessity to open it in the research «Confidentiality in health care: conflicting legal and ethical issues» [2], S. Vekovshynina, V. Kulinichenko, N. Kovalenko who examine the evolution of such ethics rules and duties as confidentiality and respect for autonomy from the time of the Hippocratic Oath to the modern days [3].

This article and my dissertation research in general was influenced a lot by expert views in the sphere of bioethics of Oksana Kashyntseva who paid important attention to the issues of influence of ethical and legal norms on the legitimacy of the scientific result in the sphere of biomedical research [4], to the ethics and patent law in health care in Ukraine etc. [5].

Dame F. Caldicott report — review of information sharing to ensure and to find a balance between the protection of patient information and the use and sharing of information to improve the patient care had a significant impact on our sci-

entific position too [6]. In terms of philosophical and theoretical grounds and «support» for our research we have analysed the works of G. W. F. Hegel, J. Bentham, L. Portes «A la recherche d'une éthique médicale», T. Beauchamp and J. Childress, P. Lambert «Le secret professionnel», M. Wilpart, S. Denis, A. Maitrot de la Motte et al.

As the ethical issues of use and sharing information are so often discussed, reviewed and analyzed, in our article we pay our attention to the duty of confidentiality and duty of openness in medical profession exclusively in Ukraine and in the United Kingdom of Great Britain and Northern Ireland (hereinafter — the UK). The comparative approach is chosen to learn what kind of legal norms regulating the said duties exist in the law of the mentioned countries, to show how differently and or similarly the duties are regulated in the precedent and continental legal systems and to clarify the importance of the right balance of the duties to the medical profession and to the human being and health care in general. The objective of this article is also to seek how Ukrainian law may be amended in order to meet the best European practice and values.

To begin our research we are referring to one of the oldest binding document for medical professionals in history — the Hippocratic Oath and international norms regulating the duties under the question.

The Hippocratic Oath is known for its confidentiality duty imposed on the doctors: «And whatever I see or hear in peoples lives during the treatment, or even outside the treatment, that ought not be made public, I will pass over in silence, considering such things to be reserved secrets» [7]. Later the above mentioned duty becomes one of the important elements of professional ethics and incorporated into the Ethical Professional codes as well as into the legal norms. But, in the said Oath the approach is quiet paternalistic [8], as the physician decides himself what is better for the patient; so, the principle of patient autonomy and balance of different rights of the person are absent in this document.

The other paper proclaiming the duty of confidentiality is the WMA International Code of Medical Ethics adopted by the 3rd General Assembly of the World Medical Association, London, in October 1949. In conformity with the said Code a physician shall respect a patient's right to confidentiality. But in contrast to the Hippocratic Oath this privacy is not absolute as the Code defines ethical to disclose confidential information when the patient consents to it or when there is a real and imminent threat of harm to the patient or to others and this threat can be only removed by a breach of confidentiality [9].

In more recent WMA document - Declaration of Lisbon on the Rights of the Patient adopted by the 34th World Medical Assembly, Lisbon, Portugal in September/October 1981 we find a sort of definition what kind of health information shall be treated as secret. So, in conformity with the said Declaration all identifiable information about a patient's health status, medical condition, diagnosis, prognosis and treatment and all other information of a person kind must be kept confidential, even after death. And all identifiable patient data must be protected [10].

In the Universal Declaration of Human Rights we find general obligations to safe the privacy of the person and to respect the honor and reputation (art. 12) [11]. As health data may include all kind of private information including information on family life, and as health data is so sensitive that it may influence on person's reputation and even good name — honor, the cited article and document in general shall be treated as ground and basis for national detailed regulations of health data confidentiality duty.

Despite the number of International norms and Codes, the national law of each country while incorporating the

said international general rules has its own peculiarities in regulating the said sphere of social relations. This article concentrates on the overview of the Ukrainian and the UK law as examples of how national legislators regulate the duty of confidentiality and the duty of openness, their differences.

The duty of confidentiality is regulated in the Ukrainian law by Constitution as Fundamental Law, by Civil law and Procedure, by Criminal law and procedure and by special laws and norms such as «the Fundamentals of legislation of Ukraine on health care», «Oath of a doctor» etc.

Thus, in the article 32 of the Constitution of Ukraine like in the Universal Declaration of Human Rights we find a general obligation to safe the privacy of the person and the rules for the collection, storage, use and dissemination of confidential information about a person [12]. More explicit obligation to keep health data as confidential information is imposed by the article 286 of the Civil Code of Ukraine; under the said legal norm a natural person shall have the right to health secrecy, to the secrecy of the fact of addressing for medical aid, to the confidentiality of the diagnosis and information received during medical examination. Moreover, a natural person shall be obliged to refrain from dissemination of the above indicated information which she/he got to know in the process of performing his/her functions or from other sources [13]. The article 40 of «The Fundamentals of legislation of Ukraine on health care» stipulates the obligation of medical staff and other persons who happen to learn the health information during their professional activity to keep the said information confidential except the express cases when the said information can be disclosed in conformity with the law of Ukraine [14]. «Oath of a doctor», enacted by the Order of President of Ukraine on the 15th of June 1992, № 349 bounds a doctor with medical secret and with medical obligation to comply with the rules of professional ethics in general; in addition, under the said document the doctor has no right to hide the truth from the patient except cases when the truth may be harmful for the patient [15]. As additional step to guarantee the professional secret, the legislator introduces certain restrictions to the list of the persons who can be examined as witness in civil and criminal procedure. In the Civil Procedural Code of Ukraine, the article 51 stipulates that persons obliged by law to keep in secret information that had entrusted to them in connection with their official or professional status are not entitled to examination as witness [16]. The Code of Criminal Procedure of Ukraine explicitly defines professionals such as doctors, psychologists as persons who can not be examined as witness about what came to their knowledge in the discharge of professional activities unless the person who entrusted them such information has released them from the duty to keep professional secret (article 69) [17].

Furthermore, the Criminal Code of Ukraine stipulates punishment for illegal disclosure of the confident information. The example of if is the article 145 of the Criminal Code of Ukraine stating that the willful disclosure of the confidential information by a person to whom it was available in connection with his/her professional or official duties, where such disclosure caused any grave consequences, — shall be punished by a fine up to 50 tax-free minimum incomes, or community service for a term up to 240 hours, or deprivation of the right to occupy certain position or engage in certain activities for a term up to three years, or correctional labor for a term of up to two years. Moreover, in conformity with the article 132 of the Criminal Code of Ukraine disclosure by a medical officer, an auxiliary employee who obtained the information without authorization, or a member of medical profession — of information on medical examination for HIV, or any other incurable contagious disease dangerous to the person's life, or

AIDS and its results that became known to them in connection with their official or professional duties, — shall be punished by a fine of 50–100 tax-free minimum incomes, or community service for a term up to 240 hours, or correctional labor for a term up to two years, with or without deprivation of the right to occupy positions or engage in certain activities for a term up to three years [18].

As for the duty of openness, in the Ukrainian medical law there are some statements that bind the medical professionals with the duty of being open with the patients. These are the article 285 of the Civil Code of Ukraine, the article 39 of «The Fundamentals of legislation of Ukraine on health care», the «Oath of a doctor» etc. Nevertheless, it goes about the duty of a doctor to be sincere with the patient mainly on the diagnosis. For instance, the article 285 of the Civil Code of Ukraine gives the right to the natural person of age to reliable and complete information on the state of his/her health, including access to the relevant medical documents concerning his/her health. But even this right is not absolute — in case the information about the illness of a natural person may aggravate his/her state of health or may ruin the process of treatment, medical staff shall have the right to provide incomplete information about the state of health of the person and to limit access to certain medical documents. This is in our opinion quiet arguable statement and may give in some circumstances too much of power over the patient. Moreover, in the Ukrainian law, the duty of openness in contrast to the duty of candour implemented in the UK, covers the duty of medical professional to provide the patient with all relevant information on the patients' health, but it does not explicitly cover the duty of medical staff to notify a patient on the mistakes made by the said professional or other incidents that may occur in the process of treatment including breach of the health secrecy or probability that the health data confidentiality might be broken.

The duty of candour in the UK was initially offered by Robert Francis QC, Chairman of the Inquiry into Mid Staffordshire NHS Foundation Trust. [19]. As a result of discussions of pros and contras of the said implementation, the duty of candour became bounding for all registered providers since 1 April 2015 in UK. Thus under the Regulation 20 of the Health and Social Care Act 2008 (Regulated Activities) 2014: A health service body must act in an open and transparent way with relevant persons in relation to care and treatment provided to service users in carrying on a regulated activity. As soon as reasonably practicable after becoming aware that a notifiable safety incident has occurred a health service body must notify the relevant person that the incident has occurred, and provide reasonable support to the relevant person in relation to the incident, including when giving such notification. The said notification must — be given in person by one or more representatives of the health service body, provide an account, which to the best of the health service body's knowledge is true, of all the facts the health service body knows about the incident as at the date of the notification, advise the relevant person what further enquiries into the incident the health service body believes are appropriate, include an apology, and be recorded in a written record which is kept securely by the health service body. To avoid the misinterpretation of the terms, the said Regulation provides such definitions as «apology», «moderate harm», «moderate increase in treatment», «notifiable safety incident», «severe harm», «prolonged psychological harm», «relevant person» etc. [20]. In conformity with the said duty the breach or possible breach of confidentiality shall be advised and notified. We find this kind of obligation imposed on the medical professionals as highly progressive and human oriented as on the one hand it is an additional guarantee for keeping the health data accurately and with all

due responsibility, and on the other hand, it is a fair tool to control the physician-patient communications, relations and confidentiality-ethics compliance.

