

NON-RECOGNITION OF A RIGHT AND CONTESTATION OF A RIGHT AS A BASIS FOR THE RIGHT TO ENFORCE INTELLECTUAL PROPERTY RIGHTS

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Annotation. The article examines theoretical approaches to the issues of intellectual property rights enforcement in Ukraine, taking into account the existing problems in the system of their enforcement. Particular attention is paid to the legislatively enshrined civil and commercial legal ways and methods of enforcement of intellectual property rights implemented by the judicial authorities in the field of intellectual property.

The concept of «enforcement of intellectual property rights» includes substantive and procedural aspects that determine the content of the right to judicial enforcement. These aspects are combined in that substantive legal opportunities are realized within the framework of the established procedural form and the relevant legislative procedure. The author identifies the key civil remedies which are considered to be universal mechanisms in the context of enforcement of infringed rights to intellectual property rights.

The author establishes that enforcement of intellectual property rights is a complex concept consisting of a system of legal provisions, state enforcement activities, legal and organizational and practical measures. This includes the use of various types of enforcement: judicial, pre-trial and extrajudicial, as well as self-defense of subjective rights of participants to economic relations in the field of intellectual property.

It is determined that not all remedies are equally important for the enforcement of an infringed or disputed right to the results of intellectual activity. Consequently, the choice of remedies for the enforcement of an infringed or disputed right depends on the nature of the right itself, as well as on the type and nature of the offense committed.

Key words: non-recognition of a right, contestation of a right, grounds for enforcement of rights, intellectual property rights.

1. Introduction.

The right to defense is one of the key rights in the context of civil legal relations. The exercise of this right provides for a choice of defense methods. The Constitution of Ukraine (Article 8) guarantees the right to enforcement of constitutional rights and freedoms of a person and a citizen [1]. This right is also enshrined in the Civil Code of Ukraine, in particular, in Article 15, which states that every person has the right to protect his or her civil right in case of its violation, non-recognition or contestation [2]. The enforcement of a right consists in the use of legally defined means (tools and mechanisms) to restore a violated right, recognize an unrecognized right or protect a disputed right. Pursuant to Article 20 of the Civil Code of Ukraine, a person has the right to choose the means of defense at his/her own discretion.

The purpose of civil proceedings is to ensure fair, impartial and timely consideration and resolution of cases aimed at effective enforcement of violated, unrecognized or disputed rights, freedoms and interests of individuals, rights and interests of legal entities, as well as the interests of the state (Article 2 of the Civil Procedure Code of Ukraine).

The choice of a particular method of civil law enforcement depends on the nature of the right sought to be protected, as well as the nature of its violation, non-recognition or contestation. The respective right or interest must be enforced by the court in such a way that this enforcement is effective. This means that the method of enforcement must correspond to the content of the right or interest, the nature of its violation, non-recognition or contestation, as well as the consequences that arose as a result of such actions (Resolution of the Supreme Court of Ukraine of 01.04.20, case No. 610/1030/18 (proceedings No. 14-436ц19) [2]; 16.06.20, case No. 145/2047/16-ц (proceedings No. 14-499ц19) [3] etc.)

Given the growing relevance of the issue of intellectual property rights enforcement, there is a need to develop new approaches to civil remedies, which are universal means of protecting civil relations.

2. Analysis of recent research and publications.

The scientific analysis of non-recognition and contestation of rights as grounds for the enforcement of intellectual property rights was paid attention to by such scholars as: V.O. Bazhanov, N.A. Ivanitska, G.O. Mykhailiuk, O.M. Melnyk, Y.M. Kapitsa, N.S. Kuznetsova, V.V. Luts, A.O. Kodynets, M.Y. Pototskyi, D.M. Prytyka, A.V. Shabalin, O.O. Shtefan, A. S. Shtefan etc.

3. The purpose of the article is to define the nature of civil law enforcement of intellectual property rights based on the analysis of current legislation, law enforcement practice and views of individual legal scholars, and also to consider the main methods of enforcement, and to define the concepts of non-recognition of a right and contestation of a right as the basis for the right to enforcement of intellectual property.

4. Summary of the main material.

Legal enforcement in the scientific literature is mainly associated with coercive activities aimed at restoring the violated right, preventing offenses and eliminating their consequences. Some researchers explicitly state that unlawfulness is the main feature of actions or omissions that serve as the basis for the application of legal remedies.

