



LEGAL PROTECTION OF INTELLECTUAL PROPERTY

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PROBLEMS AND PROSPECTS OF THE STATE INTELLECTUAL PROPERTY INSPECTORATE: INSTITUTIONAL AND LEGAL ASPECTS

Introduction. The institution of intellectual property (IP) inspectors was established in accordance with the Decree of the President of Ukraine in 2001. It is an important mechanism of state control and supervision over the observance of IP rights of business entities.

Problem Statement. The main problems associated with the formation of this institution are: unregulated legal status of the institution of IP inspectors and IP inspectorate as an institution of the national IP system; contradictions in the status of internal structural subdivisions of the Ministry of Economy and its IP Department; the need to identify the main areas for improving the institutional and legal framework for control and supervision over IP activities.

Purpose. The purpose of this research is to study the institutional and legal aspects of the modern problems and strategic prospects for the state inspectorate on intellectual property.

Materials and Methods. The general and special legal methods of studying legal phenomena and categories have been used. The sources of IP law and the legislation related to control and supervision and civil service have been overviewed with the use of the method of systematic analysis and the formal legal method.

Results. The legislative framework that provides for the regulation of the control and supervisory relations in the IP sphere has been analyzed. The problematic aspects of the legal capacity of IP inspectors have been identified.

Conclusions. The following measures to improve the institutional and legal framework for the control and supervisory activities in the IP sphere have been proposed: to establish the IP inspectorate as institution of the

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national IP system instead of restoring the institution of IP inspectors; to delegate the control and supervisory powers and to transfer staff of IP inspectors to the State Food and Consumer Service; to settle of the issue of exercising control and supervision over IP activities by the Ministry of Economy and the IP inspectors. The main areas for improving the institutional and legal framework for the control and supervision over IP activities have been determined.

Key words: intellectual property, state inspectorate, copyright, and related rights.

Aiming at ensuring the constitutional rights of citizens to protect intellectual property (hereinafter referred to as IP) and at establishing the favorable conditions for the creation of IP-objects and the development of the Ukrainian market of these objects, the President of Ukraine has charged the government with taking measures to establish the IP Inspectors Task Force within the State Department of Intellectual Property [1].

It should be noted that neither Resolution of the Cabinet of Ministers of Ukraine (hereinafter referred to as CMU) of 04.04.2000 No. 601 on the establishment of the above Department force nor the regulations for its activities (CMU Resolution of 20.06.2000 No. 997) contain any mentioning of IP inspectors. The only regulation in this area says that the Department is entitled to exercise control and to conduct inspections within its competence. Therefore, we may reasonably conclude that it is just Decree of April 27, 2001 No. 285/2001 [1] that gives grounds for the introduction of the position of IP-inspector in Ukraine.

The legal status of IP inspector was determined by the CMU a year later, but the problems associated with the establishment of this institution have still remain unsolved, which makes research in the field of IP protection an extremely important for Ukraine's innovation-driven development and the creation of competitive environment. In this aspect, the relationships in the course of the formation of institutional mechanisms to ensure government control over compliance with economic requirements of the legislation in the IP-sphere are among the top priorities to be studied.

In order to solve the legal problems related to the protection and use of IP objects, it is neces-

sary, among other things, to raise the level of awareness of innovators in the field of legal protection of IP rights [2]. This scientific and legal issue is in a permanent focus of both legislators and researchers in various fields of knowledge: law, IP, public administration and so on.

In autumn 2017, the EU-Ukraine Association Agreement (hereinafter referred to as the Agreement) fully entered into force [3]. Almost 20 percent of its text deals with IP (Chapter 9. Intellectual Property), which demonstrates, on the one hand, the importance of this area for the current stage of society, and on the other hand, Ukraine's lag behind the advanced economies in terms of the regulation of the use of IP objects.

In October 2017, the government approved the Action Plan for the implementation of the Agreement [4], which contained more than 130 tasks on the reform of the IP sphere. In addition, in the summer of 2018, a temporary advisory body to the Cabinet of Ministers, the Intellectual Property Council, was established [5]. Among the notable results of its activities there is the initiation of efforts to restore the institute of IP inspectors, which certainly raises the effectiveness of legal regulation of the control and supervisory relations in the IP sphere that directly depends on the existing system and powers of the subjects of government regulation, who are an institutional component of the mechanism of legal regulation of the complex of these relations.