As for the duty of confidentiality, in addition to the precedents, it is mainly regulated in UK by The Data Protection Act 1998 that governs rights for the individuals who are alive to access their own records, and that defines physical or mental health or condition as «sensitive personal data» [21], by The Access to Health Records Act 1990 that defines rights of access to the health records of the deceased patient [22], and by the Medical Reports Act 1988 stipulating the right for individuals to have access to reports, relating to themselves that are done by medical professionals for insurance and employment purposes [23].

So, this brief overview of the UK law in the mentioned aspects shows that, on the one hand, it is very structured; and, on the other hand, it forms coherent system respecting the balance. As it is impossible to seek confidence of patient without keeping the health data confidential and at the same time it is highly important to know how to share the health information with other medical staff in order to provide the high quality medical services and medical treatment; how to advise openly and in a correct way a patient on diagnosis and other health relevant information, the grain of truth shall be found in the equilibrium of the different rights. As we see in Ukraine there is sufficient quantity of legal norms to regulate the duty of confidentiality and duty of openness, but they are not composing an integrated system — each particular duty is governed separately. Moreover, in our opinion the duty of openness in Ukraine shall be expanded. And keeping in mind that Ukrainian law has features mainly of continental legal system, and tends to the explicit regulation and dogmatism, the Ukrainian patient in addition to the existing norms shall have explicit right to be notified of the medical incident that occurred or may occur including the breach of confidentiality. To implement this, the article 285 of the Civil Code of Ukraine as well as other relevant norms shall be amended with the above mentioned statements. ♦

Список використаних джерел / List of references

1. *De Bord J. Confidentiality [Electronic resource] / Jessica De Bord, Wylie Burke, Denise M. Dudzinski. — Access mode: https://depts.washington.edu/bioethx/topics/confiden.htm.*
2. *Beech M. Confidentiality in health care: conflicting legal and ethical issues. [Electronic resource] / M. Beech. — Access mode : http://www.ncbi.nlm.nih.gov/pubmed/17305035.*
3. *Вековшиніна С. В. Сучасна медична етика: від Гіппократа до біоетики [Електронний ресурс] / С. В. Вековшиніна, В. Л. Кулініченко, Н. В. Коваленко. — Режим доступу : http://www.google.com.ua/url?url=http://www.umj.com.ua/wp/wp-content/uploads/archive/37/pdf/540_ukr.pdf%3Fupload%3D&rct=j&q=&esrc=s&sa=U&ved=0ahUKEwiSmua2g8_LAhXoCpoKHWaVDp0QFggVMAA&usg=AFQjCNFqe-0K7J4m5Pq39wzkccQjuxBiJA.*

S. V. Viekovshynina, V. L. Kulinichenko, N. V. Kovalenko. Suchasna medychna etyka: vid Hippokrata do bioetyky.

4. *Кашинцева О. Вплив етико-правових норм на легітимність наукового результату у сфері біомедичних досліджень / О. Кашинцева // Теорія і практика інтелектуальної власності. — 2014. — № 6. — С. 13–20.*

Kashyntseva O. Vplyv etyko-pravovykh norm na lehitymnist naukovoho rezultatu u sferi biomedychnykh doslidzhen [in]: Teoriia i praktyka intelektualnoi vlasnosti 2014, № 6, S. 13–20.

5. *Kashyntseva O. Ethics and patent law in health care: Ukrainian reform [Electronic resource] / O. Kashyntseva. — Access mode : http://medicallaw.org.ua/fileadmin/user_upload/PDF/_%E2%84%96_16_KASHYNTSEVA.pdf.*
6. *Fiona Caldicott report [Electronic resource]. — Access mode : www.gov.uk/government/publications/the-information-governance-review*
7. *The Hippocratic Oath in Latin with English Translation. Latin by Albrecht de Haller [Electronic resource]. — Access mode : http://www.academia.edu/263872n8/The_Hippocratic_Oath_in_Latin_with_English_translation.*
8. *Вековшиніна С. В. Сучасна медична етика: від Гіппократа до біоетики [Електронний ресурс] / С. В. Вековшиніна, В. Л. Кулініченко, Н. В. Коваленко. — Режим доступу : http://www.google.com.ua/url?url=http://www.umj.com.ua/wp/wp-content/uploads/archive/37/pdf/540_ukr.pdf%3Fupload%3D&rct=j&q=&esrc=s&sa=U&ved=0ahUKEwiSmua2g8_LAhXoCpoKHWaVDp0QFggVMAA&usg=AFQjCNFqe-0K7J4m5Pq39wzkccQjuxBiJA.*

S. V. Viekovshynina, V. L. Kulinichenko, N. V. Kovalenko. Suchasna medychna etyka: vid Hippokrata do bioetyky.

9. *Internationl Code of Medical Ethics adopted by the 3rd General assebly of the World Medical Association, London, October 1949 [Electronic resource]. — Access mode : www.wma.net*
10. *Declaration of Lisbon on the Rights of the Patient adopted by the 34th World Medical Assembly, Lisbon, Portugal in September/October 1981 [Electronic resource]. — Access mode : www.wma.net*
11. *Universal Declaration of Human Rights adopted by the Resolution of the General Assembly of UNO in Paris, December 1948 [Electronic resource]. — Access mode : https://www.google.com.ua/search?client=opera&rls=ru&q=Universal+declaration+of+Human+rights&sourceid=opera&ie=utf-8&oe=utf-8&channel=suggest&gws_rd=ssl.*
12. *Конституція України [Електронний ресурс] // ВідомостіВерховної Ради України. — 1996. — № 30. — Ст. 141. — Режим доступу : http://zakon5.rada.gov.ua/laws/show/254к/96-вр*

Konstytutsiia Ukrainy, http://zakon5.rada.gov.ua/laws/show/254k/96-vr

13. *Цивільний Кодекс України [Електронний ресурс] // Відомості Верховної Ради України. — 2003. — №№ 40–44. — Ст. 356. — Режим доступу : http://zakon5.rada.gov.ua/laws/show/435-15.*

Tsyvilnyi Kodeks Ukrainy, http://zakon5.rada.gov.ua/laws/show/435-15.

14. *Закон України «Основи законодавства України про охорону здоров'я» від 19.11.1992 р. [Електронний ресурс] // Відомості Верховної Ради України. — 1993. — № 4. — Ст. 19. — Режим доступу : http://zakon3.rada.gov.ua/laws/show/2801-12.*

Osnovy zakonodavstva Ukrainy pro okhoronu zdorovia, http://zakon3.rada.gov.ua/laws/show/2801-12.

15. *Указ Президента України «Про Клятву лікаря» від 15.06.1992 р. № 349 [Електронний ресурс]. — Режим доступу : http://zakon3.rada.gov.ua/laws/show/349/92.*

Pro Kliatvu likaria: Ukaz Prezydenta Ukrainy vid 15.06.1992 r. № 349, http://zakon3.rada.gov.ua/laws/show/349/92

16. *Цивільний процесуальний кодекс України від 18.03.2004 р. [Електронний ресурс] // Відомості Верховної Ради України. — 2004. — № 40–41, 42. — Ст. 492. — Режим доступу : http://zakon5.rada.gov.ua/laws/show/1618-15*

Tsyvilnyi protsesualnyi kodeks Ukrainy vid 18.03.2004, http://zakon5.rada.gov.ua/laws/show/1618-15

17. *Кримінальний процесуальний кодекс України: Закон України від 13.04.2012 р. [Електронний ресурс] // Відомості Верховної Ради України. — 2013. — № 8–10, № 11–12, № 13. — Ст. 88. — Режим доступу: http://zakon5.rada.gov.ua/laws/show/4651-17.*

Kryminalnyi protsesualnyi kodeks Ukrainy vid 13.04.2012, http://zakon5.rada.gov.ua/laws/show/4651-17

18. *Кримінальний кодекс України: Закон України від 05.04.2001 р. [Електронний ресурс] // Відомості Верховної Ради України. — 2001. — № 25–26. — Ст. 131. Режим доступу : http://zakon3.rada.gov.ua/laws/show/2341-14.*

Kryminalnyi kodeks Ukrainy vid 05.04.2001, http://zakon3.rada.gov.ua/laws/show/2341-14

