The Challenges and Opportunities in Law: Ukrainian Case under the Conditions of War, pp. 735-755
https://doi.org/10.12797/9788381388887.10

Sergiy Glotov
Vilnius University, Faculty of Law
glotov.sergiy@gmail.com

Chapter 10

The Viability of Intellectual Property Law in the War

ABSTRACT

First and foremost, it is the seemingly unshakable institutions that tend to be affected by the evolution of views. This is especially true for those "rules of life" that, for one reason or another, have not worked out as expected or assumed by the society that had established them. What first comes to mind here is, of course, the example of the public international law's flagrant and disgraceful failure in terms of the security assurances given to Ukraine as a state that had given up its nuclear weapons by the world community represented by specific subjects of international law, including the aggressor country, under the Budapest Memorandum of December 5, 1994, which manifested not just the weakness of international public law, but rather its failure or even non-existence.

Meanwhile, if we talk about law, Russia's war against Ukraine spurred the evolution of views not only on such a special legal system as public international law, but also on a number of institutions of civil law, private law. Our article discusses such an undoubtedly important private-law institution as intellectual property law.

The intellectual property rights (exclusive rights) are known to be equated with the right of ownership due to the absolute nature assigned to them. However, the retrospective analysis of the relations arising in the context of compensation for the war damage inevitably makes one doubt their absolute nature, at best, and at worst, the very possibility of an exclusive right as a "right to." The reason for such doubts is, in the first place, it being impossible to exercise the right to protection by forcing third parties to refrain from encroachment on the right (object of the right), and in the case of such an encroachment, by bringing them to justice. Therefore, there is every reason to review the legal nature of the exclusive rights.

Keywords: exclusive right, intellectual property, ownership, scope of exclusive right, absolute rights, war

It so happened that a war has again come to the continent that experienced such catastrophes twice over the past century while undergoing the first and the second world wars. As in any military conflict, the Russian full-scale invasion of Ukraine has required rethinking of an extensive range of issues related to the social, cultural, legal and other fields, thus marking a new stage in the development of society.

It is evident that this evolution of viewpoints is likely to involve primarily well--established and seemingly inviolable institutions. This especially refers to the "rules of life" that have, due to any reasons, turned out different from what was expected by the society that adopted them. In this respect, a most obvious case concerns the area of public international law with a clamant and odious failure in the provision of security assurances to Ukraine as a state that gave up its nuclear weapons capacity, given under the Budapest Memorandum signed on December 5, 1994 by the global community represented by the specific international law entities, including the aggressor country. This fact has brought clear confirmation and understanding that public international law is not merely weak but actually unenforceable and inconsistent.

Meanwhile, it did not take long for the Russian war against Ukraine to facilitate the evolution of opinions in the realm of law. Changes have involved not only the field of public international law, but also a number of institutions of civil law, or private law. Within the context of this study, the focus is on an undoubtedly important civil law institution which is intellectual property law.

It is appropriate to provide some examples of the metamorphoses that have occurred in connection with the above events in the Russian law. For instance, the Resolution of the RF Government dated March 6, 2022 No. 299/2022 introduced changes to the existing rules of compensation for the use of other persons' patents, utility models and industrial designs in the areas where this use is allowed by the state with no consent from the patent owner on the grounds of the national security. According to the amendment, if the rights in question consist of the patents owned by persons having connections with any of the list of unfriendly countries (in practice, those are the states that had imposed sanctions on Russia or its citizens, headed by the USA, the European Union and the UK), the compensation, normally including the royalty, which had already been minimum in Russia, namely 0.5%, was to be reduced to zero and, accordingly, was not subject to payment.

The second regulatory measure, adopted by the Russian parliament on March 8, 2022, according to Federal Law "On Introduction of Amendments to Various Laws" No. 46-FZ, generally authorizes the Russian Government to determine by itself the range of products that are considered vital and essential and are to be exempted from any copyright protection.

Unsurprisingly, the above measures, approved by the Russian Government to restrict intellectual property, caused serious concerns of non-resident companies in

the Russian Federation and intellectual property lawyers (Galli, 2022), since that way, intellectual property right holders appeared to be deprived of their effective remedies. Accordingly, it was absolutely unclear how the Coca-Cola Company had to react to the production of analogue beverages to Coca Cola, Fanta, and Sprite by the Moscow brewery and soft beverage factory Ochakovo for the Russian market,[1] or what actions should be taken by the film copyright holders who cancelled official distribution of their films due to the situation in Ukraine only to find them shown in an unauthorized way in Russian cinemas (V rossijskih kinoteatrah…, 2022). While the situation with traditional property rights is relatively clear, as the owner of a material thing may at least protect the right physically (via self-defence), the situation with the rights to intangible mental property is completely different: self-defence is impossible due to its inherent uselessness, whereas technological means of protection may be effective only in single cases.