Thus, the relevance of the chosen topic is based on the importance of institutional formalization of the subjects of control and supervision in the IP sphere, insofar as they act as a specific legal form of management and as an organizational and legal means of ensuring the legality of such activities.

Among the Ukrainian researchers who have touched upon the problems of inspection support of the IP-sphere, there are as follows:

- ◆ A.G. Pyshna who has considered, among other things, the peculiarities of inspections by IP inspectors of the State Intellectual Property Service [6];
- ◆ O.V. Kulchytska who has studied the organizational and legal principles of government control in the field of protection of IP-law objects [7];
- ◆ L.V. Zynych who has considered the problematic issues of the operation of the institution of IP inspectors [8];
- ◆ A.B. Khridochkin who within the framework of his doctoral dissertation, has found out that the subject of public administration in the field of intellectual property of sectoral competence in Ukraine is the Ministry of Economic Development and Trade of Ukraine with its relevant department and officials, i.e. IP inspectors [9, 14, 22];
- ◆ O.P. Svitlychnyi who has described in his book the activities of IP inspectors in compliance with legislation in the field of intellectual property protection [10, 77–87];
- ◆ V.V. Shamrayev who has briefly considered the problematic issues of administrative and legal status of IP inspector in Ukraine [11, 23–26]; in a short paragraph of the practical manual he has presented an idea of the institution of IP inspectors [12, 200–201];
- ◆ Some provisions that characterize the IP-inspector as a subject of administrative process, have been included in collective research [13, 66–75].

Therefore, it is obvious that such attention to the legal status of IP-inspector testifies to the great importance of this area of research. At the same time, the existing publications give grounds for concluding that there is a sufficient room for further research in the sphere of institutional and legal support of control and supervision activities in the IP sphere.

The purpose of this research is to study the institutional and legal aspects of current problems and strategic prospects of the State Inspectorate for Intellectual Property.

To this end, there are the following objectives: to analyze the regulatory framework that provides for the regulation of control and supervisory relations in the IP sphere; to identify the problematic issues related to the legal capacity (standing) of IP-inspector; and to formulate proposals for improving the institutional and legal support of control and supervision activities in the IP sphere. The sequence of the study is determined by the logic of the above objectives, the structure and content of the requirements of applicable IP legislation, as well as by the practice of its application.

The formation of a system of legal acts on the regulation of control and supervisory relations in the IP-sphere

The regulative and legal framework for the adoption of the government resolution determining the legal status of IP-inspector [14] includes: 1) the Laws of Ukraine on the Peculiarities of the Government Regulation of Economic Entities Related to the Production, Export, and Import of Disks for Laser Reading Systems [15] (hereinafter referred to as the OD Law) and on Copyright and Related Rights [16] (hereinafter referred to as the Copyright Law); 2) Decrees of the President of Ukraine dated 30.01.2002 No. 85/2002 and dated 27.04.2001 No. 285/2001 [1].

By the last one the President of Ukraine charged the Cabinet of Ministers with taking measures in accordance with the established procedure, including to found special units for combating IP offenses within the Ministry of Internal Affairs of Ukraine and the Security Service of Ukraine and a task force of IP inspectors within the State Intellectual Property Department. In addition, the government had to develop and to approve by August 1, 2001, a program for govern-

ment support in the sphere of IP protection, which aimed at forming a civilized market for IP objects and at ensuring effective protection of rights to IP objects. However, the change of government that took place during this period resulted in a certain revision of plans for implementing the President's vision, as the adopted Concept for the Development of the National IP Legal Protection System [17] was prepared under the Partnership and Cooperation Agreement of 14.06.1994 and the Agreement on trade aspects of intellectual property rights [18], given the practice of implementing the applicable legislation.