19. *Report of the Mid Staffordshire NHS Foundation Trust Public Inquiry. Executive Summary [Electronic resource]. — Access mode : http://webarchive.nationalarchives.gov.uk/20150407084003/http://www.midstaffspublicinquiry.com/report; used in conformity with http://www.nationalarchives.gov.uk/doc/open-government-licence/version/3.*

20. *The Health and Social Care Act 2008 (Regulated Activities) Regulations 2014 № 2936 [Electronic resource]. — Access mode : http://www.legislation.gov.uk/ukdsi/2014/9780111117613/regulation/20; used in conformity with http://www.nationalarchives.gov.uk/doc/open-government-licence/version/3.*

21. *The Data Protection Act 1998 [Electronic resource]. — Access mode : http://www.legislation.gov.uk/ukpga/1998/29/contents; used in conformity with http://www.nationalarchives.gov.uk/doc/open-government-licence/version/3.*

22. *The Access to Health Records Act 1990 [Electronic resource]. — Access mode : http://www.legislation.gov.uk/ukpga/1990/23/contents; used in conformity with http://www.nationalarchives.gov.uk/doc/open-government-licence/version/3.*

23. *Medical Reports Act 1988 [Electronic resource]. — Access mode : http://www.legislation.gov.uk/ukpga/1988/28/contents; used in conformity with http://www.nationalarchives.gov.uk/doc/open-government-licence/version/3.*

Надійшла до редакції 20.03.2016 р.

Чабан Е. Обязанность сохранять сведения о состоянии здоровья конфиденциальными и обязанность предоставлять информацию о состоянии здоровья пациента в медицинском праве Украины и Объединенного Королевства Великобритании и Северной Ирландии. Статья посвящена анализу двух обязанностей: сохранение сведений о состоянии здоровья конфиденциальными и предоставление информации о состоянии здоровья пациенту; сравнительному изучению указанных обязанностей в законодательстве Украины и законодательстве Объединенного Королевства Великобритании и Северной Ирландии; разработке модификаций украинского законодательства с целью приведения его в соответствие с наилучшими европейскими практиками и гуманистическими ценностями.

Ключевые слова: Биоэтика, обязанность сохранения конфиденциальности сведений о состоянии здоровья, обязанность предоставления информации о состоянии здоровья пациенту, медицинское право, приватность, раскрытие информации, нарушение конфиденциальности, баланс прав

Chaban O. Duty of confidentiality and duty of openness in health law of Ukraine and the United Kingdom of Great Britain and Northern Ireland. This article is dedicated to the analysis of the duty of confidentiality and duty of openness in the health law of Ukraine and the UK, to the comparative examination of the principle of balance of different duties and rights implemented and used in the above mentioned countries; to the elaboration of amendments to the health law of Ukraine in order to make it meeting the best European practice and human right values.

Key words: Bioethics, duty of confidentiality, duty of openness, health law, privacy, disclosure, breach of confidentiality, balance of different rights

ISSN 2308-0361

THE ROLE OF DEONTOLOGICAL NORMS IN FORMATION OF LEGISLATION REGULATING THE PROCEDURE OF MEDICAL AND BIOLOGICAL RESEARCH INVOLVING HUMANS

Nataliya Kashkanova,
postgraduate student of Kiev University of law of the NAS of Ukraine

Кашканова Н. Роль деонтологічних норм у формуванні законодавства, що регулює порядок проведення медико-біологічних досліджень за участі людини.
Стаття присвячена проблематиці правового регулювання медико-біологічного експерименту на людях. Зокрема автором розглядається фактори, що зумовили появу правового регулювання застосування медико-біологічного експерименту на людях, які мають складний характер та пов'язані із необхідністю забезпечення особистих прав і свобод людини, націлені на недопущення їх порушення. Окремо автором аналізується, вітчизняне законодавство України в сфері охорони здоров'я, яке на національному рівні забезпечує правове регулювання окремих питань проведення медико-біологічних експериментів на людях. Автор робить висновки про необхідність наукового переосмислення особливостей договірного регулювання відносин при застосуванні медико-біологічних експериментів на людях та наголошує на потребі вироблення єдиних доктринальних підходів до вдосконалення законодавства України та приведення його у відповідність з міжнародними правовими стандартами в сфері охорони здоров'я. Разом з тим, автор звертає також увагу на необхідність подальшого ґрунтовного наукового дослідження особливостей кримінально-правових відносин, що виникають в результаті проведення таких експериментів на людях.

Ключові слова: права людини, біомедичні дослідження, клінічні випробування, лікарські засоби, інформована згода, зародження і становлення правового регулювання здійснення медико-біологічного експерименту на людях

The range of problems of legal regulation of medicobiological experiments on humans has historical patterns of its origin, formation and development. It characterizes the current state of scientific knowledge and it needs its research and rethinking with a glance to the current processes of development of society, public institutions, medical and biological sciences. In scientific literature scholars reasonably noted that experiments in the sphere of medicine, including experimentations on human, have deep historical roots, arising from the moment of realization of the idea of treatment possibility, and the effectiveness of treatment is based on previous experimental activities. That is why, one should agree with the opinion of scientists that experiments with different degree of complexity were conducted since the medicine appeared. They began with magic rituals when magicians and sacerdotes treated in temples, they were conducted by the first doctors who noted in their minds effects of the random drugs, and fixed them with further verification [1, 219].

The medicobiological experiment develops with the development of mankind, expanding its scope of application, meth-

ods of realization, expanding range of experimental subjects, which included individuals too. This highlights the necessity to establish requirements for medicobiological experiment not only as a phenomenon of medicine and biology, but also as a legal phenomenon. This is primarily due to the need of ensuring, safety and protection of the rights and freedoms of natural persons as an experimental subject.

The current state of medical and biological sciences is determined by considerable intensification, among other relating to:

- Firstly, expansion of the boundaries of medicobiological intervention in the human organism;
- Secondly, increasing of the risk of medicobiological experiments;
- Thirdly, the needs for the invention of new methods and ways of countercheck and fighting against people's diseases;
- Fourth, the need to counter illegal use of human organism for medical experiments.

The deepening of socio-economic stratification of society, the expansion and strengthening of world's conflicts increases the risk of excessive use of these factors and involvement of a person in participation in medicobiological experiments under influence of socio-economic situations of life or due to violence. All this determines the necessity of improvement of legal support of medicobiological experiments, especially in terms of guarantee, safeguarding and protection of rights of a human (an experimental subject), development of effective mechanism of the implementation of relevant legal norms regulating the exercise of medicobiological experiments on humans.

To be sure, the key problem of modern period of development of medicobiological experiments in Ukraine is the issue of compliance of legal regulations with needs of society; compliance of medical and biological sciences with the timely, complex and effective adjustment of such relations.

That is why, a key topic in modern conditions of development of society and state, medical and biological sciences is the research of issues of state regulation of medicobiological experiments with the aim to develop a common conceptual position on improving of the legislation of Ukraine in the context of maximizing ensurance, safeguarding and protection of the rights of individuals-patients.

Factors that determined the appearance of legal regulation of the use of medicobiological experiment on humans are complex, connected to the need to ensure individual rights and freedoms, aimed at preventing violations. In legal literature, such factors include, preeminently, the specific historical events that led to the need for «inclusion» of legal means to regulation of the relevant phenomena and processes of medical and biological nature. In particular, history has evidences of medicobiological experiments on humans that were horrific by content and results and were conducted by Japanese doctors on prisoners of 1939–1945; German doctors on Jews, Gypsies and prisoners from Soviet army during the World War II [2, 15].

There are well-known facts of medical experiments on humans in the early XXth century by Russian researchers [3, 11] and in the middle of the XXth century by American doctors [4, 9, 10]. All these experiments on humans were tragic and sparked considerable public outcry. These facts required an appropriate response from the side of the international community and introduction of appropriate legal regulation of biomedical experiments on humans in order to safeguard and protect human subjects.

Legal regulation of exercising of medicobiological experiments on humans is determined by: the regularities of medicine; the specifics of medical researches realization; the aim to protect the human-experimental subject and minimize the risk of negative consequences for their life and / or health.

The explanation of it is that each new medicine discovery signifies, if not life

saving, but at least facilitates serious illnesses for many people. However, studying of each new discovery at a certain stage of investigation there appears a need to check means or a method on the person, the results of action of which can not be predicted with certainty i.e. voluntarily expose a person or even a group of people with unknown, possibly dangerous medical means and methods on conditions of minimizing the risk of negative consequences. To get rid completely of the risk is not possible in such medical research. That is why the appearance of legal norms in the field of biomedical experiments is determined by the need for consistent protection of a human, on whom new methods or therapies are tested. Accordingly, it allows to reduce a risk and prove it, in order a person does not become an object of not prepared experiments or too long checking methods with more damaging consequences than it originally expected [5].

