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**ACTUAL PROBLEMS OF ACCESS TO JUSTICE IN THE CONTEXT OF THE CREATION
IN UKRAINE OF THE HIGH COURT OF INTELLECTUAL PROPERTY**



*Logvynenko Mykola Ivanovych,
Ph. D , Associate Professor, docent of
Department of Administrative, Economic Law
and Financial and Economic Security,
Educational-scientific Institute of Law,
Sumy State University*



*Jumaev Maksat,
Educational-scientific Institute of Law,
Sumy State University*

The article focuses on the main actual problems of practical real access to justice in the context of the creation in Ukraine of the High Court of Intellectual Property. It has been determined that at the present stage of development of society, globalization of the world economy, intellectual property is one of the most powerful resources that can ensure economic prosperity, stability, economic security of the state and society, provided the proper guarantee of its protection and legal protection.

In addition, the main aspects of the current state of access to justice in cases of violation of intellectual property rights are analyzed.

It has been established that access to justice, including in the field of intellectual property rights protection, is an important guarantee of basic human rights recognized and actively protected by the international community.

Given that Ukraine is one of the largest violators of intellectual property rights in the world, according to ratings of leading organizations, which has a very negative impact on the international image of our state, it prevents potential inflow of investors to our country, causes devastating losses to the economy and other spheres of social activity, the issue of improving the judicial practice of protecting these rights is particularly acute in Ukraine.

The reform of the justice system, the judiciary and other related legal institutes covered the issue of judicial protection of intellectual property rights, which stipulates the need to consider the issue of access to justice in this area, ensuring the real possibility for citizens to appeal to the court for the protection of their intellectual property rights.

The Ukrainian judiciary from the very beginning of its creation is in the process of change and reform, in search of new, more effective mechanisms for the protection of human rights. The judicial reform in Ukraine in 2016 aims to provide the separate, an independent judicial branch, capable of protecting the

rights, freedoms, legitimate interests of man and citizen, the state and society, as well as raising the level of citizens' trust in the judiciary and strengthening the social role of the court in the state. This is due to the society's need for access to justice, the existence of a genuine effective mechanism for the protection of human rights, a high level of transparency of judicial procedures, impartiality of court decisions, maximum objectivity in the consideration of a dispute, high professionalism of judges, capable of diligently, professionally and competently to administer justice. This question has caused many disputes for many years, and finally, it is reflected in the updated legislation. The fact of establishing such an institution in the state as the Supreme Intellectual Property Court is an important step towards the protection of intellectual property rights in Ukraine. The creation of a new High Court on Intellectual Property raised new questions to Ukrainian legislators, domestic practices and science, which include the problematic aspects of the name of the court, the division of competences of the courts, the territorial and institutional structure of the court on intellectual property issues, the professional training of the judges of the said body and many others. Taking into account the positive international experience, the introduction into the judicial system of the Institute for the Protection of Intellectual Property Rights is a rather progressive step, justified and expedient. The activity of such a specialized institute in the system of judicial power, in case of its improvement, will allow the most professional and effective protection of intellectual property rights, subject to improvement of the legal status of judges, procedures for their preparation and selection. Further improvement in the sphere of ensuring the development of the Institute of judicial protection of intellectual property and improving the legal status of the Supreme Court on intellectual property issues require the following: professional training of a high-quality judiciary corps; provision of participation of forensic experts, specialists in the sphere of intellectual property, since these disputes require not only legal knowledge, but also special scientific and technical; the quantitative composition of the Supreme Intellectual Property Court, as the practice of the number of cases on the protection of intellectual property rights is significant enough to be resolved by 21 judges, this situation will cause a high burden on newly elected judges, and thus the goal will not be achieved. a quick, just consideration of these disputes. The next aspect is the settlement of the appeal and cassation review of cases on intellectual property issues, as the appeal and cassation proceedings are currently foreseen by the same court, its individual chambers, which is not possible; moreover, it needs proper procedural support for the newly created court on intellectual property issues, since today only the Commercial Procedural Code defines the competence of the said court, but this does not completely coincide with the procedural peculiarities provided for by the procedural civil, administrative, criminal legislation.