It should be noted that the last concept, i.e. "national system of legal protection of IP" was disclosed neither in the IP-Concept-2002, nor in the legislation in force at the time. In addition, on May 17, 2002, the Cabinet of Ministers adopted Resolution on the Approval of the Regulations on the Intellectual Property Inspector of the State Intellectual Property Department [14], according to which the IP inspector was considered an official of the State Intellectual Property Department (SIPD) that was a government body of public administration operating within the Ministry of Education and Science of Ukraine (hereinafter referred to as MES) and subordinated to it.

As noted in the decision of the Board of the Ministry of Education and Science [19], in order to ensure control over compliance with the legislation in the IP sphere and to provide mechanisms for its implementation, a task force for supervision over compliance with the legislation in the IP sphere – the State Inspectorate for IP Sphere – was established within the SIPD. In addition, in the course of the implementation of Resolution of the Cabinet of Ministers of June 20, 2003 No. 37056, regional working groups which included, among others, IP inspectors were established.

However, at that time, the necessity to improve the OD Law [15], in particular, to revise it in terms of clarifying the powers of IP inspectors. Art. 6 of the applicable Law states that these powers, as well as the procedure for inspections

shall be determined by the Cabinet of Ministers, i.e. by its resolution on IP inspectors [14].

With the liquidation of the SIPD (CMU Resolution of March 28, 2011 No. 346), by virtue of Resolution of December 9, 2010 No. 1085/2010, the State Intellectual Property Service (hereinafter referred to as the SIPS) was established. According to the regulations, it was a central government body (hereinafter referred to as CGB) whose activities were guided and coordinated by the Cabinet of Ministers through the Minister of Education and Science, and since the end of 2013 (Resolution of December 18, 2013 No. 689/2013), through the Minister of Economic Development and Trade of Ukraine [20], now in accordance with Resolution of the Cabinet of Ministers of 31.05.2021 No. 547, the Minister of Economy of Ukraine.

It should be noted that the legal status of SIPS was regulated by two regulations at once: the first was the above mentioned one, approved by Presidential Decree of 08.04.2011 No. 436/2011, and the second was approved by Resolution of the Cabinet of Ministers of 19.11.2014 No. 658. The latter establishes that the SIPS director (chairman) was entitled, among other things, to appoint and to dismiss IP inspectors with consent of the Minister of Economy, while the former does not mention this category of IP subjects at all. After the next CGB optimization, as a result of which the SIPS was eliminated [21], the tasks and functions related to implementing the government policy in the IP sphere were assigned to the Ministry of Economy [22].

According to applicable resolution [20], the Ministry of Economy is the main body in the CGB system, which ensures, inter alia, the formation and implementation of government IP policy. Among its main tasks there is the management of state property, in particular in the IP sphere. In addition, the Ministry of Economy, in accordance with the tasks assigned to it, shall take a set of measures for certain groups of relations, which can be classified as follows: 1) rule-making IP relations; 2) administrative IP relations; 3) inter-

national IP relations; 4) control and supervision IP relations; and 5) economic IP relations.

An important step towards the further formation of the system of regulations for control and supervisory relations in the IP-sphere was the adoption of IP-Concept-2016 [23]. It proposes the introduction of a two-tier structure of the state system of legal protection of intellectual property by creating a national intellectual property organization (NIPO) under the Ministry of Economy, given the best practices of advanced economies. IP-Concept-2016 is developed in accordance with the Action Program of the Cabinet of Ministers as approved by Resolution of the Verkhovna Rada of Ukraine of April 14, 2016 No. 1099-VIII, in order to implement paragraph 174 of the Action Plan of the Cabinet of Ministers of Ukraine for 2016 as approved by Resolution of the Cabinet of Ministers of 16 March 2016, No. 184. According to the government, this approach fully takes into consideration the world experience in formulating government policy in the IP sphere and allows creating an effective state system of legal protection of intellectual property in Ukraine and ensuring full, coherent, and effective operation of national innovation system. In particular, NIPO will be entrusted with one of the main tasks, the implementation of functions related to monitoring compliance with the law in the field of copyright and related (neighboring) rights. The action plan for the implementation of the IP-Concept-2016 was approved by Resolution of the Cabinet of Ministers of August 23, 2016 No. 632-r.