It should be admitted that in general legal regulation today is one that comes from the condition of medicobiological researches. Today, the medicine can not fully develop without searching of new treatments, diagnostics and prevention, which, in turn, is usually accompanied by the need for medical experiments. The task of legal regulation, the task of health law in general must be to create a clear, thoughtful, and detailed (in perspective with the legislative confirmation) conditions of legitimacy of such experiments realization [6, 345].

In other words, the development of medical science and practice inevitably linked to researches on humans. And such studies demand proper legal regulation. The awareness of this made the mankind to seek the line that separates «the criminal experimentation on humans» and the necessary research process, and such margin is established and guaranteed from the side of law [7].

It should be noted, that legal regulation of realization of medicobiological experiments on humans has objectively determined character associated with the level of development of society, health and life sciences, awareness of social importance and social danger of medicobiological experiments. Taking this into account, we consider it appropriate to generalize the system of factors that determined the creation and formation of legal regulation of realization of medicobiological experiments on humans, and today directly influence its development. They include:

- Legal factors, relating to the absence or imperfection of existing legal means to ensure the rights and freedoms of persons who are subjects of experiment; activation of legislative activities of the international community to ensure the rights and freedoms in the process of conducting of medicobiological experiments, to prevent violent involvement for the human in realization of medicobiological experiments;
- Humanistic factors related to awareness of the necessity of introduction or strengthen of safeguarding and protection of the rights and freedoms of persons who are subjects of experiment concerning the prevention of realization of medicobiological experiments against a human's will, the need of conditions of getting the absolute consent, preventing of undue risk to their life and health, and to their descendants; respect for human rights and freedoms in conducting of biomedical experiments; non-admission of repetition of mistakes in realization of medicobiological experiments, which caused damage to life or health of a human, that were in history;
- Scientific factors relating to enabling of development of medical and biological sciences, to provide growth of new knowledge and rethinking of existing, aimed at the establishment of patterns of various diseases, mechanisms of their development, elaboration and testing of the effectiveness

of new methods of prevention and treatment;

- Economic factors, which stipulate the need of invention of new means and methods of prevention and treatment, which in future will give the opportunity to save the health and lives of people, to make means and methods of treatment more economically accessible to people;
- Social factors, the content of which is the level and peculiarities of development of society that is aware of general social purpose of medicobiological experiments on humans, their level of danger, and the necessity of proper legal regulation of realization of medicobiological experiments.

Aforementioned factors determined the initiation of legal regulation of the realization of medicobiological experiments on humans, its formation and are subsequently determining the development of such regulation.

Within the legal science problems of legal regulation the implementation of conducting of medicobiological experiments on humans was singled out in the 30s of XXth century, which took place under the influence of medical experiments that were conducted during the World War I and the War of Japan and China, resulting in the harm of hundreds of thousands of people.

Such experiments were about endurance tests for the human body from the effects of temperature: development of methods of people's reanimation from the negative impact of temperature conditions; experiments during which the human-subjects were infected with sexually transmitted diseases, and who later became the object of research on the peculiarities of the diseases progression. But the most significant impact on the appearance of the first law acts in the sphere of legal regulation of medicobiological experiments was the Nuremberg trial on Nazi doctors. The horrors of medical experiments made by Nazi doctors on prisoners in concentration camps of Dachau, Auschwitz, Buchenwald and others were impressive with their cruelty, scope and absurdity. As a result, the problem of medicobiological experiments on humans was recognized as violating of personal rights and freedoms and is not only a medical, bioethical issue, but also an issue of international legal character. The danger of uncontrollable medicobiological experiments, their dehumanized nature was recognized. The preamble of the Judgement of the Nuremberg Tribunal [8] directly indicates that the severity of testimony that lie before us, makes us to conclude that some types of medical experiments on humans generally meet the ethical standards of the medical profession only if their conduct is limited with appropriate, clearly defined frames. Moreover, the document included the separate section — admissibility of medical experiments. The project of that element of the sentence was created by American medical experts — Leo Alexander and Andrew Ivy, who studied the medical experiments conducted by Nazi doctors and proposed principles of admissibility of medical experiments [9, 172].

Later the above-noted text would be known as the Nuremberg Code (hereinafter — the Code), which at the international legal level entrenched the law norms that regulated the requirements for conducting of medical experiments on a human. With the adoption of the mentioned Code the researches on problems of legal regulation of medical experiments on humans became more active. A special attention is given by the scholars to the principles embodied in the Code, namely absolute consent of a person to the experiment; orientation of the experiment towards socially positive results; avoidance of all excessive physical and mental suffering and injury; impermissibility of the experiment upon condition that *a priori* there are grounds to suspect the possibility of death or individual injuries of the subject; the degree of the risk associated with the experi-

ment must never exceed the humanitarian importance of the problem to be solved by this experiment etc. The above-noted international act actually comes out of the impressions that was made by medical researches during the World War II, and is aimed at enabling countermeasures against antihumanity of medicobiological experiments on humans. The Code actually formed the basis of legal regulation of medicobiological experiments on humans. In legal literature scholars unambiguously draw attention to the fundamental importance of the Code in the system of medical law sources, which recognized principles of medical experiments on humans. Scientists draw attention to the role and perspective of the provisions of the Code, its place in the process of establishing of legal regulation of medicobiological experiments [10].

The attention should also be paid to the provisions of the Universal Declaration of Human Rights proclaimed by the General Assembly of the United Nations on 10.12.1948. It does not contain the provisions regulating the conducting of medicobiological experiments, at the same time it enshrines fundamental human rights. According to Art. 1 all human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood. In addition to that Art. 3 and 5 establishes that everyone has the right to life, liberty and security of person. No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. The realization of medicobiological experiments on humans is based on these rights and freedoms what is the foundation of humanity of experiments prohibition of violation of human rights and freedoms [11].

In the same context in the legal literature are analyzed the provisions of the Convention on Human Rights and Fundamental Freedoms of 04.11.1950 [12], which stipulates the prohibition of torture (Art. 3); the right to liberty and security (Art. 5); the right to an effective remedy (Art. 13) etc. [13].

Particular scientific interest to the problems of legal regulation of medicobiological experiments increases in the 60–70s of the XXth century. During this period the practical work in the sphere of medicobiological experiments became much more active, new medical technologies were arising and developing. As a result, in 1964 the European Social Charter was adopted, the provisions of which continued legal regulation of rights and freedoms. The content of the above-noted Charter did not directly stipulate the conditions and procedures of medicobiological experiments, at the same time the provisions dealing with the safeguarding and protection of human rights and freedoms were regulated there [14].

Significant importance in the system of medical law sources, especially concerning issues of medicobiological experiments, has the Declaration of Helsinki (Declaration of Helsinki of the World Medical Association «Ethical Principles for Medical Research Involving Human Subjects» from 06.01.1964) [15]. The World Medical Association developed the Declaration of Helsinki as a statement of ethical principles for medical researches involving human subjects, including researches on identifiable human material and data. Ethical principles enshrined in the Declaration of Helsinki, were the object of research of scientists in the field of law, and are an element in historiography of scientific regulation of realization of medicobiological experiments on humans.

Also the valuable importance in the system of medical law sources has the International Covenant on Civil and Political Rights [16], Art. 7 of which stipulates: no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation. In turn, the provisions of the International Covenant on Economic, Social and Cul-

tural Rights (ICESCR) [17], stipulates that the States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity (part 3 of Art. 15).

In 80–90s the problems of legal support of realization of medicobiological experiments were continued to be explored with renewed vigor that was connected with the intensification of researches in the sphere of medicine, focusing on humanities researches, and the development of legal regulation of medicobiological experiments on the legislative level of Ukraine.

During this period on the international level was adopted Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine (ETS-164) from 04.04.1997 [18], ratified by Ukraine in 2002 [19]. In the content of this Convention for the first time it was introduced the concept of professional standards, was stipulated that any intervention in the health sphere, including scientific researches, must be carried out in accordance with correspondent professional obligations and standards. The issues of consent on human medical experiments are the subject to above-noted Convention. It is also defined the conditions for the protection of persons who are not able to give such consent, is enshrined the provisions concerning the protection of persons suffering from mental disorders etc.

It should be noted that with the independence of Ukraine gave a start for developing of the national legislation of Ukraine in the health sector, which ensures the legal regulation of certain issues of medicobiological experiments on humans on the national level.

According to Art. 28 of the Constitution of Ukraine no one without their consent can be subjected to medical, scientific, or other experiments [20]. The Law of Ukraine «Fundamentals of the Legislation of Ukraine on Health Care» concedes the realization of medicobiological experiments on humans under conditions of: available socially useful purpose; scientific feasibility of medicobiological experiments; publicity of experiment application; the subject's full awareness of the impact of medicobiological experiment on the organism; exceeding of probability of success over the risk of causing serious consequences to the health or life of the subject; the subject's voluntary consent to the experiment; preservation of the necessary medical confidentiality [21].

In turn, the provisions of the Law of Ukraine «On Medicinal Products» stipulate the order of clinical testing of medicinal products that may be conducted only with the purpose of determination or confirmation of the efficacy and safety of medicinal product and only in specialized medical institutions after the mandatory assessment of ethical and moral and legal aspects of the program of clinical testing by ethics committees [22].