Consequently, the essentially declarative identification of rights on the territory of the RF jurisdiction, where the rights are violated, pushes right holders as well as users into the abyss of legal uncertainty, which inherently leads to the doubts of whether intellectual property law may be enforceable and valid as law. From this perspective, there emerges a question, whether it is worth marking intellectual property rights as property or assets if one day these assets and their possession by a specific legal entity may be recognised invalid on somebody's initiative. This paper aims at considering the above legal uncertainty from the standpoint of questioning the intellectual property rights validity.

A Brief Retrospective Overview and Analysis of the Establishment and Development of the Intellectual Property Law

Since its introduction in the legislative system at the level of the regulatory norm, the intellectual property law has been regarded as valid and unquestionable by the legal community. This law seems particularly attractive and appealing to the researcher as it is relatively young (despite the availability of extensive literature and manuscripts, people of antiquity did not recognise copyright which would ensure the author's control of their product), and so we have an opportunity to witness its development and specific legal challenges related to what this law actually is.

---

[1] See for example: https://tjournal.ru/news/623277?fbclid=IwAR22K5l4BWB3qOXrsEQd2dN67iFtnIFnWRX9Uv87xZl0AjLSjrptIv3muT4.

It is to be noted that ideological opponents of intellectual property law represented in particular by copyright had already appeared a long time ago. Probably, their most prominent representative in the nineteenth century was Pierre-Joseph Proudhon (1809-1865), who devoted a separate study to this issue entitled *Les Majorats littéraires* (Proudhon, 1865, p. 191) That work was dedicated to the consideration of the bill on literature ownership (1862), which was designed to provide copyright for an unlimited period of time. The French philosopher and economist questioned copyright (literary ownership) from the perspective of political economy, aesthetics, morality, and public law.

First of all, Proudhon challenges the classical statement by Napoleon III to the effect that intellectual work is the property similar to that of land or a house, and, therefore, this property should enjoy the same rights and might not be violated for any other reasons than in the interests of public benefit. Proudhon sought to identify whether the work performed by an artist, a writer, or a composer might generate property similar to land and whether the analogy in that identification was not actually false. His conclusion was that the establishment of literary ownership contradicts all the principles of political economy because it cannot be derived from the concept of a product or the concept of exchange, credit, capital and interest. The service provided by a writer, regarded from the economic and practical viewpoints, makes a definite implication of the existence of service and product exchange agreement between the author and society. Consequently, this exchange points out that due to the consideration paid to the writer for his benefit, a literary work becomes the property of the society (Proudhon, 1865, pp. 186-187). Obviously, Proudhon's approach does not indicate that an artist is not entitled to consideration for their work, since nobody can think of depriving a person, whether a poet or a slave, of his loaf of bread (Proudhon, 1865, p. 18). The only thing Proudhon clearly objects to is author's ownership of the work that has already been publicly released.

Furthermore, Proudhon resorts to arguments related to the field of moral and ethics, and his ideas sound more radicalized here. From the ethical point of view, art is, by nature, as priceless as justice, religion and truth. Poetry, sculpture, painting, and music are, according to Proudhon, devoted to the truth, and they cannot betray or violate it without losing their dignity (Proudhon, 1865, pp. 102-103). Only the unity of reason, law and art create the human freedom, but the question is in the way this emancipation could be implemented if an artist or a writer yields to voluptuousness and flatters vices; if they work for money and care for their own benefits the way tax-farmers or money-lenders do. Venal art, as if a woman of easy virtue, loses its meaning (Proudhon, 1865, pp. 103). As a result, the forms created by an artist to depict religious, ethical and philosophical thoughts are similarly sacred as religion and ethics themselves. In the same way that the judge is bound by the requirements

of justice and the philosopher is bound by those of the truth, the poet, the public speaker and the artist are bound by the requirements of beauty. Their obligation is to guide us to this beauty, because their mission is to enhance us and their work consists in carrying out a critical analysis of human personality, similar to the way philosophy analyses our reason and mind, and law analyses our conscience (Proudhon, 1865, pp. 103-104).

Additionally, Proudhon applies legal arguments. For one thing, the scholar believes that works of art are not for sale by their nature. For another, vesting rights to a creative product in an individual violates collective rights. "Look at a wheat field," Proudhon writes, "can you identify the head that spired first and are you in a position to assume that all the wheat heads spired on the initiative of the first one? The situation with creators (as they are called) is nearly the same, though they are frequently shown as if they were some benefactors of the mankind" (Proudhon, 1865, pp. 148-149) The thinker means that creators managed to see and express something that was already in public thought. They happened to discover a law of nature that was to be discovered sooner or later anyway because the phenomenon had been around all the time. In a certain way, they beautified an object that had long been undergoing idealisation in the collective memory and imagination… Proudhon notes that it is not right to deprive humanity of its achievements and legacy by limiting reason and freedom of science and art. According to him, in addition to its claims for ownership, intellectual property deprives society of its recognised part that is to be owned by it in a work of any content and form.

