FORMATION OF THE INTELLECTUAL PROPERTY RIGHTS AS AN INDEPENDENT BRANCH OF LAW

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Abstract

The article reveals the process of formation of the intellectual property rights as a separate branch of jurisprudence and analyzes the modern interpretation of these rights. The concept of intellectual property is not static, it has changed and continues to change and therefore this branch of law is characterized by complex terminology and it needs constantly evolving legislation. The first laws concerning intellectual property rights and the very origin of this branch of law should be attributed to Western Europe of the IV century. However, these laws had the character of privileges and were not generally valid. Nevertheless, those did not take long to wait. The article notes four approaches to the definition of the essence of the term intellectual property.

Further, in the article modern problems of the international intellectual rights and their relevance in the conditions of globalization are analyzed. An important feature of intellectual property rights is a significant role in their trans-territorial settlement of international treaties and organizations.

The last part of the article analyzes current trends in the international regulation of intellectual law. The notion of territoriality and its influence on the development of private international law and international economic turnover in the field of intellectual property are disclosed.

Keywords: *intellectual property, international private law, international organizations, principle of territoriality, conflict of laws*

Introduction

The formation of the intellectual property right as a separate area of jurisprudence occurred relatively recently, with the entry into force of the Paris Convention for the Protection of Industrial Property (1883) and the Berne Convention for the Protection of Literary and Artistic Works (1886). The norms and provisions of these conventions laid the foundations of international intellectual property law, which were further developed due to the specific nature of the new areas of application and the corresponding complication of the practice of protected rights. The objective basis and species diversity of intellectual activity are presented as an endless process. Only the fact that the objects generating these rights are the results of human intellectual activity makes this category multispectral, covering all new fields of production, science, literature, art. This is natural, just like the fact that the capabilities of the human intellect, has no boundaries and is the leading and inexhaustible resource of social development in the modern world. Such a feature of the subject of research requires refinement and deeper analysis in revealing the essence of the very notion of intellectual property and its modern interpretations.

Evolution of practice and theory of intellectual property law

The concept of "intellectual property" is not static, it has changed and continues to change, which causes an objective need for legislative consolidation of moral and economic rights to the

results of creative activity. Hence the assertion that "intellectual property law is characterized by complex terminology, non-trivial problems and constantly developing legislation" [1, p. 79].

In the early stages of social development, intellectual property was not distinguished as an independent field of scientific research, although throughout the history of mankind works of painting, literature, architecture, as well as inventions of industrial and technological nature had been greaten and appreciated. Their social, economic and cultural role was very significant in the life and development of different peoples and humanity as a whole. As the first examples of the assertion of intellectual property rights, the law in ancient Greece can serve as the fact that the works of authors should be brought to the public in undistorted form, and even the royalty for creative activity was known to ancient Rome [4, p.20]. The reason for the emergence of legal norms governing the rights to the results of creative activity was the introduction of intellectual property in commercial circulation. Previously, many works were created for years and eventually became a public good. But when their number grew, there increased demand on them and it was necessary to prove copyright, legitimizing intellectual property and giving them the status of a commodity traded on the market. However, for a long time the rights to intellectual property had the character of privileges, they were not applied systematically and did not have any protection mechanisms.

Intellectual property began to take institutional parameters in the form of copyright with the advent of Gutenberg's typewriter machine in 1469th year. Thus, literary works and scientific researches became not only accessible to wide layers of the population, but also acquired an evidentiary basis of author's belonging. This marked the beginning of the commercialization of the results of intellectual activity. For the first time this sphere of activity began to bring not sporadic, but systematic incomes to its subjects. At the same time, there was a need for the authors to have the opportunity to enjoy the fruits of their creations, as well as to protect the works they created from being used by people who do not have any relation to them. An effective mechanism for this could be provided only by the state. The legislative function of the state became an increasingly necessary tool for the regulation of intellectual property relations. But this was a new and not entirely familiar sphere of legal regulation, in which it was necessary to deal with intangible property objects. Nevertheless, the rapid development of civilization, scientific and technological progress and rising of the cultural level of society as a whole pointed to the need to create certain legal guidelines for the actions of people engaged in intellectual activity. It was necessary to have a letter of the law, that is, "a normative act adopted in a special order by an organ of legislative power and possessing the highest legal force" [8, p.141]. As John Locke wrote, law is a constant rule for life when human activity becomes independent of the unstable, uncertain, unknown, autocratic will of the other person [12]. This definition has a direct relation to the product of intellectual activity, as it is intangible, and to which any member of society can join and not only in his country, but also beyond his borders.