The beginning of the XXI century becomes decisive for the further implementation, and, the most important, improvement of the legal regulation of medicobiological experiments on humans. This is determined by a significant intensification of scientific researches in the sphere of medical experiments, the appearance and introduction of new nanotechnologies in medical practice that enhanced the problems of moral and ethical principles of intervention into the human's nature, their life and health.

Within bioethics the social mechanisms are being formatted. Such mechanisms provide the development of codes of ethics, laws, increasing of responsibilities of professionals — doctors and biologists, extension of their duties vested not only on personal, but also on the legal level. All nanobiotechnologies and nanomedicine, enriched by new experimental and clinical studies are the basis for their implementation to medical practice; they require mandatory moral, ethical, bioethical and legal qualification. As a result of discoveries and achievements

in molecular biology, genetics, nanomorphology, nanopharmacology, evolutionary biology the unprecedented opportunities to change human nature are opened. Many of these achievements aimed at human benefit, but there is also a danger to use them in another way [23].

During this period the issues of priority of ethical and moral principles in conducting of experimental medical activity with the impact on the human body become actual, because they have to be embodied in any scientific-research medical research experiment. In conformity with this, in S. Pustovit's opinion, two main mechanisms of ethical regulation of scientific projects are following: 1) the procedure for obtaining of informed consent of a subject; 2) the ethical (bioethical) examination of the project [24].

Special scientific attention is given to the complex of issues related to the definition of the new role and place of biomedical research and medicobiological experiments in modern legal, medical, genetic sciences and philosophy. Within stated scientists tries to consider the functional use of the medicobiological experiment through the prism of axiological and anthropological grounds and various methodological principles (transdisciplinary methodology) that navigate or pay attention of modern researcher to the issues of human vital activity in the context of cutting-edge biotechnologies and the necessity for moral and legal regulation biosafety of a human [25].

Prominent scientific attention is driven to the legal status and activity of the Commission (committee) on ethics. One of the important duties of the control of the compliance of the content of medicobiological experiments with the requirements for scientific researches is placed on them [26].

It should be noted that the year of 2000 was marked by the adoption of a number of legal regulations that specified the number of provisions of laws in the field of use of medicobiological experimentation. In particular, the Ministry of Health of Ukraine on 23.09.2009 adopted the Decree № 690 «The Procedure for Conducting Clinical Trials of Medicinal Products and Expert Evaluation of Materials Pertinent to Clinical Trials and Model Regulations of the Ethics Committee». It defined the basic requirements for conducting of clinical testing of medicinal products that may be held with the participation of patients (volunteers) by full or reduced program, including testing the bioavailability / bioequivalence as well as international multicenter clinical trials. The document identifies general principles of clinical trials, the basic requirements for the protection of subjects, evaluation of ethical, moral, legal aspects of the testing, and the procedure of its holding. Clinical testing conducted in healthcare facilities that have a license to practice medicine and a certificate of accreditation issued by the Ministry of Health or its authorized body [27].

Particularly crucial for the further development of medicobiological experiment on doctrinal and practical legal levels was the traditional Congress of Bioethics. Starting in 2000 and up to present there were only five scientific events involving leading experts in the spheres of medicine, law, philosophy etc., each them examined the complex key problematic issues related to the need to create an appropriate legal framework in the field of medical services, further development of studies of bioethical issues, introduction into a customary practice of the principles of bioethics, broadening of teaching of bioethics at school, creation of openness of academic and medical institutions, protecting of human rights and dignity in view of the current application of biologic and medical achievements.

The abovementioned facts give reasons to say that the problem of legal regulation of realization of biomedical experiments on humans reveals through the features of the condition and prospects of development of society. The development of medicine determines the

emergence of a significant number of varieties of medicobiological experiments on humans which needs the doctrinal classification and further legal distinction on the legislative level.

Therefore, the problem of the legal status of medicobiological experiment requires its thorough scientific investigation, identification of features of civil legal relations arising as a result of medicobiological experiments on humans.

Summarizing the abovementioned, the author maintains positions about the necessity of scientific rethinking of the characteristics of contractual regulation of relations in the application of medicobiological experiments on humans, in view of the peculiarities of modern medicine, international and national law norms. However, the absence of the unified science-based concept of reforming of the regulation of medicobiological experiments requires new unified doctrinal approaches to improving the legislation of Ukraine and brings it in accordance with international legal standards in health care. The development of medical practice requires the development trends and ways of further improving the medicobiological experiment as complex legal phenomenon. In conclusion, the author would also like to indicate the necessity of further comprehensive research of features of criminal and legal relations arising as a result of realization of medicobiological experiments on humans. ◆

Список використаних джерел / List of references

1. *Зильбер А. П. Этика и закон в медицине критических состояний / А. П. Зильбер. — Петрозаводск : Изд-во Петрозаводского университета, 1998. — 341 с.*

Zilber A. P. Étika i zakon v meditsine kriticheskikh sostoyaniy, Petrozavodsk : Izd-vo Petrozavodskogo unyversyteta, 1998, 341 s.

2. *Дргонец Я. Современная медицина и право : перевод со словац. / Я. Дргонец, П.Холлендер. — М.: Юрид. лит-ра, 1991. — 274 с.*

Drhonets Ya., Khollender P., Sovremennaya meditsyna i pravo: perevod so slovats., M: Yurid. lit-ra, 274 s.

3. *Кубарь О. И. Этические и правовые проблемы исследований на человеке: из истории России XX века / О. И. Кубарь // Человек, 2001. — № 3. — С. 11.*

Kubar O. Éticheskie i pravouye problemy issledovaniy na cheloveke: iz istorii Rossii XX veka [in]: Chelovek, 2001, № 3, S. 11.

4. *Этическая экспертиза биомедицинских исследований. Практические рекомендации / под общей ред. Ю.Б. Белоусова. — М., 2005. — С. 9–10.*

Éticheskaya ékspertiza biomedytsinskikh issledovaniy. Prakticheskie rekomendatsii, pod red. Yu. B. Belousova, M., 2005, S. 9, 10.

5. *Дзвонів Г. Р. Медичне право : навчальнийпосібник. / Г. Р. Дзвонів, Н. І. Махонько. — 2009 [Електронний ресурс]. — Режим доступу : http://yport.inf.ua/meditsinskoe-pravo-uchebnoe.html.*

H. Dzvoniv, N. Makhonko. Medychne pravo : navchalnyi posibnyk., 2009, http://yport.inf.ua/meditsinskoe-pravo-uchebnoe.html.

6. *Стеценко С.Г. Медичне право України : підручник / С.Г.Стеценко, В.Ю.Стеценко, І.Я.Сенюта; за заг. ред. д.ю.н., проф. С.Г. Стеценка. — К. : Правова єдність, 2008. — 507 с.*

Stetsenko S., Stetsenko V., Senyuta I. Medychne pravo Ukrayiny : pidruchnyk, K.: Pravova yednist, 2008, 507 s.

7. Асплунд Щ. Использование принципов научно-доказательной медицины в клинической практике / Щ. Асплунд // Рос.семейный врач. — 2000. — № 3. — С. 57–58., Гринхальх Т. Основы доказательной медицины : учебн. пособ. / Т. Гринхальх. — М. : ГЭОТАР-МЕД, 2004., Booth A., Searching for evidence: principles and practice / A. Booth, A. J. Rourke // Evidence-BasedMedicine. — 1999. — №4. — P. 133–136.

Asplund O. Ispolzovaniye printsipov nauchno-dokazatel'noy meditsiny v klinicheskoy praktike [in] Ros. semeynyi vrach, 2000, № 3, S. 57—58., Grinkhalkh T. Osnovy dokazatelnoj meditsyny: uchebnoe posobie, M. : GÉOTAR-MED, 2004., Booth A., Rourke A. Searching for evidence: principles and practice [in]: Evidence-Based Medicine, 1999, № 4, P. 133—136.

8. Нюрнбергский кодекс 1947 г. [Электронный ресурс]. — Режим доступа : http://www.psychepravo.ru/law/int/nyurnbergskij-kodeks.htm.

Nyurnbergskiy kodeks 1947 g., http://www.psychepravo.ru/law/int/nyurnbergskij-kodeks.htm.

9. Юдин Б. Г. Горький юбилей / Биоэтика: принципы, правила, проблемы / Б. Г. Юдин ; под ред. Б.Г. Юдина. — М. : Эдиториал УРСС, 1998.

Yudin B., Gorkiy yubilej / Bioétika: printsipy, pravila, problemy, M. : Éditorial URSS, 1998, s. 172.

10. МоисеевС. Медицина, основанная на доказательствах / С. Моисеев // Врач. — 2000. — № 12. — С. 4–8., Ellis J. In-patient medicine is evidence based / J. Ellis, I. Mulligan, D. L. Sackett // Lancet. — 1995. — Vol. 346. — P. 407–410.; Wulff H. R. Rational Diagnosis and Treatment / H. R. Wulff, P. C. Guitzsche. Rational. — 2nd ed. — Oxford : Blackwell Science, 2000.

