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Confiscation as a special sign of protection of intellectual property rights

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Abstract

Despite the fact that Ukraine has a legislative framework in the field of intellectual property, some issues remain unresolved, in particular, it is important to improve the mechanisms for protecting intellectual rights, among which one of the most effective is confiscation. The purpose of the study is to explore the existing problems of criminal law and administrative law confiscation as a special feature of the protection of intellectual property rights. Key research methods include dialectical analysis, which helped obtain the most objective information about problematic processes and phenomena related to confiscation as a special feature of intellectual property protection, and deduction and induction, used to examine regulations. The paper analyses the state of legal protection of intellectual property rights and measures taken by the state to reform the intellectual property system. Attention is drawn to the fact that public relations in the studied area relate to criminal

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and administrative legal mechanisms related to confiscation. It is noted that depending on the violated regulation, criminal or administrative confiscation is applied to the violator. The paper analyses Ukrainian and foreign regulations that focus on one of the types of ensuring intellectual property rights – confiscation as a special feature of protecting intellectual property rights. Certain shortcomings of the Ukrainian legislation are noted, and it is proposed to make changes to it. Circumstances that motivate the examination of the legislative reflection of confiscation as a special feature of intellectual property protection are outlined. The findings of the study can be utilised by lawyers and officials of law enforcement and other state bodies responsible for confiscation measures directly related to the protection of intellectual property rights. Individual conclusions can serve as a basis for further research on confiscation as a special feature of the protection of intellectual property rights, and proposals can serve to improve the relevant legislation

Keywords: state; law; protection; violation; copyright holder; court

Introduction

The modern world is difficult to imagine without intellectual products, which are the result of creative intellectual activity and constitute objects of intellectual property law. A distinctive feature of intellectual products is that only those results of creative mental search that meet the requirements of the law and are recognised as eligible are subject to legal protection and eligible for rights holders. The necessity of its protection is explained by the gradual process of economic intellectualisation. Ultimately, this affects the economic security of a particular country (Baranov *et al.*, 2020).

An indicator of the well-being of the country's population is the share of gross domestic product per citizen, which depends entirely on the country's economic development. The 21st century has brought significant changes to the global economy. There is an ongoing, sometimes unrecognised, transition from an economy of things to a knowledge-based economy, where additional value is predominantly formed through the results of intellectual and creative activity, which are, in most cases, objects of intellectual property law (Tsybulov & Romashko, 2021). The

field of intellectual activity is rapidly developing, so there is a need to protect an intellectual product. The Constitution of Ukraine (1996) guarantees the protection of intellectual property, and this guarantee corresponds to the challenges of today as the outcomes of creative activity have reached the level of market relations.

The international community also pays considerable attention to intellectual property issues, which is why the world celebrates the International Day of Intellectual Property (World IP Day). The intellectual product is legally protected in most countries of the world. Countries in the Western world have a number of regulations designed to protect the rights to an intellectual product. Ukraine also has its own legislation on intellectual property

To bring the legislation on the protection of intellectual activity in line with European Union standards, Resolution of the Cabinet of Ministers of Ukraine No. 179 "National Economic Strategy for the Period until 2030" (2021) was adopted, outlining principles for the protection of intellectual property rights. Moreover, a significant step

on this path was the Law of Ukraine No. 2974-IX “On Amendments to Certain Legislative Acts of Ukraine Regarding Strengthening the Protection of Intellectual Property Rights” (2023).

In recent years, various aspects of the mechanism for protecting and safeguarding intellectual property have been addressed by Ukrainian researchers. In Particular, I. Hryshko and M. Utkina (2020) focused on defining the concepts of “intellectual property” and “protection of intellectual property rights.” A. Shabalin (2020) explained the main methods of civil protection of intellectual rights, analysed special methods, and emphasised methods not directly stipulated by the law but could be chosen through judicial procedure. V. Shmorhun (2020) emphasised the proper legal protection of trademarks, trade names, and geographical indications. O. Korotun (2020) provided theoretical and practical generalisation of administrative legal protection of intellectual property. A. Kudin (2021) investigated and disclosed the tools of public administration of patent activities. G. Lebedeva (2021) formulated proposals allowing the application of certain levers for protecting civil rights in cases of illegal use of intellectual products. According to A. Lisovyi and O. Dmytruk (2020), effective means of protecting intellectual product owners’ rights could include restrictions on websites with pirated content. I. Kovalenko (2022) addressed the issue of plagiarism of computer programmes posted online and compared norms of legal protection of intellectual property in Ukraine and the USA. I. Tarasova (2018) examined the protection of intellectual property in education, particularly regarding the protection of results of educational activities.