The aforesaid example of critical attitude to establishing the right to an intellectual (creative) product perfectly illustrates the core idea of the movement in legal thought which provided arguments whether the result of creative activity may be regarded as property, or as an object that may be owned and at the disposal of an individual, since the term "ownership" was rather used as a household term in those considerations.

In any case, this identification clearly points to the attempts to bring the results of creativity to the class of works protected by law, in their content resembling the right of ownership, by means of establishing the respective law. However, it has already been mentioned that the intellectual property law has been generally recognised and it can be currently found in all and any jurisdictions as property items sui generis.

Therewith, it should be stated that from the doctrinal standpoint. the proprietary concept of intellectual property law, despite being dominant at the end of the eighteenth century and the early nineteenth century, has long been perceived as invalid, and the overwhelming majority within the legal community strongly believe in the soundness of the exclusive rights concept, which can be confirmed in as early studies

as those from the turn of the twentieth century, e.g., the works by G.F. Shershenevich (1891, pp. 25-65), A.A. Pilenko (2001, pp. 110-118) etc.

Nonetheless, even today, the legal doctrine of the USA still features discussions on the nature and origins of intellectual property rights. The issue of the kind of right intellectual property belongs to (Merges, 2017) is even worded in the title of a paper by R.P. Merges published by UC Berkeley.

Having said that, it is to be mentioned that in the common law countries, including the USA, the utilitarianism plays a prevailing role. According to the utilitarianism theory supporters, represented, in particular, by Mark A. Lemley and Peter S. Menell, the value of tangible objects and works of art is primarily, if not fully, in their capability to perform tasks or meet the needs of individuals or the society as a whole. The state seeks to protect these tangible and intangible objects (works of art) using a special legal regime. Although purely commercial (proprietary) approach is not always applicable to these works, utilitarian approach has always been within the focus of shaping copyright in the USA (Menell, 2000, p. 156) The regulatory foundations of the approach lie in Section 8 Article 1 of the US Constitution, which provides, among other things, for the power of the US Congress to facilitate the development of sciences and useful trades, thus ensuring exclusive rights to the authors and inventors of works and inventions for a specific period of time. The utilitarian approach proceeds from the premise that intellectual property rights are the products of state regulation and, therefore, their existence always requires grounds, namely, the analysis of their benefits and the regulation quality, as well as the opportunity to provide society with innovations.

However, Merges objects to the utilitarian approach, noting that, in this case, insufficient attention is paid to the private law component in intellectual property relations, since the use of intellectual property and the protection or assignment of intellectual property rights are normally between equal parties, thus being an integral part of civil law (Merges, 2011).

In this respect, having analysed the existing obstacles that prevent regarding intellectual property rights as equivalent to ownership, Merges comes to the conclusion that they are insufficient. Among the features of intellectual property rights, Merges singles out the following: conditionality, i.e., dependence on certain state regulated procedures for the acquisition of rights and their confirmation, which is applicable to patent law and means of personalisation, restricted time, and the range of applicable items. The above limitations weaken the strength or power of intellectual property rights. However, it should be noted that the right of ownership is not unlimited, either.

The idea of borrowing elements of the legal regulation of ownership and their transfer to the intellectual property law within the common law system is thorough-

ly and comprehensively considered by Richard Epstein, who studied the ownership regime to different resources, in particular, legal regulation of land and water resources. The scholar owes his fame to the article *An Outline of Takings* (Epstein, 1986) regarding private property and the power to convert it into the public property. The focus is on the Fifth Amendment to the US Constitution in terms of its provisions of takings, which specify that no private property may be alienated for public use with no fair consideration. Afterwards, Epstein addressed the issues of intellectual property law and applied thereto his conclusions on private property, thus revealing another perspective of the intellectual property law, which was missing in the positions of those experts whose analytic opinions were originally shaped in the domain of intellectual property law. In 2006, at the Summit in Aspen (Colorado, USA), organised by the Progress and Freedom Foundation, Epstein gave a lecture on *The Structural Unity of Real and Intellectual Property*, where he defined four principles, creating the basic framework of understanding property ownership. He stated that these principles may be applied to intellectual property rights with the only distinction being in their transfer, which may be absolute only in relation to assets, but not to intellectual property. In virtually any case and any issue within the intellectual property domain, it is possible to find appropriate analogy in the area of tangible assets ownership (Epstein, 2006, pp. 3-4).

According to Epstein, the *structural unity* between the ownership and the exclusive right to intellectual property must direct legislative and judicial bodies toward the use of the achievements of real rights to develop and improve intellectual property law. The proper understanding of tangible and intangible assets ownership systems proceeds from the common idea to form the system of rights distribution, which will generally raise the value of assets in private property (Epstein, 2010, pp. 522-523).