One of the unresolved problems of the newly created court is the procedural safeguard of its activities. The court, at this stage, does not carry out its activities. Therefore, today the issue of transferring cases on protection of intellectual property rights from one court to the newly created court on intellectual property issues is particularly problematic. That is, today the system of judicial protection of intellectual property rights in Ukraine is characterized as a transitional type system.

The current state of judicial reform is due, above all, to the international obligations undertaken and the policy of improving the legal regulation of intellectual property rights protection, which is paid special attention to the institute of judicial protection. The reform of the judicial system has not yet been completed, since not all of its stages have yet been completed. The Supreme Intellectual Property Court is not functioning yet, as certain aspects of its activities are not consistent with the general system of justice and justice in Ukraine, and therefore need to be resolved immediately, since the issues of legal protection of intellectual property rights in Ukraine today are at risk of violations person's right to access to justice. In the light of international obligations, it is necessary to draw attention to the fact that the right to access justice has been recognized by the international community as one of the fundamental human rights. The conceptual principles and content of any reform carried out in the state should be the affirmation of man and citizen as the main duty of the state, which proclaims itself legal. The development of social relations, modern automation and informatization of society leads to the strengthening of the role of intellectual property rights in the modern world. The freedom of literary, artistic, scientific and technical creativity guaranteed by the Constitution of Ukraine, protection of intellectual property, their copyright, moral and material interests arising in connection with various

types of intellectual activity, makes it even more necessary to consider the issue of judicial protection of intellectual property rights in Ukraine, as one of the most effective forms of protection. The general European tendencies and directions of development of our state, international obligations did not go away and the reform of the system of judicial protection of intellectual property rights in Ukraine, in particular, the main reform idea and result was the creation of the High Court on Intellectual Property.

Keywords: judicial protection of intellectual property rights, the High Court of Intellectual Property, judicial reform, accessibility of justice.

Логвиненко М.І., Джумасєв М. Актуальні проблеми доступності правосуддя в контексті утворення в Україні Вищого суду з питань інтелектуальної власності. У статті зосереджено увагу на актуальних проблемах реального доступу до правосуддя в контексті створення в Україні Вищого суду з питань інтелектуальної власності. У статті розглянуті основні аспекти сучасного стану доступу до правосуддя у справах щодо порушення прав інтелектуальної власності. Встановлено, що доступність правосуддя, в тому числі і в сфері захисту прав інтелектуальної власності, є важливою гарантією основних прав людини. Реформування системи правосуддя та судоустрою охопило і питання судового захисту прав інтелектуальної власності, що обумовлює необхідність розгляду питання доступу до правосуддя у зазначеній сфері, стану забезпеченості реальної можливості громадян звернутися до суду за захистом своїх прав інтелектуальної власності. Сучасний стан судової реформи обумовлений, перш за все, взятими на себе міжнародними зобов'язаннями та політикою вдосконалення правового регулювання захисту прав інтелектуальної власності, особливу увагу якою приділено саме інституту судового захисту. Реформа судової системи ще не має завершеної форми, оскільки не всі її етапи ще здійснені. Вищий суд з питань інтелектуальної власності на сьогодні ще не функціонує, оскільки окремі аспекти його діяльності не узгоджені із загальною системою судоустрою та правосуддя в Україні, а тому потребують негайного їх вирішення, оскільки питання судового захисту прав інтелектуальної власності в Україні на сьогодні в стані загрози порушення права особи на доступ до правосуддя. З урахуванням міжнародних зобов'язань, необхідно звернути увагу на те, що право на доступ до правосуддя міжнародним співтовариством визнано одним з основоположних прав людини. Створення Вищого суду з питань інтелектуальної власності, стало настільки поспішним законодавчим рішенням, що на практиці цей крок не має практичної його реалізації, оскільки, багато питань потребують вирішення, зокрема, проблеми єдиного підходу законодавчої бази до цього, удосконалення процесуального законодавства.

Ключові слова: судовий захист прав інтелектуальної власності, Вищий суд з питань інтелектуальної власності, судова реформа, доступність правосуддя.