Moiseev S. Meditsina, osnovannaya na dokazatel'stvakh [in]: Vrach, 2000, № 12, S. 4–8., Ellis J., Mulligan I., Sackett D. L. In-patient medicine is evidence based [in]: Lancet, 1995, Vol. 346, S. 407—410; Wulff H., Guitzsche P., Rational Diagnosis and Treatment; 2nd ed.,Oxford: Blackwell Science, 2000.

11. Загальна декларація прав людини (рос/укр) від 10.12.1948 р. [Електронний ресурс]. — Режим доступу: http://zakon4.rada.gov.ua/laws/show/995_015.

Zahalna deklaratsiya prav lyudyny vid 10.12.1948, http://zakon4.rada.gov.ua/laws/show/995_015.

12. Конвенція про захист прав людини і основоположних свобод від 04.11.1950 р. [Електронний ресурс]. — Режим доступу : http://zakon4.rada.gov.ua/laws/show/995_004.

Konventsiya pro zakhyst prav lyudyny i osnovopolozhnykh svobod vid 04.11.1950, http://zakon4.rada.gov.ua/laws/show/995_004.

13. Крылова Н. Проведение биомедицинских исследований на человеке / Н. Крылова [Електронний ресурс]. — Режим доступу : http://www.narcom.ru/publ/info/467.

Krylova N. Provedenie biomeditsynskikh issledovaniy na cheloveke, http://www.narcom.ru/publ/info/467.

14. Європейська соціальна хартія (ETS N 35) (укр/рос) від 18.10.1961 р. № ETS № 35 [Електронний ресурс]. — Режим доступу : http://zakon4.rada.gov.ua/laws/show/994_300.

Yevropeyska sotsialna khartiya (ETS № 35) vid 18.10.1961, http://zakon4.rada.gov.ua/laws/show/994_300.

15. Гельсінська декларація Всесвітньої медичної асоціації «Етичні принципи медичних досліджень за участю людини у якості об'єкта дослідження» [Електронний ресурс]. — Режим доступу : http://zakon4.rada.gov.ua/laws/show/990_005.

Helsinska deklaratsiya Vsesvitnoyi medychnoyi asotsiatsiyi «Etychni pryntsypy medychnykh doslidzhen za uchastyu lyudyny u yakosti obekta doslidzhennya», http://zakon4.rada.gov.ua/laws/show/990_005.

16. Міжнародний пакт про громадянські і політичні права від 16.12.1966 р. [Електронний ресурс]. — Режим доступу : http://zakon4.rada.gov.ua/laws/show/995_043?nreg=995_043&find=1&text=%EC%E5%E4&x=-842&y=-15589#w11.

Mizhnarodnyi pakt pro hromadyanski i politychni prava vid 16.12.1966, http://zakon4.rada.gov.ua/laws/show/995_043?nreg=995_043&find=1&text=%EC%E5%E4&x=-842&y=-15589#w11.

17. Міжнародний пакт про економічні, соціальні і культурні права від 16.12.1966 р. [Електронний ресурс]. — Режим доступу : http://zakon4.rada.gov.ua/laws/show/995_042.

Mizhnarodnyy pakt pro ekonomichni, sotsialni i kulturni prava vid 16.12.1966, http://zakon4.rada.gov.ua/laws/show/995_042.

18. Конвенція про захист прав і гідності людини щодо застосування біології та медицини: Конвенція про права людини та біомедицину [Електронний ресурс]. — Режим доступу : http://zakon4.rada.gov.ua/laws/show/994_334.

Konventsiya pro zakhyst prav i hidnosti lyudyny shchodo zastosuvannya biolohiyi ta medytsyny: Konventsiya pro prava lyudyny ta biomedytsynu, http://zakon4.rada.gov.ua/laws/show/994_334.

19. Список подписаний и ратификаций Конвенции о защите прав и достоинства человека в связи с применением достижений биологии и медицины: Конвенция о правах человека и биомедицине (ETS № 164) (Овьедо, 04.04.1997 г.) [Электронный ресурс]. — Режим доступа : http://zakon4.rada.gov.ua/laws/show/994_529.

Spisok podpisanij i ratyfykatsyi Konventsii o zaschste prav i dostoinstva cheloveka v svyazi s primeneniem dostizheniy biologiy i meditsyny: Konventsia o pravakh cheloveka v biomeditsyne (ETS № 164) (Oviedo, 04.04.1997, http://zakon4.rada.gov.ua/laws/show/994_529.

20. Конституція України від 28.06.1996 р. / Konstytutsiya Ukrayiny.

21. Закон України «Основи законодавства України про охорону здоров'я» від 19.11.1992 р. № 2801-XII Osnovy zakonodavstva Ukrayiny pro okhoronu zdorov'ya.

22. Закон України «Про лікарські засоби» від 04.04.1996 № 123/96-ВР.

Zakon Ukrayiny «Pro likarski zasoby».

23. Чекман С. Сучасні основи біоетики медико — біологічних досліджень / С. Чекман, В. Ф. Шаторна, Я. С. Яскевич, В. І. Гарець, О. О. Савенкова, М. І. Загородний // Вісник проблем біології і медицини. — 2011 — Вип. 3. — Т. 3 (89). — С. 30–33.

S. Chekman, V. Shatorna, Ya. Yaskevych, V. Harets, O. Savenkova, M. Zahorodniy, Suchasni osnovy bioetyky medyko-biolohichnykh doslidzhen [in]: Visnyk problem biolohiyi i medytsyny, 2011,Vyp. 3, T.3 (89), S. 30–33.

24. Пустовіт С. В. Біоетичні принципи та механізми регулювання медико-біологічних досліджень / С. В. Пустовіт // Современные проблемы токсикологи. — № 4. — 2010. — С. 5–9.

S. Pustovit, Bioetychni pryntsypy ta mekhanizmy rehulyuvannya medyko-biolohichnykh doslidzhen [in] Sovremennye problemy toksikologii, № 4, 2010, S. 5–9.

25. Яскевич Я. С. Биомедицинские исследования в контексте трансдисциплинарно-синергетической методологии / Я. С. Яскевич // Інтегративна антропологія. — 2014. — № 1 (23). — С. 4–15; Биоэтика. Вопроссы и ответы / под. ред. Б. Г. Юдина, П. Д. Тищенко. — М. : Прогресс — Традиция, 2005.

Ya. Yaskevych, Byomeditsynskie issledovania v kontekste transdistsiplinarno-sinergeticheskoi metodologii [in]: Intehratyvna antropolohiya, 2014, № 1(23), S. 4–15., Bioétika. Voprossy i otvety / pod. red. B. Yudyna, P. Tyshchenko, M. : Prohress-Tradytsiya, 2005.

26. Етичні комітети: становлення, структура, функції / під ред. В. Л. Кулініченка, С. В. Всковшиніної. — К. : Видавець Карпенко В.М., 2002. — 160 с.; Мальцев В. И. Независимые этические комитеты: регламент работы и задачи / В. И. Мальцев, Т. К. Ефимцева // Український медичний часопис. — 2000. — 2 (16) — С. 48–51.; Пустовіт С. В. Біоетичні принципи та механізми регулювання медико-біологічних досліджень / С. В. Пустовіт // Современные проблемы токсикологи. — №4. — 2010. — С. 5–9.

Etychni komitety: stanovlennya, struktura, funktsiyi [Pid red. V. Kulinichenka, S. Vskovshyninoyi], K.: Vydavets, Karpenko V., 2002, 160 s.; Maltsev V., T. Efymtseva, Nezavisimye étichekie komitety: reglament raboty i zadachi [in]: Ukrayinskiy medychnyy chasopys. — 2000. — 2 (16) — S. 48–51.; S. Pustovit, Bioetychni pryntsypy ta mekhanizmy rehulyuvannya medyko-biolohichnykh doslidzhen [in]: Souremennye problemy toksikolohii, №4 2010, S. 5–9.

27. НАКАЗ МОЗ Про затвердження Порядку проведення клінічних випробувань лікарських засобів та експертизи матеріалів клінічних випробувань і Типового положення про комісії з питань етики [Електронний ресурс]. — Режим доступу : http://zakon4.rada.gov.ua/laws/show/z1010-09; Наказ МОЗ ТИПОВЕ ПОЛОЖЕННЯ про комісію з питань етики [Електронний ресурс]. — Режим доступу: http://zakon4.rada.gov.ua/laws/show/z1462-12.

Nakaz MOZ Pro zatverdzhennya Poryadku provedennya klinichnykh vyprobuvan likarskykh zasobiv ta ekspertyzy materialiv klinichnykh vyprobuvan i Typovoho polozhennya pro komisiyi z pytan etyky, http://zakon4.rada.gov.ua/laws/show/z1010-09; Nakaz MOZ Typove polozhennya pro komisiyu z pytan etyky http://zakon4.rada.gov.ua/laws/show/z1462-12.