All the above mentioned contrasts with the so-called Continental approach, which is based on the perception of intellectual property rights as intrinsic, thus promoting the personality of the author and their own interests.

Nevertheless, it is still true that both for the common law and the Continental law countries, intellectual property rights along with ownership rights are perceived as the outcome of the author's personal creative work. In effect, this is the reason determining the proclamation of the exclusive right inviolability at the level of legal norm. For instance, in reference to ownership rights, D.I. Meyer once wrote that even those states that do not highly value the rights of their citizens still declare ownership inviolability because the person's control of a thing is necessary to meet their needs, whereas the willingness to meet them is so inherent in humans that they highly value their available means. Therefore, the right of ownership is commonly recognised as essential and believed to be inviolable (Vytsyn, 1873, p. 731). It is quite

logical to assume that human needs may be met not only by tangible but also by intangible benefits, including the results of creative activities. The point is to meet not merely intangible needs of both the society and the author (right holder), but also, naturally, the material needs of the latter, promoted by the steadily increasing intellectual property commercialisation. For this reason, no invincible obstacles can be found to withhold the inviolability of not only the owner of tangible assets, but also the owner of intangible assets, which serves as the grounds for the independence of intellectual property law along with real and liability law.

The Exclusive Right as the Absolute

The recognition of the exclusive right and its theoretical evidence as an independent kind of property rights was an indisputable milestone in the development of intellectual property right protection. Ernest Roguin characterised author's rights to spiritual (creative) works as the monopoly right, whose essence was understood not as the exclusive right of possessing a well-known thing, but as the right to prevent any other persons from possessing similar or identical items (Roguin, 1889). Defining the term of *monopoly*, Roguin mentioned that according to the conventional word use, the monopoly was something exclusive. Accordingly, it was not an opportunity for the thing to be used by one person, because all absolute rights have this feature. From his standpoint, the difference between the *monopoly* and real right, or interest, consisted in the fact that while the active (positive) and passive (negative) aspects of the real right were equally significant, the former was missing in the monopoly. The monopoly is a general obligation to refrain from taking certain steps and in the legal system, it is in the interim position between the real and liability right.

When criticizing the provisions of Roguin's theory of monopoly rights, G.F. Shershenevich stated that in that case, it is to be recognised that the title to a land plot is also a monopoly in relation to all those who seek to convert their labour into its cultivation (Shershenevych, 1891, p. 63). Owing to this criticism, one can reasonably point out the following:

1. While understanding *monopoly* as something exclusive, belonging to one or few persons, we are to indicate that the monopoly is generally a property of absolute rights and, in this respect, it is indeed "necessary to admit that the title to a land plot is a monopoly."
2. The theory of exclusive rights suggested by G.F. Shershenevich is based on the main features and on the same scheme as the theory of monopoly rights suggested by Roguin. Shershenevich identified some actions, being benefits to the

person who is their doer, if other persons are deterred from taking the same steps. Since the aim of legal defence is rather to provide famous persons with an exclusive opportunity to take well-known actions prohibiting all the others to mimic, the above rights should be called *exclusive*. At the same time, professor Shershenevych put exclusive rights alongside ownership rights to the category of absolute rights, distinguished from each other by the tangibility of their object (Shershenevych, 2005, p. 431).

The standpoint that intellectual property rights are absolute is also dominant in the Ukrainian legal doctrine (Pidopryhora, 2000, p. 14; Spasybo-Fatieieva, 2012, p. 40; Pototskyi, 2007, pp. 81-83). The provision of the absolute nature of intellectual property rights was reflected in the structure of the existing Civil Code of Ukraine. While explaining the role of Book 4 *Intellectual Property Law* in the Civil Code of Ukraine, A.S. Dovhert draws attention to the fact that intellectual property rights are absolute rights, therefore, the respective section must be among those regulating absolute rights (in particular, real rights and personal non-property rights). For that reason, absolute rights to these items are to be regulated along with the regulation of real rights to things and before the liability law, which regulates the turnover of things and intellectual property exclusive rights (Dovhert, 2000, p. 40).

In absolute legal relations, only one right holder is determined, and it is opposed by the indefinite number of passive persons (obligors). In absolute legal relations, the legal bond of the authorised subject is valid equally and identically to all and any person.

The consequence of the specific interpersonal connections in absolute legal relations is the absolute nature of protection, under which absolute right is protected from any violation from any third person. Regardless of the caused property damage, whose indemnification, according to the general rule, requires the fact of the damages and the fault of the wrongdoer, absolute rights are subject to protection per se, in other words, even in case the violation does not infringe property rights. Unlike relative, absolute rights emerge despite the will of third persons, mediate the statics of civil transactions, and their enforcement requires and needs only the will of their right holder. The illegal exercise of absolute rights by any third person or the illegal obstruction in the right holder's exercise of their right are to be prevented, and the law is to be reinforced. A special remedy for absolute rights is represented by filed motions for the recognition of rights.