The first laws concerning intellectual property rights, as well as the very origin of this field of law, should be attributed to Western Europe, since it was there that the first laws were created that were harbingers, and some even prototypes of modern national as well as international legal norms in the field intellectual property rights. For example, in Florence in 1421, the world's first patent for invention was issued. It was an invention of the Italian Filippo Brunelleschi, who invented a rotary crane for ships. In England in 1449, King Henry VI issued one of the oldest patents for the invention of colored glass. However, as noted above, these acts were more of a privilege character and were addressed to specific individuals, not being generally applicable laws. Nevertheless, those did not take long to wait. Among the first laws mentioning the right to inventions (modern patent law) was the Venice Charter of 1474, which is of particular importance for several reasons. First, it set a specific time (14 years) for the exclusive right to use the author of his invention. The next important feature was that the document specified certain conditions to be protected by these rights. It was supposed to be original and unique on the territory of Venice. And last, in our opinion, a very important feature of this Charter is that it

first indicated the moral rights of the owner. That is, the rights to intellectual property were first considered not from the point of view of commerce, but as natural rights inherent in the author or the inventor, not as a result of the contract, but independently of it. In general, speaking about the origins and ways of developing intellectual property rights and understanding the term itself, it should be noted that throughout the development of legal science, four approaches (theories) have been formed to define the essence of the term intellectual property.

The first and most popular is the theory of economic efficiency. Very specifically, this theory was developed in the work of V.Landes and R.Pozner on copyright [10, p.14]. The need for intellectual property rights in it is explained by the fact that such a legal system with its exclusive rights to created works and inventions granted to the author for a certain period provide economic efficiency, and also stimulate the development of innovative processes in society. As noted by V.Landes and R. Posner, "a characteristic feature of intellectual products is that they are easily copied and that their use by one person does not interfere with the use of the second and third person. These features, in turn, lead to the threat that the creator will not be able to compensate for himself the costs that he incurred while creating the work, which in turn entails the refusal to engage in creative activity" [10, p.15]. Thus, the theory of economic efficiency explains the existence of intellectual property law as a necessary system for ensuring the further development of innovation processes, as well as science and the arts as a whole.

Another theory of intellectual property rights, the so-called theory of "labor," is directly related to the theory of natural law. It became popular and became widespread in the eighteenth century in France. However, the theory of natural rights in relation to intellectual rights is based on the views of J. Locke with its idea of the author's natural right to objects that are the result of his work, including creative activity. In this theory, the position is stressed that "guaranteeing the right of ownership, the state must recognize, also the achievements of intellectual labor and ensure their protection" [12].

The third approach to intellectual property rights is based on the concept of individual rights. This approach is based on the views of Hegel and Kant on the right of private property. The right of private property, in their opinion, is one of the most important components for the common prosperity of each person and one of its necessary fundamental needs. At the same time, intellectual property rights create the conditions for a person to engage in creative, intellectual activity, thereby improving his life. There is also a fourth theory, which in some ways resembles the theory of utilitarianism. Its supporters argue that, intellectual property rights should be aimed at achieving a more just and attractive society, as well as ownership in general.

All these theories, one way or another, explain the need for intellectual property rights for the development of the creative potential of society. To some extent, all these four approaches to intellectual property are interrelated and do not contradict each other. Moreover, in our opinion, they complement each other, encompassing a certain sphere of law enforcement relations related to intellectual property. In addition, it should be noted that each of these theories corresponds to a certain historical period and thus is based on the views and ideas of educators, philosophers and jurists, taking into account the realities of their time and the need for the regulation of intellectual rights.