Formulation of the problem. Intellectual property at this stage of development of the world economy is one of the powerful resources that can ensure economic prosperity, stability, economic security of the country and society. The issues of protection of intellectual property rights in Ukraine are particularly relevant, since our country is one of the leading violators of intellectual property rights in the world, which adversely affects the international image of our state, hampers the influx of investors into our country, causes numerous damage to the economy and other spheres. As part of the international obligations assumed, our country today forms a policy of improving the legal regulation of the protection of intellectual property rights, including judicial protection, which led to the reform of the judicial system. At present, the reform cannot be called complete, since not all of its stages have been implemented. The creation of the High Court

of Intellectual Property requires an urgent decision problem of its functioning, so far as today, this situation indicates a violation of the principle of access to justice in the field of protection of intellectual property rights. Taking into account international obligations, it is necessary to pay attention to the fact, that the right of access to justice by the international community is recognized as one of the fundamental human rights. The conceptual principles and content of any reform carried out in the state should be the affirmation of the rights of man and of the citizen, as the main duty of the state, which declares itself legal state.

Analysis of recent research and publications. The topic of accessibility of justice in the field of protection of intellectual property rights in the scientific sphere is not sufficiently developed, most of the research is devoted to the administrative and legal status of the newly created High Court of Intellectual Property, the

status of judges of the named court. The following domestic scientists devoted their work to this topic: G.O. Androschuk, A.O. Dihtiar, G.K. Dorozhko, V.L. Krizhna, M.I. Logvynenko, K.L. Nazarenko, E.P. Orlyuk, V. Sidenko, O.D. Svyatotsky, V.B. Kharchenko and others.

Purpose and tasks. The purpose of this article is to examine the fundamental guarantees of the right to access to justice for the protection of intellectual property rights in the context of the reform and creation of the High Court of Intellectual Property, as well as international obligations assumed by Ukraine. Achieving the goal is possible with the help of such tasks as: consideration of the concept of accessibility of justice, analysis of the administrative and legal status of the newly formed court, establishing a link between the creation of the court and ensuring the principle of accessibility of justice in the field of intellectual property rights, etc.

The presentation of the main material. The main characteristic of the current stage of development of the legislative framework of Ukraine in the field of protection of intellectual property rights can be called an absolute focus on international and European experience. This is due to the gradual accession of Ukraine in the European Union, the conclusion of multiple contracts and agreements, from which the obligations to improve the legal regulation of the protection of intellectual property rights. The value of the results of human intellectual activity increases and plays an enormous role in the modern development of the state, economy, politics, society, which exacerbates the need to protect intellectual property rights. As it turned out, in the context of judicial reform and the creation of a completely new institution of judicial protection of intellectual property rights in the form of the High Court of Intellectual Property, the most significant issue today is the issue of access to justice for the protection of intellectual property rights. The right to access to justice is one of the fundamental human rights recognized by the international community as such, which includes: the right to access to court, the right to execute court decisions, and the right to final court decisions. Access to justice in the field of intellectual property rights protection is not just the actual territorial placement of a court within a certain administrative-territorial unit, but also the availability of a real opportunity to exercise its right to apply to the court. Also, this right includes the possibility of initiating a trial, and, at the same time, the presence of the corresponding responsibilities of the subjects conducting the judicial process is necessary. It is this set of elements of the right to access to justice that meets the requirements enshrined in international legal acts that our state undertakes to fulfill.

Turning to the content of international norms, in particular the European Convention for the Protection of Human Rights and Fundamental Freedoms, access to justice (access to justice) is one of the key guarantees of the right of judicial protection, along with such criteria as fairness, completeness, legality, impartiality of the court. At the constitutional level, Ukraine guarantees access to justice, as evidenced by the provision of Article 55 of the Constitution of Ukraine that «human rights and freedoms are protected by the court» and Article 124 regarding the extension of the jurisdiction of courts to «any legal dispute and any criminal charge» [2]. The content of this principle is duplicated in part 3 of Article 7 of the Law of Ukraine «On the Judicial System and Status of Judges», which stipulates that «access to justice for every person is ensured in accordance with the Constitution of Ukraine and in the manner established by the laws of Ukraine» [7]. In the context of this, analyzing the practice of the European Court of Human Rights, Yu.I. Matat draws attention to such an understanding of “access to justice” as the ability of a person to obtain judicial protection without hindrance, access to an independent and impartial solution of disputes in accordance with the established procedure based on the rule of law. The category under consideration, together with such elements as the finality of a court decision and the timely implementation of final decisions, are integral parts of the right to a court, which, in turn, occupies one of the main places in the system of fundamental values of any democratic society” [3]. Today, taking into account the reform in the field of judicial protection of intellectual property rights, the issue of real access to justice in this group of legal relations is very acute, which is due to the current transition period in this area.