Надійшла до редакції 19.04.2016 р.

Кашканова Н. Роль деонтологических норм в формировании законодательства, регулирующего порядок проведения медико-биологических исследований с участием человека. Статья посвящена проблематике правового регулирования медико-биологического эксперимента на людях. В частности автором рассматриваются факторы, обусловившие появление правового регулирования применения медико-биологического эксперимента на людях, имеющих сложный характер и связаных с необходимостью обеспечения личных прав и свобод человека, нацеленные на недопущение их нарушения. Отдельно автором анализируется, отечественное законодательство Украины в сфере здравоохранения, которое на национальном уровне обеспечивает правовое регулирование отдельных вопросов проведения медико-биологических экспериментов на людях. Автор делает выводы о необходимости научного переосмысления особенностей договорного регулирования отношений при использовании медико-биологических экспериментов на людях и подчеркивает необходимость выработки единых доктринальных подходов к совершенствованию законодательства Украины и приведения его в соответствие с международными правовыми стандартами в сфере здравоохранения. Вместе с тем, автор обращает также внимание на необходимость дальнейшего тщательного научного исследования особенности уго-

ловно-правовых отношений, возникающих в результате проведения таких экспериментов на людях.

Ключевые слова: права человека, биомедицинские исследования, клинические испытания, лекарственные средства, информированное согласие, зарождения и становления правового регулирования осуществления медико-биологического эксперимента на людях

Kashkanova N. The role of deontological norms in formation of legislation regulating the procedure of medical and biological research involving humans

This article is devoted to the problems of legal regulation of medical and biological experiments on humans. In particular, the author examined the factors determined the appearance of legal regulation of the use of medicobiological experiments on humans that have a complex nature and related to the need to ensure individual rights and freedoms, aimed at preventing violations. Separately, the author analyzed the national legislation of Ukraine in the health sector, which on the national level provides legal regulation of certain issues of medicobiological experiments on humans. The author made conclusions about the necessity of rethinking of the peculiarities of contractual regulation of relations in the application of medicobiological experiments on humans, and emphasized the need to develop a unified doctrinal approach to improving the legislation of Ukraine and bring it in accordance with international legal standards in health care. At the same time, the author also noted the need for further comprehensive scientific research of the features of criminal and legal relations arising as a result of such experiments on humans.

Keywords: human rights, biomedical research, clinical trials, medical products, informed consent, appearance and formation of legal regulation, realization of medical and biological experiments on humans

ISSN 2308-0361

PARLIAMENTARY HEARINGS IN UKRAINE: THE EXPERIENCE AND PROSPECTS

Olena Chomahashvili,
head of the commercial designations Department of industrial property of the Intellectual Property Research Institute of the NALS of Ukraine, PhD in Law, associate professor

Чомахашвілі О. Парламентські слухання в Україні: досвід та перспективи.
В статті увага приділена вивченню теоретичної та нормативно-правової основи порядку проведення парламентських слухань в Україні та окресленню межі обов'язковості; розглянуто практику проведення парламентських слухань в Україні на прикладі екологічної сфери та розглянути виконання прийнятих вказівок; проаналізовано ситуацію сьогодення у сфері проведення парламентських слухань та сформульовано пропозиції щодо розвитку цього питання. Пропонується розглядати парламентські слухання не тільки як форму парламентського контролю, а і як спосіб зворотного зв'язку з об'єктом управління. Докладно розглянуто питання правових та організаційних засад проведення парламентських слухань.

Досліджено теоретичну та нормативно-правову основу порядку проведення парламентських слухань в Україні. Автор наголошує, що положення про проведення парламентських слухань у Верховній Раді України не визначає наслідки неприйняття Верховною Радою України Постанови щодо схвалення рекомендацій учасників слухань. Розглянувши практику проведення парламентських слухань на прикладі екологічної сфери є очевидним, що більшість прийнятих вказівок не були виконані. Проаналізувавши ситуацію у сфері проведення парламентських слухань були сформульовані такі пропозиції щодо розвитку: створення належної нормативно-правової основи організації і проведення парламентських слухань, з метою повноцінного використання потенціалу контрольної функції парламенту; посилення інформування широкого загалу суспільства щодо змістовного наповнення парламентських слухань; залучення фахівців та експертів до участі у парламентських слуханнях з подальшим опублікуванням їх виступів.

Ключові слова: проведення парламентських слухань, парламентський контроль, контрольна функція парламенту, екологічні права.

Parliamentary hearings are essential for the proper performance of the Verkhovna Rada of Ukraine of its functions. They are held to examine issues of public interest and require legislative regulation. Parliamentary hearings influence the planning bill works because their recommendations are determined by legislation to be developed and adopted for the regulation of certain spheres of social relations. They also generally act as a guideline for design norm of the state because their results are recommended to take not only in laws but in other regulations.

Parliamentary hearings contribute to the transparency of the parliament, as soon as they are conducted publicly and openly with direct radio broadcast and their transcripts posted on the official website of the Verkhovna Rada of Ukraine. In addition, due to the active participation of the public they are effective means of dia-

logue between the government and society in whole.

At the same time the parliamentary hearings require certain improvements and implementation of the recommendations [1, 5].

Parliamentary hearings are an integral part of parliamentary government, they have a particular place and role in the multifaceted activities of representative bodies and held to examine issues of public interest and require legal regulation at all [2].

The purpose of the research is to analyze the current legislation of Ukraine and generalize the practice of parliamentary hearings to determine the legal basis of positive changes, implementation of the adopted recommendations; formulate the algorithm of necessary actions to improve the dialogue between the public and government.

We propose to consider parliamentary hearings not only as a form of parliamentary control, but also as the way of feedback control object [1, 97].

Parliamentary hearings held in Parliament to examine issues of public interest and require legislative regulation.

Parliamentary hearings held during the session, usually not more than once a month during the week, which is given for work within committees, fractions (parliamentary groups).

The proposal for parliamentary hearings shall be made on the basis of a decision taken by corresponding with issues in a draft resolution of the Verkhovna Rada, which has determined the theme of the parliamentary hearings and date of the meeting. Only one thematic issue can be offered for the discussion at the parliamentary hearings.

The issue of parliamentary hearings is included in the agenda of the parliamentary session without a vote.

The decision on the subject, date and time of the parliamentary hearings is adopted by the Parliament no later than 30 days before the elections. In the decision of the Verkhovna Rada of Ukraine is also indicated a committee or committees responsible for preparation of parliamentary hearings.

The decision of parliamentary hearings of the Verkhovna Rada is published in the Voice of Ukraine within 10 days after the date of its adoption.

The proposals to hold parliamentary hearings on the issues that have been the subject of the Verkhovna Rada of the current convocation may be made no earlier than one year after the previous parliamentary hearings in regard of the topic.

Many representatives are invited to participate in the hearings in the Parliament. Among them are the representatives of public authorities, local governments, political parties and other associations, academic institutions, members of the public who want to take part in parliamentary hearings and filed no later than five days by the committee that is preparing for hearings.

The committee, which is preparing to hold parliamentary hearings, makes a list of invitees for hearings, conducts hearings and parliamentary order of performances of participants. The list of invitees for parliamentary hearings is submitted for the approval to the Chairman of Verkhovna Rada of Ukraine no later than three days before the elections.

Parliamentary hearings are conducted publicly and openly with direct radio and, if necessary, TV broadcasting.

During the parliamentary hearings the Parliament during the plenary session adopts a resolution of Verkhovna Rada of Ukraine, which approves the relevant recommendations [2].

Legal regulation of the organization and conduct of parliament and committee hearings in Ukraine. Therefore, our research highlights some of their results. An analysis of regulations on holding hearings in committees of the Verkhovna Rada of Ukraine and the parliamentary hearings in the Parliament of Ukraine follows that order of hearings and ad hoc special parliamentary commission remains unresolved.

At the same time, the practice of temporary special commissions of the Verkhovna Rada of Ukraine suggests that such commissions are formed to prepare and review the most important laws (*e.g.* laws amending the Constitution of Ukraine). Taking into account, the Regulations on hearings in committees of the Verkhovna Rada of Ukraine should be extended to temporary special commission regards the powers of commissions for the preparation and preliminary consideration of the bills.

In case if the status of investigation commissions is irregular at law, the Parliament should regulate the procedure of such commissions at least by appropriate resolution that would have endorsed the Regulation on the hearings in the investigation of the Verkhovna Rada of Ukraine.

The regulations on holding of parliamentary hearings in the Verkhovna Rada of Ukraine, providing mandatory involvement in hearings of representatives of state and local authorities, political parties and other associations, academic institutions, the public, do not specify the criteria for «selection» of participants mechanisms to ensure participation in hearings of representatives from all (or at least most) stakeholders.