Prerequisites for the Inception of International Intellectual Property Law

The society continues to develop, and with it relations appear that need legislative consolidation of rights and obligations that must be protected and respected. With the advent of ever new diverse intellectual products of creative work, all the relations arising from the processes of economic turnover with these products began to need legal protection. But the products of the human intellect have long ago not bordered on their turnover with the borders of states. For example, the opportunities created by the World Wide Web (WWW) via the Internet allow in seconds to transfer data or information to any part of the world. This fact has a great influence on the very development of the field of law that we are considering. In the 21st century, the information and distribution system has acquired a completely new dimension and is

no longer limited to the walls of libraries and universities. Now every person has access to any desired information in his home, in the workplace and in the end is simply in his pocket. This process can also be called informational globalization. It is in connection with these processes that the issues of international intellectual law have acquired increased relevance. But the urgent need for international legal protection of intellectual property ran into difficulties that were related to the fact that intellectual property law had a territorially limited character and its own forms within individual states. The state, in which the creation of an intellectual product takes place, as well as its registration, is also the place of its primary legal recognition and protection. Thus, the only way to protect intellectual property rights outside a country was the conclusion of bilateral, multilateral and universal international treaties. In this regard, we can only agree with the opinion of Getman-Pavlova that "the specific nature of the legal regulation of intellectual property law as an area of private international law is the most significant role of international public law than in all other branches of private international law" [3] Despite the fact that many states continue to develop their national legislation in the field of intellectual property rights, thus consolidating the methods of its regulation and protection, international law has been and remains the most important and even leading legal source for this sphere. In this connection, the question arises: what place does intellectual property rights take in international law and what is the mechanism for protecting intellectual property in it? As already noted above, intellectual property rights have a special restrictive feature - territoriality. By territoriality in this case is understood that "the protection of these rights is granted only in the territory of the state where it is requested and granted under the law of the state" [7, p.1] This entails consequences in the form that intellectual rights, which are protected by the law of one state, are not necessarily protected as objects of intellectual property in the territory of other states. Thus, there is no automatic protection of intellectual property rights recognized in one state in the territory of another. The reasons for the appearance of such a legal conflict precisely with respect to intellectual property rights have both historical and political prerequisites. Leanovich explains this by saying that "intellectual property implies practically the monopoly rights that are necessary to stimulate investment of market participants in intellectual achievements and in this process the state renders support primarily to its citizens and organizations" [7, p.2]. Thus, the issue of intellectual property rights with a foreign element is decided by the law of the state from which this right is claimed. In the future, this situation leads to a practical lack of any conflict-of-law regulation of intellectual property issues with a foreign element. In this connection and some other problems arising from the territorial nature of IP rights, a number of issues arise related to the procedure for the protection of IP rights in several states simultaneously. Under these conditions, international public law comes to the assistance of international private law.

One of the peculiarities of the intellectual property rights as an area of private international law is its closer, in contrast to other legal spheres, connection with the norms of public international law. The issue is that the territorial framework for the protection of intellectual property rights can only take an extraterritorial nature through broad international regulation.

To date, an important layer of work on this issue is carried out through the activities of international organizations. Thus, in 1967, the Stockholm Convention was concluded, under which leadership the international cooperation in the field of intellectual property rights is conducted. It should be noted that it includes all the set of intellectual property rights. As noted in Article 3 of the Convention, its purpose is to "... promote the protection of intellectual property throughout the world through the cooperation of States and, as appropriate, in cooperation with any other international organization [5]. Protection of the results of human intellectual activity for the sake of cultural, economic and social development of mankind is also the most important function of the World Intellectual Property Organization (WIPO). The statutory tasks of this organization emphasize the promotion of activities designed to improve the protection of intellectual property throughout the world and to harmonize national legislation in this area [11]. A significant role in the international mechanism for the protection of intellectual

property rights is played by the World Trade Organization (WTO), which specializes in regulating the international exchange of objects of sale and purchase (goods, services), which contain a number of legal provisions on trade in intellectual property. Moreover, one of the conditions for countries to join the WTO is to improve the system of legal protection of intellectual property. In 1994, the Agreement on Trade-Related Aspects of Intellectual Property Rights-TRIPS (Agreement on Trade-Related Aspects of Intellectual Property Rights) was concluded in the Uruguay Round of the WTO, which provides for certain sanctions in case of violations of these rights. It can be said that in the international legal field there is a sufficiently large mechanism for protecting the results of the creative and intellectual activity of a person. In addition to international universal and regional organizations, there are also a number of non-governmental organizations engaged in the protection of intellectual property rights. These organizations are created by producers of specific types of goods, in which products of intellectual activity are embodied, and in whose protection both at the national and international levels there is a need. These include, for example, the International Intellectual Property Alliance, the International Union for the Protection of Industrial Property (Paris Union), the Union for the Protection of Selection Achievements, the International Federation of the Recording Industry (International Federation of Phonographic Industries) and others [9 with. 327]. Some of these organizations are members of WIPO, but there are also acting as independent subjects of the branches of intellectual specialization.