In the aforementioned studies, researchers primarily focus on administrative and civil law aspects of intellectual property protection. However, issues of confiscation as a form of punishment

and special confiscation, which is not a punishment but is connected with the protection of intellectual property rights, remain unexplored.

The purpose of this study is to explore theoretical, practical, and legislative perspectives on confiscation as a special feature of intellectual property protection.

To achieve this purpose, the following tasks are set: characterise the state of legal protection in the field of intellectual property; analyse legislative grounds for applying confiscation and special confiscation in domestic and foreign legislation; identify ways to improve the legislative regulation of the studied sphere of societal relations.

Materials and Methods

During the research, a system of scientific techniques was used. Specifically, the dialectical method enabled the examination of problematic issues related to confiscation and special confiscation, contributing to the understanding of the legal nature of confiscation. Deductive and inductive methods were utilised to examine the normative application of confiscation and special confiscation within the framework of criminal, administrative, and international legislation. The method of abstraction facilitated the transition from criminal law analysis of confiscation to administrative confiscation. A synergistic approach was applied to determine the expected research results, which helped identify avenues for improving legislation in the studied sphere of relations.

The normative foundation for the paper was Ukrainian regulations, including the Constitution of Ukraine, and provisions of criminal, administrative, and international legislation. The norms of the Constitution of Ukraine provided the basis for exploring issues regarding the state’s guarantee of protection for subjects of intellectual property. Resolution of the Cabinet of Ministers

of Ukraine No. 179 “National Economic Strategy for the Period until 2030” (2021) allowed the investigation of the main directions of state policy regarding the protection of intellectual property rights, while the Law of Ukraine “On Amendments to Certain Legislative Acts of Ukraine Regarding Strengthening the Protection of Intellectual Property Rights” (2023) enabled insights into changes made to certain regulations of Ukraine concerning the reinforcement of intellectual property rights.

The examination of Law of Ukraine “On Amendments to Certain Laws of Ukraine Regarding the Creation of a National Intellectual Property Authority” (2020) provided an understanding of the main stages of reforming the state system of intellectual property and the authority of the created National Intellectual Property Office. The exploration of the Decree of the Cabinet of Ministers of Ukraine “Some Issues of the National Intellectual Property Authority” (2022) determined that the Ukrainian National Office of Intellectual Property and Innovation fulfils the functions of the National Intellectual Property Authority.

The investigation of criminal legislation was necessary to ascertain that the institution of confiscation as a special feature of intellectual property rights protection is stipulated by articles 176, 177, 203-1, 229 of the Criminal Code of Ukraine (2001) (hereinafter – CCU). The investigation of Article 96-1 of the criminal law was necessary to assess the feasibility of applying special confiscation for protecting the interests of intellectual property owners.

To further investigate the issues of protection of the rights of intellectual product owners, the norms of the administrative legislation of Ukraine were considered. This allowed establishing that administrative liability for violations in the field of intellectual property is stipulated by Article

51-2 and Articles 156-3, 164-3, 164-6, 164-7, 164-8, 164-9, and 164-13, which also provide for confiscation. In addition, the norms of customs legislation regarding the protection of intellectual property rights were examined.

For the purpose of comparing Ukrainian and foreign legislation, the international experience of applying confiscation as a special feature of intellectual property rights protection was explored using the example of Belgian legislation (Code Pénal de la Belgique, 1867).

The study uses economic and legal journalism, judicial practice, analytical materials, and Internet resources.

Results and Discussion

Establishing violations of intellectual property rights is challenging because it involves encroachments on personal non-property or property rights of intellectual property. Practice shows that such infringements are mostly related to misappropriation of authorship, unauthorised use of intellectual property objects, and the like.

International protection of intellectual property rights is entrusted to the World Intellectual Property Organization (WIPO). Ukrainian legislation encompasses a substantial number of regulations related to intellectual property protection, which provide for civil, criminal, and administrative liabilities.

However, the existing system of intellectual property protection is not sufficiently effective, thus it cannot ensure adequate protection of subjective rights.

This viewpoint is supported by the Office of the United States Trade Representative (USTR) report (2021) concerning intellectual property rights enforcement. Ukraine has been placed on the priority watch list, expressing concerns about insufficient intellectual property protection.