However, the amendments to some laws of Ukraine on the establishment of NIPO [24] do not mention control functions in the sphere of copyright and neighboring rights or in any other area of IP rights among its powers. At the same time, the NIPO functions have been assigned to the Ukrainian Institute of Intellectual Property state-owned enterprise (hereinafter referred to as *Ukrpatent*) [25]. In addition, the above-mentioned definition of “state IP legal protection system” has been included in several IP laws, albeit in a somewhat controversial formulation.

Finally, let us outline the bylaws that have a procedural nature and regulate the following areas: 1) the criteria for assessing the risk from doing business in the IP sphere [26]; 2) the procedures for the involvement of the State Regulatory Service and the Ministry of Economy in state supervision (control) [27]; 3) the unified form of the act [28]; 4) the instructions on documenting and recording administrative offenses [29].

Thus, the modern system of laws for the regulation of control and supervisory relations in the IP sphere is represented by: international legal acts and treaties; laws of Ukraine; decrees of the President of Ukraine, resolutions and orders of the Cabinet of Ministers of Ukraine; orders of the Ministry of Economy and the Ministry of Education and Science. The subject of their regulation are groups of IP relations concerning: the implementation of IP norms; software and conceptual development of the IP sphere; the establishment of the legal status of subjects; the implementation of control and supervision process, etc.

The issues related to legal capacity of IP-inspector

Considering the legal capacity as it is defined in modern legal science – the ability of a person to act as a party to legal relations – we shall pay attention to its separate type – special industrial legal capacity as such that is associated with the ability to acquire rights and responsibilities in accordance with professional qualifications and official position. That is, in this case, it is a question of professional, official legal capacity of IP inspector, as a legal precondition for recognizing the person as the bearer of the corresponding legal status. The structure of this complex legal property includes legal capacity, legal capability, and delictual capacity.

As noted by V.V. Shamrayev, the administrative and legal status of IP inspector is an inseparable unity of responsibilities and rights of IP inspector in conjunction with its legal capacity, as well as administrative measures applied to him for improper performance of tasks in this area

(administrative liability and disciplinary responsibility of public administration officials) [11, 23–26]. However, such a separation of legal capacity and delictual capacity seems unreasonable not only in relation to IP inspector, but also to any person in general.

Having classified the subjects of administrative and legal protection of IP rights in the field of R&D in Ukraine by the following criteria: 1) the scope of activities of the subjects; 2) the legal nature of the formation; 3) the areas of activity; and described the activities of such entities, L.V. Zolota mentions the IP inspector [30, 4, 10], although she does not refer it to the system of subjects of administrative and legal protection of IP rights (IPR) [30, 14].

E.V. Yurkova has classified and disclosed the competence of public administration entities in the field of IPR protection, improving, in her opinion, the provision that “the administrative and legal status of public administration in the field of IPR protection is a set of its responsibilities and rights, as established in order to protect IP rights, in combination with their legal capacity.” At the same time, IP-inspectors are not referred to as the subjects [31, 4, 7]. In addition, it seems unreasonable to use in the above definition personal pronouns “its” and “their” in relation to the category of public administration.

O.M. Korotun has positioned the administrative and legal status of public administration in the field of intellectual property protection as a set of specific subjective rights and responsibilities that are implemented on the basis of legislation in specific forms and methods to ensure the interests of society and the state. Depending on the peculiarities of the administrative and legal status, the subjects (entities) of public administration in the field of intellectual property protection are divided into the law enforcement and the supervisory ones [32, 14]. This division has been formulated in more detail in the conclusions, namely, according to him, there are the law enforcement, the supervisory, and the judicial public administration entities [32, 22].

A.V. Khridochkin, while studying the peculiarities of the administrative and legal status of IP inspector, has stressed the need to continue administrative reform, including the further harmonization of special laws and bylaws regulating the activities of state inspectors, with the Presidential Decree of April 8, 2011 [33, 150].

Such a statement is not correct, because, firstly, the mentioned Decree that is invalidated by Decree of 20.06.2019 No. 419/2019, except for the mention that the said public service shall, in accordance with its tasks, supervise (exercise control) over the observance of the requirements of the IP legislation by business entities of all forms of ownership, in no way concerns the legal status of IP inspector.