The Parliamentary hearings on assigned role in the legislative process and implementation of control powers strongly suggest norm Regulations on holding of parliamentary hearings in the Verkhovna Rada of Ukraine, according to which hearings a draft decision on the results of hearings shall be distributed to the deputies the Verkhovna Rada of Ukraine beforehand.

In other words, a hearing conducted after the result, approximately known in advance, which eliminates the need for its conduct. The corresponding provisions deserve the critical evaluation.

As it was mentioned above, the lack of legal regulation of the conduct of parliamentary and committee hearings is the fact that the persons concerned have actually deprived of the right to make public its position on issues that are discussed at the hearings if they cannot because of regulatory restrictions publicize this position in his speech (speech) during the hearings.

This assertion is supported by the fact that under the provisions the burden of preparation of analytical materials for the parliamentary hearings rests with the Cabinet of Ministers and other executive bodies and local authorities. The apparatus of the Verkhovna Rada of Ukraine should be obliged to reproduce and distribute to the participants the hearings materials submitted by representatives of all stakeholders.

As the authors of the study say [3], critical assessment of merits and standards of provisions under which MPs materials prepared for parliamentary hearings, given 5 days before the hearing, and other participants in the hearing — on the day of their conduct during registration. In this approach, the majority of participants will not be able to fully acquaint with the contents of these materials, make comments and suggestions submitted for discussion. In their view, failing production of sufficient copies of information and analytical materials, the latter would be placed on the official website of the Supreme Council for 5 days before the hearing so that the public hearings and participants could get acquainted with them.

Below it is discussed the content of the recommendations of the parliamentary hearings and investigated their status of their implementation. Since the subject of parliamentary control is the work of the Government, and not the entire system of executive power, the author examined the content of the recommendations of the participants in the hearing only in the part that directly relates to the Cabinet of Ministers of Ukraine.

The authors did not aim to examine and analyze the performance of any and all recommendations of the seminar par-

ticipants addressed the Cabinet of Ministers of Ukraine, limited only by clearly defined guidelines (*e.g.* for a defined normative acts, drafting legislation, increase / decrease in funding of certain programs etc.).

Such approach is due primarily to the fact that the lack of clearly defined guidelines makes virtually impossible to control the completeness and timeliness of their implementation.

Also, the authors did not consider the content and results of the implementation of the recommendations provided by the Government taking certain organizational and administrative measures. This is because the content of the instructions of the Cabinet of Ministers of Ukraine.

The basic source of the study are the bills that were or are under consideration of the Verkhovna Rada of Ukraine, regulations of the Cabinet of Ministers, the Verkhovna Rada of Ukraine on the recommendations of the parliamentary hearings and for the information of the Cabinet of Ministers heard during the days of the Government in the Parliament of Ukraine, laws of Ukraine (among them stands out separately by the State budget of Ukraine for the relevant years), speeches of representatives of the Government during the Days of the Government in the Parliament of Ukraine, and other publicly available printed and electronic sources of reliable information.

Failure execution / partial execution / failure of certain recommendations were considered in this study, the authors started from the following. Implementation guidelines means its full implementation in the prescribed recommendation term (if the timing of the recommendations provided, the implementation of recommendations considered its performance within a reasonable time — that is one to two years or until the next parliamentary hearings on similar issues, starting from the date of adoption of the Resolution on guidelines implementation of which is subject to analysis). In partial fulfillment of recommendations of the authors implies its partial implementation (*i.e.* the extent narrower than foreseen recommendation) in the prescribed period or recommendation within reasonable time.

Under the guidelines author understands its failure to fully or failure within a fixed or reasonable time. As the results of the monitoring results of implementation of the recommendations of the parliamentary hearings the author found the main reasons for failure of guidelines of developed proposals for improving the organization and conduct of parliamentary hearings and monitoring their implementation. Parliamentary hearings on environmental issues «On compliance with environmental legislation in Ukraine, implementation areas and improve environmental policy» (29.11.2000) (On recommendations of parliamentary hearings on compliance with environmental legislation in Ukraine, and directions of improvement of environmental policy (№ 2130-III of 07.12.2000).

The content of hearings and recommendations of participants of parliamentary hearings held on 29.11.2000 is a result of discussion of the issue of compliance with the requirements of environmental legislation in Ukraine and ways of implementation and improvement of environmental policy. It was said that in recent years in Ukraine were formed the foundations of environmental law, made structural reforms in the field of environment and natural resources, laid the foundations of a new environmental policy and mechanisms of its implementation. At the same time, the lack of a clear strategy for reforming society, inconsistency of reforms in the field of environment and natural resources, uncoordinated and inconsistent actions of central and local executive authorities and local governments do not promote proper efficiency and effectiveness of program elements. Basic directions of the state policy in the field of the environment, natural resources and environmental safety were approved by the Verkhovna Rada of Ukraine in March 1998.

Financing of environmental programs and environmental protection measures are inadequate. The inertia in implementing of market mechanisms of financial support for environmental activities has led to the steady decline of investments in this area. It is under-funded protection measures and sustainable land use. There is the need of internal coordination and further improvement and development of existing environmental legislation and economic mechanisms of nature. ◆

Список використаних джерел / List of references

1. *Parliamentary hearings — an important factor in improving national legislation: Proceedings of the Round Table / under the general editorship V. Zaichuk. — K. : Institute of Legislation of the Verkhovna Rada of Ukraine, 2012. — 269 p.*
2. *Regulations of the Verkhovna Rada of Ukraine [Electronic resource]. — Access mode : http: / /zakon2.rada.gov.ua/laws/show/1861-17/paran22#n22.*
3. *[Electronic resource]. — Access mode : http: / /parlament.org.ua/index.php? Action = publication & id = 8 & ar_id = 1081 & iar_id = 678 & as = 2.*
4. *Paliament [Electronic resource]. — Access mode : parlament.org.ua.*
5. *The Law of Ukraine «On Committees of the Verkhovna Rada of Ukraine» (Supreme Council of Ukraine, 1995, № 19, p. 134, 1998 r., № 40-41, p. 250, 2000, № 12, Art. 96, № 13, p. 107).*

Надійшла до редакції 27.05.2016 р.

Чомахашвили А. Парламентские слушания в Украине: опыт и перспективы. В статье внимание уделено изучению теоретической и нормативно-правовой основы порядка проведения парламентских слушаний в Украине и обрисовке пределов обязательности; рассмотрена практика проведения парламентских слушаний в Украине на примере экологической сферы и рассмотреть выполнение принятых указаний; проанализирована ситуация в сфере проведения парламентских слушаний и сформулированы предложения по развитию этого вопроса. Предлагается рассматривать парламентские слушания не только как форму парламентского контроля, но и как способ обратной связи с объектом управления. Подробно рассмотрены вопросы правовых и организационных основ проведения парламентских слушаний.

Исследовано теоретическую и нормативно-правовую основу порядка проведения парламентских слушаний в Украине. Автор отмечает, что положение о проведении парламентских слушаний в Верховной Раде Украины не определяет последствия непринятия Верховной Радой Украины Постановления об принятия рекомендаций участников слушаний. Рассмотрев практику проведения парламентских слушаний на примере экологической сферы очевидно, что большинство принятых указаний не были выполнены. Проанализировав ситуацию в сфере проведения парламентских слушаний были сформулированы следующие предложения по ее развитию: создание надлежащей нормативно-правовой базы организации и проведения парламентских слушаний, с целью полноценного использования потенциала контрольной функции парламента; усиление информирования широкой общественности общества по содержательному наполнению

парламентских слушаний; привлечение специалистов и экспертов к участию в парламентских слушаниях с последующим опубликованием их выступлений.

Ключевые слова: проведение парламентских слушаний, парламентский контроль, контрольная функция парламента, экологические права

Chomahashvili O. Parliamentary hearings in Ukraine: experience and prospects. In the article attention is paid to the theoretical and legal foundations of the order of parliamentary hearings in Ukraine and outlining their mandatory limits. It is analysed the practice of parliamentary hearings in Ukraine on the example of the environmental sector and consider the fulfillment of instructions; the today situation in parliamentary hearings and formulated the proposals for the development of this issue. It is proposed to consider the hearings not only as a form of parliamentary control, but also as a way of feedback of control object. Details analysis of legal and institutional framework of parliamentary hearings was made.

The theoretical and legal basis of the order of parliamentary hearings in Ukraine was studied. The author emphasizes that provision of parliamentary hearings in the Parliament of Ukraine does not determine the consequences of the rejection of the Verkhovna Rada of Ukraine Resolution on approval of the recommendations of the seminar participants. Having examined the practice of holding parliamentary hearings on the example of the environmental sphere is obvious that most of the taken steps were not met. After analyzing the situation in the parliamentary hearings there were formulated following proposals for development of them: an appropriate regulatory basis for the organization and holding of the parliamentary hearings, in order to fully exploit the potential of the control function of Parliament; strengthening of informing the public about the social content of parliamentary hearings; involvement of specialists and experts to participate in the hearings, followed by the publication of their performances.

Key words: parliamentary hearings, parliamentary control, the control function of Parliament, the environmental law

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