Article 15(1) of the Civil Code of Ukraine provides that every person has the right to defense of his or her civil right in case of its violation, non-recognition or contestation. The content of this provision suggests that the right to enforcement in the context of this article is considered as a subjective right of a participant in civil relations that arises in cases of violation of civil rights and interests belonging to him/her (for example, in case of non-fulfillment or late fulfillment of an obligation in the field of intellectual property), non-recognition of this right (for example, in case of failure to recognize a person as an author) or contestation of civil law (in particular, disputing the right to use a work etc.)

Enforcement of civil rights and interests can be carried out in various ways, in particular in the field of intellectual property. For example, a person whose rights are violated, unrecognized or contested may use the general methods of enforcement provided for in Article 16 of the Civil Code of Ukraine, as well as special methods of enforcement provided for in Article 432 of the Civil Code of Ukraine, as well as in specialized laws in the field of intellectual property. According to the general approach adopted in the theory of law, the enforcement of rights can be realized through the application of certain organizational measures that can be considered as an internally coordinated set of actions. These measures may be taken by the authorized person independently or by applying to the competent authorities and are aimed at preventing, terminating infringement, challenging, non-recognition or infringement of intellectual property rights and legally protected interests in this area. The main division of forms of enforcement of rights is into jurisdictional and non-jurisdictional. Thus, the enforcement of intellectual property rights can be realized through various mechanisms, depending on the specific circumstances.

The enforcement of intellectual property rights is to ensure the legal inviolability of these rights, their inviolability, and, in case of violation, to apply enforcement measures to restore them. The right to protection of the subject of intellectual property rights arises only when its rights or legitimate interests are violated, not recognized or contended. This right is exercised within the framework of civil, criminal and administrative legal relations arising in such cases. The concept of “enforcement of intellectual property rights” covers activities provided for by law aimed at recognizing, restoring rights and removing obstacles that impede the exercise of rights and legitimate interests of intellectual property rights holders. Ukraine has a comprehensive system of intellectual property rights enforcement, which includes legal rules, mechanisms for their application and the relevant legal infrastructure for the practical implementation of these rules. In general, this system is in line with international standards governing intellectual property.

The special laws of Ukraine regulating the field of intellectual property, with certain exceptions, do not establish a specific list of actions that are considered infringement, non-recognition or contestation of rights in respect of certain intellectual property. An infringement is any encroachment on the rights provided for by law with respect to the relevant intellectual property. Special laws define what actions are considered to be the use of these objects. At the same time, any action related to the use of an intellectual property object committed without the consent of the right holder is considered an offense. One of the main provisions that ensures the enforcement of intellectual property rights in case of their infringement is Article 431 of the Civil Code of Ukraine. According to this provision, infringement of intellectual property rights, including non-recognition of such rights or infringement thereof, shall result in liability as defined by the Code, other legislative acts or agreements [4]. Accordingly, the general rule is specified in the provisions of Article 432 of the Civil Code of Ukraine, according to which every person has the right to apply to the court to protect their intellectual property rights in accordance with Article 16 of the Civil Code. In addition to the general remedies set forth in Article 16, part 2 of Article 432 of the Civil Code of Ukraine sets forth special remedies aimed directly at protecting intellectual property rights [4].

Infringement of intellectual property rights may take several forms. This includes non-compliance by the parties with the law when concluding an agreement regarding an intellectual property object (Article 215, part 2 of Article 1107 of the Civil Code of Ukraine); disrespect for the honor and reputation of the creator of an intellectual property object and failure to indicate his or her name when using the work (Article 297, Article 423 of the Civil Code of Ukraine); unlawful use an intellectual property object (part 1, Article 424 of the Civil Code of Ukraine: unlawful use of a work without the author's consent (Article 443 of the Civil Code of Ukraine), unlawful use of an invention, utility model or industrial design without the permission of the owner of the relevant patent or other subject of patent law (Article 464 of the Civil Code of Ukraine), unlawful use of a trademark without the consent of the holder of the relevant certificate or other entity determined by law or contract (Article 495 of the Civil Code of Ukraine).