Consequently, the absolute nature of exclusive right enables to specify a number of its typical features:

– the respective right is correlated to the obligation of all third persons to avoid any actions that would be in conflict with it;
– the obligations of passive subjects are formulated as prohibitions;

– the right may be violated by any person;
– the exclusive right claim may be filed against any person who violates the right;
– the right arises regardless of the will of passive subjects.

It is worth emphasizing again that by means of the above, the exclusive right is essentially given the same status as the right to ownership: one of the basic human rights, which has the internal bond to the guarantee of individual's personal freedom in relation to the subject of the right (thing).

The Content of the Exclusive Right

In compliance with all and any international treaties and agreements on intellectual property, including the Berne Convention for the Protection of Literary and Artistic Works, the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations, the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), and EU Directives, the essentials of the exclusive right are conveyed via the *right to consent*, *the right to consent or prohibit*. The Civil Code of Ukraine also applies the term *the right to prevent* (par.3 p.1 art.440, par.3 p.1 art.464, par.3. p.1 art.474, par.3 p.1 art.487, par.2 p.1 art.490, par.3 p.1 art.495, par.3 p.1 art.503, par.3 p.1 art.506 of the Civil Code of Ukraine). This having been said, providing the legislative framework for the exclusive right, it is the right of a person who has the exclusive right to use the intellectual property item at their own discretion (positive right of use), as well as to give consent and prohibit to use it (negative right of prohibition).

Therefore, it follows that within the scope of exclusive rights, it is possible to point out positive and negative powers. With this in mind, the latter ones are basic (prevailing). To provide the grounds for these statements, it is worth giving several additional arguments related to the specifics of intellectual property items and the history of intellectual right development. First of all, we should attend to the institution of privileges, the precursor of exclusive rights. It is of interest due to two reasons. First, privileges are definitely structured according to the positive model. They were based on the power of a person to use the result of intellectual activity himself. Yet, in terms of their content, exclusive rights differ from them and represent a new stage of development. It intrinsically confirms unacceptability of limiting exclusive rights to the power of personal use. Otherwise, we would still be discussing privileges. Second, it is possible to single out a number of historical preconditions, which determined the *positive nature* of privileges and which are currently non-existent. The factor confirming the issue of first privileges to inventions was shop manufac-

turing and the obligatory principle that became widely spread in the Middle Ages in most European countries. This principle was based on the idea that all competitors, operating in a specific industry, are to have an opportunity to compete using more or less equal tools. Consequently, everyone undertakes to work in the same conditions; no person is allowed to neglect customary manufacturing methods, even to implement improvements or enhancements (v. Pylenko, 1902, pp. 129-174).

Gradually, in the course of strengthening centralized power in the field of economy (early Absolutism epoch in Europe), mercantilist policy was introduced. Rulers sought to expand their control of manufacturing, which implied the need to fight shop-based organisation. In order to appeal and win the support of the public, they proclaimed themselves to be protectors of progressive ideas in industry. Therewith, they commenced to issue privileges to use specific inventions. The situation with author's privileges was somewhat different. Their issue was related to the invention of printing machines. During the early period, the important factor determining the content of privileges was the system of censorship applied in different states. In that field, privileges consisted in the monopoly right to carry out printing production and distribution activities. Those privileges were granted by the government to publishers and book sellers for a certain period of time on condition that those were given the consent from the censorship, which served both as an instrument of political control of the distribution of dangerous theories and as a tool to keep the records of published works.

Today, there are no prohibitions on the introduction of any innovations and new developments in manufacturing, publishing, and other production activities. In order to begin using the result of one's intellectual activity, its creator (developer) does not need to be granted an exclusive right or any privilege. Many inventors of patentable solutions start using them long before being granted a patent, or choose not to apply for a patent at all. It is to be noted that in these circumstances, their activities may not be recognised as illegal. Another thing is that a variety of other persons can use the newly created object in the same way. In this case, due to the intangibility of the object, they will not even have to fight for being granted the actual possession of the object (as would be the case with a tangible item) or take the object from other persons. The exclusive copyright to the object arises from the moment of its creation. However, if, supposedly, those exclusive rights did not exist and they were not guaranteed by the state, then the author and all other interested persons would be able to use the object. In general, the situation is similar with the means of individualization. In order to use a kind of designation to individualise one's products and services or the business as a whole, exclusive rights are not required. Many entrepreneurs decide to register a trademark only when their designation, or brand, has become popular (which, nonetheless, is not the right strategy). The acquisition of exclusive rights to the means of individualization in this case is required primarily

for a possibility to prohibit any other persons to use the specific designation. In these circumstances, however, it is necessary to mention one detail. In the absence of exclusive rights, the opportunity of effective use of designations as means of individualization will be rather limited in time. As soon as the designation starts being used by several agents, consumers will stop linking it with one source of origin when making their consumer choices. The designation will stop distinguishing products (services) of the person from the class of similar ones. In this case, due to the absence of exclusive rights, it will be possible to speak about the use of designation as the means of individualization only relatively. When defining the negative power of prohibition as the key element of the exclusive right, we still admit and recognise that the content of the exclusive right also includes the positive power granted to the person to use the product or service by themselves.