The Institute of judicial protection of Intellectual Property Rights in Ukraine has a long history of its formation. The reform of the judicial branch of power had a significant impact on the state of the judicial protection of intellectual property rights, which influenced the jurisdiction of intellectual property cases. Such reformist changes, in turn, affect access to justice. Perennial discussions, European integration processes, international obligations, modern challenges have led our state to the stage of creating a specialized court for the protection of intellectual property rights. During the years of independence, the issue of delimitation of jurisdiction between Commercial Courts, general Courts, administrative Courts was raised many times. Constant discussions on their jurisdiction led scientists to think about the need to form a specialized court, to whose jurisdiction all matters of intellectual property will belong, regardless of the subject matter of the dispute. Based on this, it is possible to come to the understanding that judicial protection of intellectual property rights is the

possibility provided by current legislation for any person to apply to a specially authorized court - the High Court of Intellectual Property, to protect their intellectual property rights, to restore these rights and achieve justice. The analysis of the reform allows us to say that in this way an absolutely new model of the Ukrainian judicial system, focused on international and European experience, was created. This is evidenced by the introduction of amendments to the Constitution of Ukraine, namely, the Law of Ukraine «On Amendments to the Constitution of Ukraine (regarding justice)» of 02.06.2016 No. 1401-VIII [5]. Amendments to the Constitution of Ukraine resulted in the adoption of the new Law of Ukraine «On the Judicial System and Status of Judges» No. 1402-VIII. By the Decree of the President of Ukraine «On the formation of the High Court of Intellectual Property Issues» dated September 29, 2017 No. 299/2017 [8], the High Court of Intellectual Property was established. For the practical implementation of the Decree, a decision was taken by the High Qualifications Commission of Judges of Ukraine «On announcing a competition to fill vacancies of judges of the High Court on Intellectual Property». Today, there are 21 such posts [8]. In addition, the Verkhovna Rada of Ukraine adopted the Law of Ukraine «On Amendments to the Commercial Procedural Code of Ukraine, the Civil Procedure Code of Ukraine, the Code of Administrative Procedure of Ukraine and other legislative acts» [4], which directly cover issues of judicial protection of intellectual property rights. In the opinion of Svetlichny A.P., the introduction of amendments is aimed at overcoming procedural problems that prevent effective judicial protection in Ukraine. In addition, these changes are aimed at improving the principles of legal proceedings (competition, dispositiveness, proportionality) and procedural mechanisms (consideration of cases, prevention of abuse of rights, introduction of an «electronic court», etc.) [10, p. 29]. The adoption of these laws and the amendment of the Constitution raised new questions, especially regarding the practical implementation of the changes. Ukraine has embarked on a reform of the judicial system and related legal institutions, including the institution of judicial protection of intellectual property rights. The goal of this course is the reform of the judicial system, judicial proceedings and related legal institutions [6], as well as the practical implementation of the principles of the rule of law and ensuring everyone the right to a fair trial of cases by an independent and impartial court. The reform should ensure the functioning of the judiciary, bring the judicial system in line with public expectations regarding an independent and fair court, thereby increasing the level of citizens' confidence in the court, as well as the European system of values and

standards for the protection of human rights. The above-mentioned reform, aimed at changes, both in the internal structure of the judicial branch of government and in the procedural order, is provided for by current legislation. In the scientific community and in practice, there are many controversial issues and discussions regarding the judicial reform. The main question that worries scholars and practitioners is how to influence the reform on the rights of citizens, to what extent the current human rights are guaranteed and implemented by the state, especially the right of access to justice in the field of intellectual property rights protection. The creation of the High Court of Intellectual Property only in Kiev, just the same and raises the question of accessibility, that is, territorial accessibility to this court. In addition to the issue of accessibility, the most controversial issue was the issue of jurisdiction of the newly created court. According to Part 2 of Art. 20 of the Commercial Procedural Code of Ukraine The High Court of Intellectual Property Matters deals with intellectual property rights, in particular:

1) cases in disputes concerning the rights to an invention, utility model, industrial design, trade mark (mark for goods and services), commercial name and other intellectual property rights, including the right of prior use;

2) cases in disputes concerning the accounting, registration of intellectual property rights, invalidation, extension of validity, early termination of patents, certificates, other acts that certify or on the basis of which such rights arise, or which violate such rights or the related law interests;

3) cases of recognition of a trademark well-known;

4) cases in disputes concerning the rights of the author and related rights, including disputes concerning collective management of the author's property rights and related rights;

5) cases in disputes regarding the conclusion, modification, termination and execution of an agreement on the disposal of intellectual property rights, commercial concessions;

6) cases in disputes arising out of relations related to protection against unfair competition in relation to: the misuse of signs or goods of another manufacturer; copy the appearance of the product; collection, disclosure and use of commercial secrets; Appeal against decisions of the Antimonopoly Committee of Ukraine on issues specified by this item [1]. Among the positive facts regarding the creation of a completely new institution of the judicial protection of intellectual property rights are the following:

- ensuring legality in the consideration of disputes of violation of intellectual property rights

- improving the efficiency of legal proceedings in the field of protection of intellectual property rights;

- improving the level and quality of protection of the rights of authors, inventors and persons who, on the basis of the law or contract, own intellectual property rights;

- ensuring the unity of law enforcement practice;
- elimination of differences in the interpretation of the provisions of the current legislation, which now exist due to the presence of different jurisdictions;
- a significant reduction in the cost of litigation;
- the acceleration of the terms of consideration of disputes will ultimately lead to the possibility of ensuring infringed intellectual property rights and reducing material losses.

Today it can be said that certain aspects of the administrative law status of the High Court of Intellectual Property are not yet regulated, which in turn violates the right to access everyone to justice. Such conclusions can be made on the basis of an analysis of existing norms of the Constitution of Ukraine and updated procedural legislation. The creation of a new High Court of Intellectual Property raised new questions for the Ukrainian legislator, domestic practice and science, which include the problematic aspects of the name of the court, the delimitation of court competence, the territorial and institutional structure of the court on intellectual property, professional training of judges of the said body and many others. Taking into account the positive international experience, the introduction of the institution of the protection of intellectual property rights into the judicial system is quite a progressive step, reasonable and expedient. The activity of such a specialized institution in the judicial system, if improved, will allow the most professional and effective protection of intellectual property rights, subject to improvement of the legal status of judges, the procedure for their preparation and selection. The negative side of what is happening is that in the conditions of the transition period, the right to access to justice is not sufficiently ensured. The reason is that the newly created court is not functioning yet, there are many questions about the transfer of cases to this court from other courts, or the question of the validity of decisions of other courts on the protection of intellectual property rights in the context of creating a specialized court in this area. All these issues require urgent solutions, since the violation of the right of access to justice is unacceptable.

Conclusions. Thus, the judicial reform carried out in Ukraine significantly changed the system of judicial protection of intellectual property rights. Despite some aspects of the functioning of the newly formed court, the activities of the High Court of Intellectual Property still raise many controversial and unresolved issues. The very fact of creating such an institution in the state as the High Court of Intellectual Property is a progressive step towards the judicial protection of intellectual property rights in Ukraine and ensuring the right of access to justice in this area. But only if it is improved, otherwise the opposite mechanism of action of such measures can occur, which will lead to an even greater violation of the human right to access to justice and the real possibility of protecting intellectual property rights. Further improvement in the field of access to justice in the field of protection of intellectual property rights and the development of the institution of judicial protection of these rights, as well as improvement of the legal status of the High Court of Intellectual Property, require such aspects as: professional training of high-quality judiciary; ensuring the participation of legal experts and specialists in the field of intellectual property, since these disputes require not only legal knowledge, but also special scientific and technical ones. In addition, legal settlement is required - the quantitative composition of the High Court of Intellectual Property, which is extremely low today, which, again, can lead to a high burden on newly elected judges, and thus the goal of a quick, fair consideration of these disputes will not be achieved. The next aspect is the settlement of the appeal and cassation review of cases on intellectual property issues, since the appeal and cassation consideration today is assumed by the same court and its separate chambers, which violates the principle of instance, provided for by the Basic Law of our state. Moreover, the functioning of a newly created court requires proper procedural support for its activities, since today only the Economic Procedural Code defines the competence of this court, but this does not completely coincide with the procedural features provided for by procedural civil, administrative, criminal legislation. Accordingly, in order to ensure real access to justice in the field of protection of intellectual property rights, these procedural aspects should be promptly resolved, since they impede the real possibility of a person to appeal to the court for the protection of these rights.