Secondly, the author does not take into account the provisions of the Constitution of Ukraine on the subordination of bylaws to laws, which means the highest legal force of the latter, since all the bylaws are adopted on the basis of laws and their content shall not contradict them. Insofar as the President, in accordance with Part 3 of Art. 106 of the Constitution of Ukraine, on the basis of and in pursuance of the Constitution and laws of Ukraine, issues decrees and orders that are binding on the territory of Ukraine, in the case of conflict between norms of bylaw and law, the law shall prevail, as stated in the letter of the Ministry of Justice of Ukraine [34].

In the context of this research, it is appropriate to pay attention to the decision of the Administrative Court of Cassation under the Supreme Court of Ukraine, which contains extremely important provisions for understanding, the legal capacity of IP inspector, namely [35]: the IP inspector shall act on behalf of the CGB, not as an independent subject of power; the IP inspector cannot act as an independent defendant, as the appropriate defendant is the relevant body.

According to V.V. Kulchytskyi, it is advisable to introduce a three-tier control system for a trial period (as a pilot project), which shall include customs bodies, market regulators and the judiciary [36, 93]. However, currently, with regard to

the state market regulators, it is necessary to take into account the legislative requirement [37, Part 15 of Art. 23] according to which if as a result of inspection of products, signs of product falsification, breach of IP rights or other offense are detected, the prosecution for such falsification, breach or offense is beyond the competence of the market regulator.

The authors of monograph [38] have disclosed, among other things, the nature and legal nature of state regulation/control and identified ways to improve the organizational and legal framework of state regulation in the field of IP protection. However, in the dynamics of modern IP legislation, some results have lost their relevance.

N.P. Kapitanenko has considered the types of state regulation in the IP sphere. She distinguishes the external and the internal regulation [39, 165]. At the same time, while stating that the direct state supervision over the compliance of economic entities with the requirements of the IP legislation for the use of IPR is assigned to IP inspectors [39, 171], the author does not indicate to which type of the regulation she refers “direct state supervision,” although, based on the logic of the analysis of these types of regulation, she probably means an interdepartmental (departmental) supervision.

The review of some scientific and practical results has shown the trichotomous nature of the legal capacity of IP inspector, in terms of its regulation by the control and supervision legislation (the Law of Ukraine on the Basic Principles of State Supervision (Control) in Economic Activity” [40], the institution of the economic and administrative law), on the one hand. And on the other hand, by the IP legislation (the institution of the civil law), in particular, by the Law of Ukraine on the Distribution of Copies of Audiovisual Works, Phonograms, Videograms, Computer Programs, and Databases [41, Art. 12], the OD Law (15, Art. 6] and the Copyright Law (the IP inspectors are mentioned in the law indirectly, through the function of the Ministry of Economy). Therefore, it can be stated that the composition of IP objects

that fall under the supervision by IP inspectors is also limited. On the third hand, the legal capacity of IP inspector is regulated by the legislation on civil service (the Law of Ukraine on Civil Service, the institute of the constitutional and administrative law). That is, the trichotomy of IP inspector is disclosed in the unity and differentiation of its legal status as: 1) civil servant; 2) inspector; and 3) IP specialist.

At the same time, the major legal acts that determine the legal status of IP inspector is regulation [14] that is a bylaw: 1) regulates the general principles for activities of IP-inspectors; 2) determines their main functions, rights, and responsibilities regarding the state supervision over the observance of the requirements of the IP legislation by economic entities in the process of using the objects of IP law; 3) governs the procedure for state IP regulation.

It should be noted that computer programs are a relatively new IP object that appeared in our lives and immediately started to play an important role in it. The formation of the legal protection of computer programs has been considered by us in [42].

We should also pay attention to the fact that this government decree has been amended/modified several times in 2004–2019. Therefore, some researchers, due to inattention, have made erroneous conclusions. O. Barladian believes that the tasks, functions, and powers of the mentioned officials (IP inspectors) are regulated by Resolution of the Cabinet of Ministers of January 9, 2014 No. 674 [43, 101], although in fact, it is Resolution of the Cabinet of Ministers of May 17, 2002 No. 674 as revised on January 17, 2014 [14] (based on Resolution of the Cabinet of Ministers of December 18, 2013 No. 933 [44]).