Non-recognition of personal non-property or property intellectual property rights is manifested in the denial of the existence of a person's subjective civil right to an intellectual property object (Articles 423, 424 of the Civil Code of Ukraine), as well as the right to use (Article 426 of the Civil Code of Ukraine) or dispose of (Article 427 of the Civil Code of Ukraine) this object. It is an act (action or inaction) of a person to ignore an intellectual property right that does not directly infringe the right, but creates uncertainty in the legal status of the owner of the rights [6, p.237]. This may also apply to a share in an intellectual property object created jointly by several persons or owned by several persons (Article 428 of the Civil Code of Ukraine), as well as an intellectual property object created as a result of the performance of an employment contract (Article 429 of the Civil Code of Ukraine) or created as a result of the performance of an individual contract (Article 430 of the Civil Code of Ukraine).

Contestation of a personal non-property or property intellectual property right reflects the state of legal relations when the relevant subjective civil right is subject to enforcement in a jurisdictional body. If such a body is a court, the holder of the disputed right has the opportunity to demand its recognition by filing a counterclaim. It is the action of a person aimed at changing a disputed intellectual property right by applying to the court for recognition of the existence of his or her right and/or recognition of the absence of the opponent's right [6, p.237].

In order to implement the principle of judicial enforcement of civil rights and interests, the content of Article 16 of the Civil Code of Ukraine, which establishes the general principles of enforcement of these rights and interests in court, plays an important role. In the context of intellectual property, civil law specifies the peculiarities of enforcement of intellectual property rights in Article 432 of the Civil Code of Ukraine. The approach to additional provisions on the enforcement of intellectual property rights introduced by the legislator is specific to civil law, as the drafters of the Civil Code of Ukraine justified the need to introduce such additional provisions by focusing on judicial enforcement of intellectual property rights.

To ensure the enforcement of intellectual property rights, the court may use a wide range of methods defined by civil law. These methods include: recognition of the right, invalidation of the proprietary intellectual property right transaction, cessation of actions that violate the right, restoration of the previous position, enforcement of the obligation in kind, change of legal relations, and termination of legal relations. In addition, the court may apply methods of compensation for damages, other forms of compensation for property damage, compensation for moral (non-pecuniary) damage, and declare decisions, actions or inaction of public authorities illegal; withdrawal from civil circulation of goods manufactured or placed into civil circulation in violation of intellectual property rights and destruction of such goods at the expense of the person who committed the infringement; withdrawal from civil circulation of materials and tools used primarily for the manufacture of goods in violation of intellectual property rights, or withdrawal and destruction of such materials and tools at the expense of the person who committed the infringement.

Summarizing the above provisions, it can be argued that civil remedies are determined by the provisions of legislation and bylaws, as well as substantive legal measures of a coercive nature. These measures are not aimed at punishing the offender, but at compensating for the damage caused. The scientific literature on intellectual property notes that, along with civil law enforcement, there is also economic law enforcement of intellectual property rights for business entities (business entities) [5, 54; 6].

Enforcement within the framework of a single civil procedure is well-founded, as an analysis of Article 20 of the Commercial Code of Ukraine shows that the universal methods of enforcement the rights of business entities, as defined in part 2 of this provision, coincide with the methods of enforcement provided for in Article 16 of the Civil Code of Ukraine [4]. Article 20(3) of the Economic Code of Ukraine also states that the procedure for protecting the rights of business entities and consumers is determined by this Code and other laws [7]. The main provisions on intellectual property rights are enshrined in the Civil Code of Ukraine, in particular, in Book Four "Intellectual Property Rights". This is also confirmed by the generalization of judicial practice [8].

In copyright, the basis for civil liability for copyright infringement is the commission of a civil offense. This infringement may be expressed through non-compliance, non-recognition or contestation of copyright [9, p. 456]. For example, in case of infringement of author's rights, the author may choose both universal remedies provided for by the Civil Code of Ukraine and use special remedies established by the legislation on copyright and related rights. An infringing party may use only universal remedies, rely exclusively on special remedies, or combine them. Such flexibility in the choice of defense implements the principle of discretion in civil law, which allows the use of a wide range of remedies, in particular in case of infringement of intellectual property rights. In this regard, M. Pototskyi rightly notes that subjects of intellectual property rights, in case of violation of their rights and legitimate interests, have the opportunity to choose a method of enforcement. Both civil and commercial legislation and special legislation in the field of intellectual property offer a wide range of remedies for the enforcement of violated rights [6, p. 239].