Literature:

1. The Commercial Procedural Code [Hospodars'kyy protsesual'nyy Kodeks] dated November 6, 1991 No. 1798-XII / The Verkhovna Rada of Ukraine. Information from the Verkhovna Rada of Ukraine (BP). 1992. No. 6. p.56.

2. The Constitution of Ukraine [Konstytutsiya Ukrayiny]: Law of Ukraine dated June 28, 1996 No. 254к / 96-BP. Information from the Verkhovna Rada of Ukraine. 1996. No. 30. Art. 141
3. Matat Y. I. [Matat YU. I. Pravo na dostup do pravosuddya: yevropeys'kyi dosvid ta problemy zabezpechennya v Ukrayini] The right to access to justice: European experience and problems of ensuring in Ukraine. URL: http://www.legalactivity.com.ua/index.php?option=com_content&view=article&id=1419%3A081216-22&catid=171%3A6-1216&Itemid=212&lang=en.
4. On Amendments to the Commercial Procedural Code of Ukraine, the Civil Procedural Code of Ukraine, the Code of Administrative Legal Proceedings of Ukraine and other legislative acts [Pro vnesennya zmin do Hospodars'koho protsesual'noho kodeksu Ukrayiny, Tsyvil'noho protsesual'noho kodeksu Ukrayiny, Kodeksu administratyvnoho sudochynstva Ukrayiny ta inshykh zakonodavchykh aktiv]: Law of Ukraine dated 03 October 2017. Information from the Verkhovna Rada of Ukraine. 2017. No. 48. Art. 436
5. On amendments to the Constitution of Ukraine (in relation to justice) [Pro vnesennya zmin do Konstytutsiyi Ukrayiny (shchodo pravosuddya)]: Law of Ukraine dated 02.06.2016 No. 1401-VIII. Information from the Verkhovna Rada (BP). 2016. No. 28, p.532.
6. On the Strategy for the Reform of the Judiciary, Justice and Related Legal Institutions for 2015-2020 [Pro Stratehiyu reformuvannya sudoustroyu, sudochynstva ta sumizhnykh pravovykh instytutiv na 2015-2020 roky]: Decree of the President of Ukraine dated May 20, 2015 No. 276/2015.
7. On the Judicial System and Status of Judges [Pro sudoustriy i status suddiv]: Law of Ukraine dated 02.06.2016 № 1402-VIII / The Verkhovna Rada of Ukraine. Information from the Verkhovna Rada (VVR., 2016, No. 31. p. 545.
8. On the formation of the Supreme Court on Intellectual Property [Pro utvorennya Vyshchoho sudu z pytan' intelektual'noyi vlasnosti]: Decree of the President of Ukraine dated September 29, 2017 No. 299/2017. URL: <http://zakon3.rada.gov.ua/laws/show/299/2017>.
9. Decision of the High Qualifications Commission of Judges of Ukraine on the announcement of the competition for vacancy positions of judges of the Supreme Intellectual Property Court [Rishennya Vyshchoyi kvalifikatsiyanoi komisiyi suddiv Ukrayiny pro oholoshennya konkursu na zaynyattya vakantnykh posad suddiv Vyshchoho sudu z pytan' intelektual'noyi vlasnosti] No. 98 / sn-17 of September 30, 2017. URL: http://vkksu.gov.ua/userfiles/vkksu_rishennya_konkurs_vsiv.pdf.
10. Svitlychny O.P. Protection of Intellectual Property in the Light of Judicial Reform in Ukraine [Svitlychnyy O. P. Okhrona intelektual'noyi vlasnosti u svitli sudovoyi reformy v Ukrayini]. Public law 2017. No. 4 (28). Pp. 27-31.