The importance and complexity of the existing issues in the field of intellectual property, reflecting the existing shortcomings within the country, drive researchers to seek solutions, resulting in various perspectives. This ranges from fulfilling a control function in society (Mernyk, 2023) and implementing changes associated with establishing a stable and integrated system of state institutions (Petryshyn *et al.*, 2021), to obligatory involvement of experts in the intellectual property sphere in reform processes (Gusarov, 2020).

It is worth noting that a reform of the state intellectual property system was initiated in Ukraine in 2016, leading to significant changes. For instance, the Law of Ukraine “On Amendments to Certain Laws of Ukraine Regarding the Creation of a National Intellectual Property Authority” (2020) led to the establishment of a national intellectual property office responsible for implementing state policies in this sphere.

Furthermore, problems within the state intellectual property system prompted the Cabinet of Ministers of Ukraine to issue Decree No. 43-r “Some Issues of the National Intellectual Property Authority” (2022), designating the Ukrainian National Office of Intellectual Property and Innovations as the National Intellectual Property Authority from November 8, 2022.

Ukrainian legislation regarding intellectual property protection is evolving slowly. However, to ensure the country’s European integration and attract foreign capital, it is necessary to reformat the approach to the field of intellectual activity. A reliable and stable alignment of Ukrainian legislation with European Union norms is a rational path. This aligns with the view of L. Ivashova *et al.* (2022) that foreign states’ legislation evolves faster than corresponding legislation changes in Ukraine.

Investigating Ukrainian legislation on intellectual property protection allows asserting that,

in the initial stages of legislation formation in this field, protection of intellectual property rights was ensured by civil law norms. However, such protection of intellectual property rights alone has become insufficient over time. Thus, current Ukrainian legislation includes regulations providing for civil, criminal, and administrative liabilities for intellectual property rights infringements (Lisovyi, 2021).

Analysis of Article 41 of the Constitution of Ukraine (1996) allows confirming that the right to property is protected by the state. Consequently, property confiscation is applied solely based on a court decision.

In accordance with the provisions of the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (2005), confiscation can also be linked to criminal offences related to counterfeiting and pirate distribution of goods, potentially violating intellectual property rights.

As stated by D.J. Solove (2020), the value of confidentiality cannot be empirically determined by individual assessments and cannot be reduced to a monetary figure based on specific transactions, as the value of confidentiality constitutes a foundational element of society rather than a commodity traded on the market.

Therefore, for the implementation of legal asset confiscation, it is required that such a penalty is established by law, followed by a court decision, and in certain cases, information related to asset confiscation should be treated confidentially.

The institution of confiscation is regulated by a number of legislative acts, so it is reasonable to examine them. In the sanctions of the articles of the Special part of the criminal law, there are a significant number of articles the norms of which provide for the confiscation of property. In accordance with

the provisions of the current CCU (2001), liability for violation of intellectual property rights is provided for in Articles 176, 177, 203-1, 229.

According to the Criminal Code of Ukraine (CCU) of 2001, criminal offences are divided into misdemeanours and felonies. Regarding misdemeanours, the scope of misdemeanours against intellectual property rights under the current CCU is limited, for example, Article 232. Analysis of articles related to the protection of intellectual property suggests that sanctions once included confiscation. However, in 2016, confiscation and destruction as penalties were removed from Articles 176, 177, 203-1, and 229 of the CCU. This move seems unwarranted as counterfeit products could re-enter circulation. To strengthen accountability in intellectual property protection, legislative changes to reintroduce confiscation as a penalty in Articles 176, 177, 203-1, and 229 of the CCU would be advisable.

In addition to confiscation as an additional penalty, another criminal legal measure was introduced to the CCU in 2013 – the concept of special confiscation (Kulchytskyy & Sliusar, 2020). The Constitutional Court ruled that special confiscation terminates not ownership rights but illegal and unscrupulous possession (Bakonina, 2022). It can be assumed that the special confiscation provided for in Article 96-1 of the CCU (2001) may offer some opportunities for legally re-introducing counterfeit products into circulation. To prevent this, it is suggested to exclude special confiscation concerning counterfeit products from Article 96-1 CCU, as such products should be destroyed (Law of Ukraine No. 981-VIII..., 2016). This strict stance of Ukrainian legislation is consistent with international law (Agreement on Trade-Related Aspects..., 1994).