Current trends in the international regulation of intellectual property law

All these organizations are part of the system of international protection of intellectual property rights. However, returning to the essence of intellectual rights or in other words of ownership rights to the results of the activity of the human mind, it becomes obvious that these rights act as private, despite their intangible characteristics. As Velyaminov notes "an immaterial benefit is always the result of intellectual activity of people, individuals. However, like any property, intellectual property can be transferred from one owner to another, even in advance, not yet being created. In any case, the right of intellectual property is a private right, guaranteed by the state power. ... The regulation of intellectual property rights is a sovereign state prerogative " [2, p.337]. Thus, it turns out that, for legal intellectual property in another country, it is required either to achieve such protection under the law of a foreign state. The principle of territoriality of intellectual property rights is noted in almost all works on private international law. The reason for this approach was precisely in relation to intellectual property rights, is the economic and political interpretation of intellectual rights, when "the territorial nature of intellectual property rights is due primarily to the objectives of economic policy pursued by the state [3, p. 2]. But this approach practically eliminates the conflict method of regulating the relations of intellectual property rights in the presence of a foreign element, which is an anachronism in the world of globalization. Despite this, many states, however, are not in a position to abandon this principle in favor of adopting the extraterritorial power of rights that protect intellectual property rights. To a large extent, the shortcomings caused by the prevalence of the territorial principle in the protection of intellectual property rights, primarily by facilitating the uncontrolled movement of intellectual products among countries is compensated by international agreements in this field. But defining intellectual rights as strictly territorial, some authors argue about the complete absence of conflict problems in this area. This approach is somewhat radical and, as S.Krupko notes, "... restrains the development of private international law and negatively affects international economic turnover in the sphere of intellectual property" [6, p. 9]. Without having an extraterritorial effect, intellectual right is limited in solving a number of topical problems of modern regulation of the market for creative products. To understand this issue it is necessary, first, to define the concept of territoriality. The principle of territoriality is one of the types of spatial scope of the law and, in turn, is divided into relative and absolute territoriality. Territoriality absolute implies the application of only national law in internal processes and the inadmissibility of foreign intervention. Relative territoriality allows the

possibility of indirect application of foreign law within the state. The essence of such legal situation is that "foreign courts can be endowed with the competence to resolve disputes arising from relatively territorial laws" [2, p.7]. It should be noted that sporadic application of the law of a foreign country does not lead to universal extraterritoriality of the decisions taken. Speaking about the spatial distribution of the law, we must also note two more of its subspecies: relative universality and absolute universality. Relative universality is a concept sufficiently approximate to the aforementioned territoriality of the law, but they already create some mobility in their use. Absolutely universal law implies the possibility of its use, as well as the exercise of the rights arising on its basis both within the country and abroad. However, this form of spatial distribution of the law is a rarity for today. Certain of its manifestations can be observed in integration associations of countries, such as the European Union, as one of the sources of European law is supranational regulations. The conflict issue may arise in the event that the legal relationship can be exercised abroad. In other words, it is sufficient that the law on the basis of which the legal relationship arose was relatively territorial. Art. 5.2 of the Berne Convention provides for a combination of the principles of territoriality and the national regime, which logically leads to the application in respect of objects of intellectual property rights of the law of the country in which protection is sought (i.e., the country whose court is considering the case) – lex fori. That is, regardless of whether the court of which country is considering the case, referring to the law of the country, "where protection is sought", may lead to the application of the law of a foreign state.

Conclusion

In international private law today, universal laws relatively prevail. As a result, intellectual property rights are not regulated by specific universal norms having the power of some supranational institution capable of streamlining the process of recognizing subjective rights to the results of intellectual activity. The principle of territoriality also opposes this process. Each state determines the conditions for granting these rights in its own way and according to its specific criteria. In addition, the fact of registration of IP rights is also a sovereign act of the state and cannot be recognized abroad. However, all these arguments are valid with absolute territoriality of the law and do not exclude the relative territoriality of legal relations in the field of intellectual property rights. Conflict issues in the presence of a foreign element in the process of creating and using the results of intellectual activity are also not excluded from their relative territoriality. Therefore, conflict problems are something that should not be radically rejected by arguing about the territoriality of intellectual property law rights.

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