Being an official of the Ministry of Economy, the IP inspector has the legal status of a civil servant, i.e. is endowed with the ability (opportunity) to have fundamental rights, to perform basic and additional duties, as well as to bear legal responsibility [45, Art. 7, 8, 62, 63, section VIII]. Although the general requirements for this ca-

tegory are considered unjustified, but currently they meet the norms of the law [45, 20], a significant disadvantage of this IP inspector bylaw is that it has no requirements for a person who applies for this position. The recruitment practice of the Ministry of Economy shows that, for example, the qualification requirements for the applicant [46] for chief specialist (category B) at the Division for State Supervision over Compliance with Intellectual Property Law under the Board for the Copyright and Related Rights of the Department for the Development of the IP Sphere as stated in the announcement for additional recruitment for the period of quarantine are at least surprising. While the general requirements for this category, although seem to be unjustified, but currently meet the requirements of the law [45, Art. 20] (at least, junior bachelor's or bachelor's degree at the discretion of the subject of appointment, and fluency in the national language), the special requirements for professional competence (that are determined by the subject of appointment, given the recommendations approved by the CGB responsible for developing and pursuing the government policy in the sphere of public service, now the National Agency of Ukraine for Civil Service Affairs) are missing at all (there are no requirements for the applicant's experience). This fact does not correspond to the job description as established by the subject of appointment [46].

Performing such duties by a person with the initial (short cycle) or the first (bachelor's) level of higher education, with no experience in the civil service, supervision or control, or in the IP sphere, in our opinion, is likely to be ineffective.

Special attention should be paid to the use of such terms as "legal capacity," "competence," and "legal status" in relation to IP inspector, the content of which is not always adequately reflected in the chosen interpretation. Therefore, based on the general theoretical provisions of jurisprudence, it is proposed to further consider the legal capacity of IP inspector as an element of its special legal status, as a set of subjective rights, legal

responsibilities, and legitimate interests. The content of the legal status of the IP law subjects includes their purpose, tasks, functions, forms, methods, objectives, powers, and competence, i.e. outlines the issues that this entity are authorized to deal with.

Proposals to improve the institutional and legal framework for control and supervision activities in the IP sphere

One of the central proposals for improving the institutional and legal framework for control and supervision in the IP sphere is that at the present stage of its development, which is focused on new content, quality, and scope of innovation and technology components, we shall consider the state IP inspectorate as an institution of the national IP system instead of discussing the institution of IP inspectors. In this case, we may justify this proposal as follows.

1. The Ministry of Economy delegated the control and supervision powers by assigning them to the main tasks of the IP Department [47]. There is no mention of IP inspectors in the regulation on the IP Department of the Ministry of Economy. In addition, the question of the defined limits of state supervision (control) over the observance of IP legislation by business entities within the scope of only the three above-mentioned laws remains open.

2. Two important legal provisions are noteworthy: a) the IP inspectors have the right to involve representatives of the regulatory bodies listed as the CGB responsible for measures in the field of the regulation of the production, export/import of disks for laser reading systems and matrixes (the list of CGBs, their powers and procedures are determined in accordance with the Constitution of Ukraine, by the OD Law and the Law of Ukraine on the Central Government Bodies) [48, Art. 6]; b) CGBs are established to perform certain functions of public policy, in the form of a service, agency, inspection, commission; one of the main CGB tasks is the implementation of state supervision (control); if most of the CGB func-

tions are those related to control and supervision over compliance with applicable legislation by government bodies, self-governing bodies, their officials, legal entities and individuals, CGB is founded as an inspectorate [48, Art. 16.17].

3. Currently, there are five state inspectorates of Ukraine: the State Inspectorate for Cultural Heritage, Architecture and Urban Planning, the Environment Inspectorate, the State Inspectorate for Nuclear Regulation, and the State Inspectorate for Energy Supervision. At the same time, the Ministry of Economy (we pay attention to the official renaming of the Ministry [49]) has 4 CGBs: the State Export Control Service of Ukraine; the State Reserve Agency of Ukraine; the State Service of Ukraine for Food Safety and Consumer Protection (hereinafter referred to as the State Food and Consumer Service); the State Labor Service of Ukraine, which to some extent are endowed with control and supervisory functions.