It is notable that among EU countries, Belgium's criminal legislation includes special confiscation as a form of punishment for offences and

misdemeanours related to items specified in the law. Belgian legislation provides the opportunity to apply special confiscation to items that were created as a result of an offence, which is important for preventing infringements in the field of intellectual property protection, as offenders, depending on the type of intellectual property, can produce counterfeit (pirated) goods (Code Pénal de la Belgique, 1867).

The source establishing administrative liability for offences against intellectual property rights is the Code of Ukraine on Administrative Offences (1984) (hereinafter – CUAO). Articles providing for administrative liability in the field of intellectual property include Article 51-2 and 156-3, 164-3, 164-6, 164-7, 164-8, 164-9, and 164-13. Analysis of these norms indicates that intellectual property offences under administrative law entail the confiscation of the items that were the subject of the offence, such as counterfeit products. The analysis of Article 51-2 of the CUAO provides grounds to state that confiscation of counterfeit products is envisaged for intellectual property rights violations (Code of Ukraine on Administrative Offences, 1984). However, the small fines for intellectual property rights violations specified in Article 51-2 of CUAO do not correspond to current realities, fail to fulfil a preventive function, and therefore constitute an ineffective mechanism in the fight against intellectual property rights violations. To enhance responsibility in the field of intellectual property protection, changes should be introduced to the sanction of Article 51-2 of CUAO, specifically introducing the possibility of destroying counterfeit products and raising the threshold for penalty sanctions.

According to Art. 461 of the Customs Code of Ukraine (2012) (Customs CU), the objects of infringement of intellectual property rights can be various objects of intellectual property rights

against which offences are committed at the customs border.

In addition to confiscation, Article 401 of Customs CU stipulates the destruction of goods that were imported with infringements of intellectual property rights. This type of destruction can be performed at the request of the right holder. An example of the implementation of the requirements of Article 401 of Customs CU can be found in cases involving a founder of a furniture brand.

One feature of confiscation in cases of customs violations is that it: 1) serves as an administrative penalty; 2) involves the compulsory seizure of goods and means of transport; 3) includes their gratuitous transfer to state ownership; 4) applies to the confiscation of vehicles, regardless of whether these goods or means of transport are owned by the offender, including in cases of intellectual property rights violations; 5) can be used both as a primary and additional administrative penalty. Regarding administrative, criminal offences, and violations of customs legislation related to the protection of intellectual property rights, the respective penalties do not correspond to the gravity of the committed offences against intellectual property rights. Article 476 of Customs CU (2012) is not consistent with Article 243. This is because the sanction of Article 476 does not include the destruction of counterfeits, while Article 243 allows for the disposal of confiscated goods, meaning counterfeits already confiscated and intended for state income can be reintroduced into commercial circulation.

Despite certain differences between confiscation as stipulated by administrative and customs legislation, it is worth noting that, in the analysis of cassation case No. 400/548/19, the Grand Chamber of the Supreme Court concluded that according to Article 461 of Customs CU, confiscation is one of the types of administrative penalties

for customs violations. Pursuant to the first part of Article 487 of Customs CU, proceedings in cases of customs violations are conducted in accordance with Customs CU, and to the extent not regulated by it – in accordance with CUAO (Resolution of the Grand Chamber..., 2020). Thus, based on the obtained results, legal argumentation should be regarded as a process that reflects legally significant activities involving substantiating statements using various means – legal and non-legal arguments. Such activities are communicative and are performed in various types of legal activities, often in the form of discourse (Rabinovych & Dudash, 2022).

Material goods have always had proper legal protection. However, the situation has rapidly changed with the emergence of new results of intellectual activity that required different approaches to legal protection. Products (goods) manufactured using intellectual property objects are quickly distributed worldwide, including within Ukraine, and enjoy additional demand, bringing additional profits to their rights holders, as a result of which such goods often become the subject of infringements. Whether the adopted regulations on the protection of intellectual property rights will be effective depends on many factors. Given the unsatisfactory state of legislation in this regard, one of the conditions for effective protection of intellectual property rights is the availability of effective legal mechanisms – including confiscation as a special feature of intellectual property protection.

Conclusions

Based on the provided information, there are grounds to assert that these issues are inadequately regulated by Ukrainian legislation.

The increasing commercialisation of intellectual property and the resulting presence of

counterfeiting, piracy, patent trolling, and the like require proper protection of intellectual property rights, cooperation with international organisations, and consideration of foreign countries' experience in this field. The legal mechanism for protecting intellectual property rights is a complex of legal means necessary for restoring and terminating infringements of authors' rights and applying state coercive measures to infringers.