The Grand Chamber of the Supreme Court of Ukraine has repeatedly emphasized that the choice of a specific method of civil law enforcement depends on both the content of the right or interest sought to be enforced and the nature of its violation, non-recognition or contestation. Such rights or interests must be protected by the court in an effective manner that is consistent with the content of the right or interest, the nature of the violation, non-recognition or contestation, and the consequences caused by such actions. Similar conclusions are provided, in particular, in the resolutions of the Grand Chamber of the Supreme Court of Ukraine [10]. The judicial legal position set forth is fully consistent with the existing scientific views. In particular, M.Y. Pototskyi notes that the enshrined remedies often do not correspond to the nature of the offense committed, which over time acquires new forms and scales [6, 239-240].

In our opinion, the above legal position of the Grand Chamber of the Supreme Court is quite logical and appropriate in the context of its practical application. We believe that it would be advisable to enshrine in the procedural legislation, in particular in the Civil and Economic Procedure Codes of Ukraine, the basic legal criteria for the application by the court of a remedy not directly provided for by law. Such an approach would contribute to the formation of a unified standard in the case law of Ukraine.

For the implementation of the principle of judicial enforcement of civil rights and interests, the content of Article 16 of the Civil Code of Ukraine, which defines the general principles of enforcement of civil rights and interests in court, is of great importance. With regard to intellectual property, civil law specifies the peculiarities of judicial enforcement of these rights in Article 432 of the Civil Code of Ukraine. The approach proposed by the legislator to introduce additional provisions on the enforcement of intellectual property rights is an innovation for civil law. The drafters of the Civil Code of Ukraine have justified the need to introduce these additional provisions in terms of judicial enforcement of intellectual property rights. To ensure the enforcement of intellectual property rights, the court has the right to use any remedies provided for by civil law. Such remedies include: recognition of a right, invalidation of a transaction, cessation of actions that violate the right, restoration of the situation that existed before the violation, enforcement of an obligation in kind, change of legal relations, termination of legal relations, compensation for damages and other methods of compensation for property damage, as well as compensation for moral (non-pecuniary) damage and invalidation of decisions, actions or inaction of public authorities.

However, not all remedies are equally important for protecting an infringed or disputed right to intellectual property. For example, patent rights and rights to means of individualization are confirmed by the fact of state registration, so a common way to challenge them is to request the invalidation of the issued security document. On the other hand, the enforcement of this group of rights is not characterized by the use of such a method as compulsory performance in kind, since their objects are intangible goods. Thus, the choice of judicial remedies for the violated or disputed right depends on the nature of the right itself, as well as the type and nature of the offense committed.

One of the special remedies used in the intellectual property rights system is the possibility of applying a one-time monetary penalty instead of compensation for damages for the misuse of an intellectual property object. It is important to note that the wording of the relevant provision of Article 432 of the Civil Code of Ukraine, which establishes this remedy, states that the amount of the penalty is determined in accordance with the law, taking into account the person's fault and other circumstances of material importance. This means that a one-time monetary penalty may be imposed only if a special law regulating the enforcement of a particular intellectual property object allows for such a possibility. An example of such a provision is Article 55 of the Law of Ukraine "On Copyright and Related Rights" [11].

5. Conclusions.

From the analysis of these definitions, we can conclude that the category "enforcement" is a complex concept which includes a system of legal norms, as well as state coercive, legal and organizational and practical activities. This activity is realized through the use of judicial, pre-trial, extrajudicial enforcement, as well as self-defense of subjective rights of participants in legal relations. It is worth noting that enforcement is carried out after the fact of violation of the rights or interests of the victim, which is manifested in active actions.

It can also be summarized that judicial enforcement of intellectual property rights is a material and procedural phenomenon that is a specific type of jurisdictional form of enforcement. It is realized through the appeal of subjects or other participants of legal relations to the court in order to protect their violated, unrecognized or disputed rights and legitimate interests related to intellectual property. Judicial enforcement also involves taking legislatively established measures aimed at preventing offenses in this area, in order to stop illegal actions and restore the original situation.

Thus, despite the existence of a sufficiently reformed legislative framework for the enforcement of intellectual property rights, the problem of effective implementation of judicial enforcement in this area in Ukraine remains unresolved. The complexity of court proceedings related to intellectual property, their duration, as well as the lack of uniform approaches in court practice to this category

of disputes negatively affect the level of legal enforcement of intellectual property rights holders. In this context, special legislation that details how to protect rights to specific intellectual property objects, taking into account their specifics, is important.

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