In terms of its functional content, the State Food and Consumer Service is a hybrid CGB that has the powers of both service and inspectorate. This body was formed as a result of optimization of the CGB system [50], by reorganizing the State Veterinary and Phytosanitary Service and adding the State Inspectorate for Consumer Protection and the State Sanitary and Epidemiological Service to the State Food and Consumer Service that was being organized that time.

One more aspect that needs to be improved is the status of internal structural units of the Ministry of Economy and the IP Department. The latter has already been considered above as an IP institution of the Ministry of Economy, but its own structure needs further analysis. The fact is that according to the first version of Resolution of the Ministry of Economy, which approved the regulations for the structural units of the IP Department, it included, among others, the sector of state supervision over compliance with IP legislation [51].

The tasks of the sector included the implementation of state supervision (control) over compliance with the requirements of the three above-

mentioned IP laws by economic entities, regardless of ownership, as well as the organization of activities of IP inspectors to implement measures of state supervision (control) over compliance with the requirements of the IP legislation by economic entities, regardless of ownership, in the respective region. However, Resolution of the Ministry of Economy No. 2027 of 12.10.2020 invalidated the provision on the specified sector of state IP supervision. So, the question of control and supervision in the IP sphere and IP inspectors remained open.

This happened soon after the publication by USTR of Special Report 301 that was a deliverable of annual review of the status of the protection and ensuring of compliance with the IP requirements by U.S. trade partners all over the globe. According to this Report, Ukraine, in 2020, remained in the list of monitoring priorities. In the opinion of the American experts, the restoration of the institution of IP inspectors likely will help combatting online piracy [52, 58–59].

In addition, attention should be paid to the Resolution of the Ministry of Economy, which establishes the officials of the Ministry of Economy, who perform the powers of IP inspectors [53]. The list includes seven officials from the IP Department of the Ministry of Economy, which raises many questions:

First, such an interpretation of Regulation [14] that “the IP inspector shall be an official of the Ministry of Economy” by the IP Department is rather doubtful, while in the Resolution of the Ministry of Economy it looks like “the official of the Ministry of Economy shall be an IP inspector.” In our opinion, this norm should be interpreted as follows: the person who has successfully passed the selection (competition) for the position of IP inspector, been appointed to this position by the State Secretary of the Ministry of Economy by respective administrative document, with a notice of the employment contract signed given to the tax administration, and sworn an oath of civil servant (legal fact) becomes an official of the Ministry of Economy.

Secondly, it is obvious that the Resolution refers to doing by an employee in the same institution, along with his/her main job under the employment contract), an additional job of another profession (position), and therefore, the pay for this extra work, in accordance with Art. 105 of the Labor Code of Ukraine. So, is it expedient (and practicable) to combine the main job of top manager of the IP Department with the powers of IP inspector and does it contradict Art. 120 of the Constitution of Ukraine, given the decision of the Constitutional Court of Ukraine of October 17, 2002 No. 16-rp / 2002 in the case of combining the official duties of top officials of government bodies (case No. 1–4 / 2002)?

Third, how is the requirement of Regulation [14], which states that the IP inspectors shall work in certain regions where they represent the Ministry of Economy, met in this case?

Fourth, the IP Department of the Ministry of Economy experiences some HR problems that, for example, were revealed when the IP Department director who was one of the appointed IP inspectors was dismissed by the Minister on November 15, 2019.

Fifth, we have to agree with the opinion of S.V. Mazurenko who regrets that the knowledge and qualifications of specialists among IP inspectors, tax inspectors, and judges, on whom the application of legislation depends, still has not reached appropriate level [54, 385], and there is a significant lack of IP inspectors [54, 387].