The right holder receives immediate benefits, profits from using the intellectual property item in their activities, from disposing of the exclusive right. The full scope of positive opportunities, which the right holder may exclusively apply to the item, determines the economic foundation of the exclusive right; it allows qualifying the activities performed by a specific person as innovative. In the case of determining exclusive and real rights merely via the negative power, the differences between these rights will disappear. It will be possible to discuss only the unified absolute right, whose content will consist in the right holder's opportunity to prohibit infringement upon the protected item from other persons.

The removal of positive powers from the content of the exclusive right may challenge the inviolability and security of the correspondent legal possibilities of right holders (to use their own item by themselves). First and foremost, it should be noticed that it is impossible to deliberately withdraw the behavioural possibility provided by the legal right. For the field of intellectual property rights, this issue is significant and essential, which may be explained by the totality of the following aspects.

To begin with, the results of intellectual activity, due to being intangible by nature, generally cannot be localized in space. Accordingly, developers may use them for their benefit in different countries. Nevertheless, at the global scale, the level of innovative development of individual states and, consequently, their innovative companies varies greatly. It may be assumed that for protectionist purposes, the states with insufficient level of development may prohibit foreign companies to use their developments in manufacturing specific products, etc. Or, an alternative situation is also possible when even from among national companies, the state *selects* only those that are allowed to use innovations whereas the others are prohibited to do so. Supposing that the exclusive right is merely an opportunity of prohibition to others, it will be necessary to admit that in the above mentioned situations, there will be no restrictions to exclusive rights.

The need to include the positive component in the content of the exclusive right is also confirmed by the legislative logic, whose core is to reveal the exclusive right to a certain item through listing specific powers.

In this regard, the copyright and related rights legislation of the European states normally defines exclusive rights by means of the description of the positive component: as an exclusive opportunity to use the works protected by copyright and related rights in the ways specified by law. For example, according to Article 15 of the Act on Copyright and Related Rights (Urheberrechtsgesetz – UrhG), the right holder has the exclusive right to 1) use the work in a tangible form, which, in particular, includes the right of reproduction; the right of distribution; the right of showing; 2) publicise the work in an intangible form, which includes, in particular, the right to public recital, performance and presentation; the right to disclose the work to the general public; the right to transmit; the right to communicate video and audio recordings to the public; the right to broadcast. The subsequent articles discuss the content of these powers.

Pursuant to Article 106 Section 17 of the United State Code, the right holder is granted the exclusive right to use and provide to third persons an opportunity to use the copyright protected work in the ways specified in the article. The closed list specified in this Code includes, among other things, the right of reproduction, processing, and distribution of work copies. Pursuant to the Copyright, Designs and Patents Act 1988, the exclusive right (copyright) is defined as the property right that arises to copyright works (p. 1 art. 1), and it allows the right holder to act in relation to the work in the ways which are marked in Chapter II of the Act as the actions protected by copyright law (art. 2). The closed list of these actions is established in art. 16 of the Act. Overall, it coincides with the list specified in the US legislation.

The clearest manifestation of the positive component can be found in the cases of exclusive rights to the registered designations of places of product origin and geographic indications. The person (subject) whose activity meets statutory requirements is granted the access (it may join) to use the unique designation with the reputation which was earlier registered and used by other persons. In this case, the right holder primarily receives its *positive* power, namely, the opportunity of personal use. Another argument to the benefit of the fact that the content of the exclusive right includes positive powers is in the principle of exhaustion. The right holder is not entitled here to take actions to use and sell the product (a copy of the work or product), in which the result of the intellectual work is implemented (trade mark) after this tangible item was marketed in duly manner by the right holder or by a person authorized by the right holder. In other words, the intellectual property tangible carrier is excluded from the field controlled by the right holder after the first consent for alienation to the buyer. Looking at this institution from another perspective (not

at the moment of the right exhaustion, but over the period of its validity), it becomes clear that the right holder's actions to introduce their work (the use in manufactured products, reproduction in the multitude of work copies, application of trademarks on manufactured goods, etc.) are within the scope of the exclusive rights.