An overview of scientific sources confirms that the protection of intellectual property rights is achieved through criminal law, administrative law, and civil law norms. This, in turn, results in diverse approaches to the effective application of confiscation and special confiscation as means of protecting intellectual property rights.

The international experience of applying special confiscation as a feature of intellectual property rights protection was examined through the example of the criminal legislation of Belgium. The analysis of provisions of the Agreement on Trade-Related Aspects of Intellectual Property Rights allows asserting that national legislation in matters of intellectual property protection is harmonised with the mentioned agreement, as it entails confiscation and/or destruction of goods involved in violations. For the enhancement of administrative confiscation, it would be appropriate to incorporate destruction of counterfeit products alongside confiscation under Article 51-2 of the CUAO.

Regarding customs legislation, fully agreeing with the need to confiscate counterfeit goods that were moved in violation of intellectual property rights, it would be appropriate to destroy such goods, and therefore, it is necessary to make changes to the Customs Code of Ukraine. Currently, Article 476 of the Customs CU does not provide for the destruction of counterfeit goods, and

Article 243 allows confiscated goods, including counterfeit ones, to be reintroduced into economic circulation, which contradicts international agreements stipulating non-alternative destruction of counterfeits.

To strengthen criminal liability in the field of intellectual property rights protection and ensure adequate liability, it is advisable to introduce changes to the sanctions of Art. 176, 177, 229 of the CCU, along with the confiscation and destruction of counterfeit products, materials/raw materials, and equipment used for their manufacture. Further exploration should substantiate the appropriateness of lowering the threshold for criminal liability under Articles 176, 177, 229 and increasing the fines.

It was found that the CCU introduced the institute of special confiscation. While approving the main provisions and considering the conducted study, it would be appropriate to exclude special confiscation from the sanction of Article 96-1 of the CCU concerning counterfeit products, materials/raw materials, and equipment used for their production, and instead provide for the destruction of such products.

The scientific originality of the study lies in the attempt to generalise the issues of confiscation and special confiscation as features of protecting intellectual property rights. Prospects for further research involve delving into the confiscation of intellectual products, developing new mechanisms for protecting intellectual rights, and seeking ways to improve existing legislative norms.

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None.

Conflict of Interest

None.

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Конфіскація як спеціальна ознака захисту прав інтелектуальної власності

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Анотація

Незважаючи на те що Україна має законодавчу базу у сфері інтелектуальної власності, деякі питання залишаються неврегульованими, зокрема актуально вдосконалити механізми захисту інтелектуальних прав, серед яких один з найдієвіших – конфіскація. Мета дослідження – вивчити наявні проблем кримінально-правової та адміністративно правової конфіскації як спеціальної ознаки захисту прав інтелектуальної власності. Ключові методи дослідження – діалектичний, який допоміг отримати максимально об'єктивну інформацію про наявні проблемні процеси і явища, пов'язані із конфіскацією як спеціальною ознакою захисту прав інтелектуальної власності, а також дедукція та індукція, застосовані для вивчення нормативно-правових актів. Проаналізовано стан правової охорони прав інтелектуальної власності та заходи, яких ужила держава щодо реформування системи інтелектуальної власності. Звернено увагу на те, що суспільні відносини в досліджуваній сфері стосуються кримінальних та адміністративних правових механізмів, пов'язаних з конфіскацією. Наголошено, що залежно від порушеної правової норми до порушника застосовуються кримінальна або адміністративна конфіскація. Проаналізовано українські та зарубіжні нормативно-правові акти, у яких зроблено акцент на одному з видів забезпечення прав інтелектуальної власності – конфіскації як спеціальної ознаки захисту прав інтелектуальної власності. Зауважено певні недоліки українського законодавства, з метою його вдосконалення запропоновано внести зміни. Окреслено обставини, що актуалізують дослідження стану законодавчого відображення конфіскації як спеціальної ознаки захисту прав інтелектуальної власності. Результати роботи, а також її частини можуть використати юристи, а також посадові особи правоохоронних та інших державних органів, які забезпечують заходи конфіскації, що безпосередньо пов'язані із захистом прав інтелектуальної власності. Окремі висновки можуть бути основою для подальшого дослідження конфіскації як спеціальної ознаки захисту прав інтелектуальної власності, пропозиції можуть слугувати для вдосконаленні відповідного законодавства

Ключові слова: держава; право; охорона; порушення; правовласник; суд