Thus, given the provisions of the draft national IP strategy that declares the restoration of the institution of IP inspectors, for raising the effectiveness of the application of administrative and delictual rules for combating these breaches in the IP sphere, including [55, 124, 130]: increasing the number of IP inspectors and ensuring the financing of their activities at the expense of the national budget; entitling the IP inspectors to record the content of a website (page), other places of data storage on the Internet; and establishing the coordination of actions of IP inspectors and law enforcement agencies. Also, there are the fol-

lowing areas of improving the institutional and legal framework for control and supervision over IP activities with the subsequent formulation in the texts of respective legislative acts and regulations: the internal structure and powers of the main IP body; the external structure of the main IP-body and powers of territorial and interregional territorial IP bodies; maximum number of IP inspectors; the establishment of special requirements for the professional competence of IP inspectors; the definition of the spheres of individual, departmental and interdepartmental (complex and commission) control and supervision over IP activities, depending on the type of measure and the type of IP object.

Conclusions

It has been proposed to improve the institutional and legal framework for control and supervision over IP activities at the present stage of its development through focusing efforts on the new content, quality, and scope of innovation and technology components, by establishing the IP inspectorate as institution of the national IP system instead of restoring the institution of IP inspectors.

The main results of the research are as follows.

1. The legislative framework that governs the control and supervisory relations in the IP sphere has been analyzed. The analysis has allowed classifying the groups of relations by which the Ministry of Economy takes IP measures; presenting a modern system of legal acts for regulating the control and supervisory relations in the IP sphere; and systematizing the subject of regulation of the institute of control and supervision over compliance with the requirements of IP law by constituent blocks.

2. Problematic aspects in the legal capacity of IP inspector have been identified.

3. Directions and approaches to improve the institutional and legal framework for control and supervision in the IP sphere have been proposed.

The importance and practical orientation of the results is caused by the need to reform the in-

spection institution as part of the state system of legal protection of IP.

The prospects for further research in this area are to review the existing institutional and legal

mechanisms of control (supervision) over compliance with legislation in the field of IP protection in foreign countries and relevant experience in forming the legal status of IP inspection bodies.

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ПРОБЛЕМИ ТА ПЕРСПЕКТИВИ ДЕРЖАВНОЇ ІНСПЕКЦІЇ З ПИТАНЬ ІНТЕЛЕКТУАЛЬНОЇ ВЛАСНОСТІ: ІНСТИТУЦІЙНО-ПРАВОВІ АСПЕКТИ

Вступ. Інститут інспекторів з питань інтелектуальної власності (ІР) було створено відповідно до Указу Президента України в 2001 році. Він є важливим механізмом контролю держави за забезпеченням дотримання ІР-прав суб'єктів господарювання.

Проблематика. Основними проблемами, пов'язаними із формуванням цього інституту, є: неврегульованість правового статусу інституту державних ІР-інспекторів і ІР-інспекції як інституції національної ІР-системи; протиріччя статусу внутрішніх структурних підрозділів Мінекономіки та його ІР-департаменту; необхідність визначення основних сфер вдосконалення інституційно-правового забезпечення контрольно-наглядової ІР-діяльності.

Мета. Дослідження інституційно-правових аспектів сучасних проблем та стратегічних перспектив державної інспекції з питань інтелектуальної власності.

Матеріали й методи. Використано загальнонаукові та спеціальноюридичні методи дослідження правових явищ та категорій. Дослідження джерел ІР-права, а також законодавства про контрольно-наглядову діяльність та про державну службу проведено з використанням методу системного аналізу та формальноюридичного методу.

Результати. Проведено аналіз нормативно-правової бази, що забезпечує регулювання контрольно-наглядових відносин в ІР-сфері. Виявлено проблемні питання у правосуб'єктності державних ІР-інспекторів.

Висновки. Запропоновано шляхи вдосконалення інституційно-правового забезпечення контрольно-наглядової діяльності в ІР-сфері: розгляд питання не про інститут державних ІР-інспекторів, а про державну ІР-інспекцію як інституцію національної ІР-системи; передавання контрольно-наглядових ІР-повноважень та штату ІР-інспекторів Держпродспоживслужбі; врегулювання питання про контрольно-наглядову ІР-діяльність Мінекономіки і про державних ІР-інспекторів; визначено основні сфери вдосконалення інституційно-правового забезпечення контрольно-наглядової ІР-діяльності.

Ключові слова: інтелектуальна власність, державна інспекція, авторське право, суміжне право.