It is worth paying special attention to the disposal of the exclusive right within the aspect under consideration. The right holder may dispose of the exclusive right both by means of its alienation and by means of its *burdening*, for instance, establishing exclusive right derivatives to the intellectual property rights via a license agreement. The availability of the latter opportunity is to a certain extent derived from the negative power: the opportunity to prohibit any third persons to use the work. In the case of the exclusive right disposal under license agreements and commercial concession agreements, the right holder provides limited access to the work to a specific person within the stipulated scope. Otherwise stated, he or she lifts the prohibition to use the work by the specific person in certain ways. However, it should be noted that the power of disposal is not universal by nature. For example, it is not included in the composition of the exclusive right to the corporate name, the name of the goods origin, and the geographical indication. For right holders of corporate names and brands, it is highly limited: they may dispose of the rights to the corporate name only by means of the commercial concession agreement inside the company. It is connected with the specifics of respective intellectual property items and their related interests.

The disposal of a trademark is *justified* in a different way. The access to another person's brand is not a necessary pre-condition to enter the market with a product or a service. Yet, the disposal of the exclusive right to a trademark may be justified from the perspective of the right holder interests (and those of consumers) regarding the market expansion, volumes of production and sales (under a license agreement); and *sales* of a reputable business, etc. Therewith, it is important to understand that the disposal of the exclusive right to trademarks may involve significant risks for consumers. Products (services) of the license holder or a new exclusive right acquirer may appear to be of inadequate quality. At the same time, consumers may be disappointed by the failure of their reasonable expectations (based on the experience of acquiring products or services from the right holder), misinformed of the source and origin of the products and their qualitative characteristics. In order not to allow for violating these public interests, the legislator reasonably imposed certain restrictions on the disposal of the exclusive right to the trademark. For instance, according to the legislator's will, the right holder may normally license the trademark only on condition that the license holder undertakes to ensure the quality conformity of manufactured or sold products it places the licensed trademark on to the quality requirements, established by the licensor.

It is evident that, in this case, we do not discuss the complete prohibition of disposal. First, as discussed before, significant interests are related to the transferability of trademarks. Second, at least in case of licensing, consumers' interests (so that they are not deceived or misinformed and do not get a low-quality product) overlap with the right holder's interests. If the license holder manufactures low-quality products (services) under the brand name, the right holder will suffer reputational losses, since the consumers will attribute these products to it. The brand value will fall. In this case, it is possible to suggest that the right holder will monitor (control) the use of its marks and indications.

It is natural that, at the legal doctrine level, it is also possible to find various approaches to revealing the content of exclusive rights. For example, British lawyer and scholar M. Spence emphases the positive power of the exclusive right, determining it as the right to use the work in any specified way (Spence, 2007, p. 7). However, the author also points to the negative aspect of the exclusive copyright, noting that it is the *right against imitation* by nature.

D.T. Keeling reveals the core of the exclusive right via the positive aspect, too. The scholar notes that every state in the world recognises specific exclusive rights: the right of an inventor to use their invention commercially; the authors' right to publish, market and sell copies of their books; the singer's right to allow the sale of recordings of their performances; the director's right to show their works in cinemas; the entrepreneur's right to protect the reputation of their goods, not granting other users with the right to use the trademark (Keeling, 2004, p. 18).

The approach suggested by H. Smith is worth special attention. The author singles out two strategies that may be implemented in the field of property rights: the strategy of exclusion (prohibition) and the strategy of control. The former implies the establishment of a wide range of work use, where the right holder is entitled to exclude all other persons. This strategy does not provide for fixing any specific uses. It is quite sufficient to generally identify the limits of the right. The strategy of control, in turn, implies specifying individual ways of exercising the right, accessible by the right holder (Smith, 2007, pp. 1742-1822). Smith proceeds from the assumption that the area of absolute property rights (which involve the right of ownership, and exclusive right) manifests the strategies of prohibition (exclusion)rather than that of control. They are based on simple rules, under which obligors are forced to avoid taking actions (keep a distance). Regarding intangible assets, including the results of intellectual activities, the right of exclusion is the right to refuse from providing access to the work, prohibit a wide range of uses. Meanwhile, the possibility of prohibition of using the work to other persons is an indirect mechanism of ensuring various privileges of the right holder as regards the use of the work. Exercising the right of excluding all persons, the intellectual property right holder is entitled to

take a correspondent range of actions and may get either positive or negative effect from the efforts taken. The strategy of exclusion delegates making decisions on the use of the work to the right holder that, like a doorman, is responsible for the access to the intellectual property work and monitors the use of the resource. The strategy of control, in this respect, complements and further develops the basic mode of exclusion. Smith notes that the more uses are united and summarized, the more the strategy of exclusion is represented in a certain area and the more *proprietary* this right is. In this case, patent law and copyright law are significantly different from the standpoint of the implemented strategies. According to him, patent law features the strategy of exclusion rather than that of control in comparison with copyright law. He draws attention to the fact that patent and copyright exclusive rights are defined in different ways. In patent law, the exclusive rights embrace the application, production and sales of the product (use implementation) where the patented work is used. Similar options are defined rather broadly and include various specific uses. However, the exclusive copyright is manifested through specific uses of the work, which is rather typical of the mode of control. Copyright provides the right holder with the powers to reproduce the work, communicate it to the public, distribute its copies, and process it (Smith, 2007, p. 1742).

Summarizing this reasoning, it should be again emphasized that the scope of the exclusive rights includes both the negative power to prohibit all other persons to use the work and the positive powers to use the work by themselves and to dispose of the exclusive right.

In effect, the exclusive right is a more sophisticated and complex phenomenon than a mere totality of powers of prohibition, disposal, and use. The intangible nature of intellectual property items provides an opportunity to build diverse enforcement models using these powers and the participation of a large number of persons involved in the field of items use besides the right holder. Dozens or even hundreds of licenses may be issued by the right holder for one item. However, the opportunities granted to each and every license holder for using the item may vary considerably. The right holder is entitled to *set* various accessible use parameters, such as territorial (for example, the provision of each license holder with the right to use the item only within the territory of a specific region), temporary, content (specific uses), and quantitative (for instance, the number of personal computers on which the software programme may be installed). In this case, the exclusive right should be understood as the right holder entitlement of limited control of the access of other persons to the intellectual property item, its commercial use, which the right holder may exercise by means of different prohibitions and licenses offered to an unlimited number of persons, and which may be disposed of, pursuant to the general rule, by transferring it to another person.

The Ownership Content

Since the absolute nature of ownership as the right does not require any excessive evidence, this approach is recognised as the only valid one in all and any systems of justice. The significance of the right to ownership is hard to overestimate because, as John Locke believed, it was the foundation for establishing the civil society. Ownership, according to Locke, is rather about human life and freedom than about property itself (Locke, 1985, p. 35). Thomas Hobbes stated that it was at the rise of the right to ownership that there occurred a historically vital transition from the natural state of the society to civil society, in other words, to civil laws (Hobbes, 1989, p. 311). For these reasons, it is interesting to identify the way the legislator defines the content of this right.

Under the civil law doctrine, the content of ownership is defined through the owner's powers. Despite the differences in specifying these powers at the statutory level in various systems of justice—at places, these are the right of use and disposal, for example, in France (Art. 544 of the French Civil Code), elsewhere the focus is on the right of disposal, for instance in Germany (§903 of the German Civil Code), while other systems specify the right of use, possession and disposal, like in Ukraine (Art. 317 of the Ukrainian Civil Code)—it may be stated that, considering this content understanding through the lens of positive and negative powers, the law defines exclusively positive powers. This consideration is also confirmed by the fact that it is common for the legislator to include an additional clause running that the right to ownership is exercised by owners at their own discretion, according to their own will, regardless of any third persons' will, in strict compliance with law.

Regarding the negative right, within the context of ownership, the legislator does not specify it for the owner in any respect, merely implying it by means of assigning the passive obligation to an unspecified number of persons to refrain from violating this right.

Therefore, a certain non-correspondence appears in the system of absolute rights as regards the content of the right to ownership and the exclusive right through the opposition of positive powers of the former and negative-and-positive powers of the latter.

It is beyond argument that this non-correspondence merely points to the fact that the right to ownership is presumed as most absolute, in spite of recognising the absolute nature of the exclusive right. Therewith, it is actually provided with a secondary and supporting role in the system of absolute rights, all being due to the negative power of prohibition.

That way the legislator indicates to the exclusive right holder that it is their duty to take care of exercising the prohibition right, thus marking the presumption that

in the absence of prohibition, third person's actions are not to be regarded as violations of their right by the exclusive right holders.

In view of the above, it is quite logical to raise the issue of the means by which the right, in particular, exclusive right, may be present in the legal landscape as the right, especially being presented as an absolute right and be exercisable.

The following are the conditions for the right existence that enable its exercisability. First of all, it is necessary to presume that the right can be exercisable not through physical coercion. Nevertheless, it is worth attending to the fact that the right is highly dependent on the existing threat of physical coercion in the case of the right violation. Thus, it means that the punishment represented by coercion force does not facilitate the right exercisability, but aims to ensure obedience thereto by third persons.

Consequently, the right is primarily exercised due to the law obedience by citizens.

Obeying the law can be observed owing to a number of factors, where the most important one is the willingness of the members of the society to recognise and obey law requirements voluntarily. However, the willingness of each citizen to obey the law depends on its content. In case the law is not acceptable for the society in terms of its content, or it is imposed on the society from outside, or it explicitly and grossly violates public good requirements, then, due to its content, this law will be met with resistance, the willingness to evade or violate it, which makes it unenforceable.

Therefore, the correspondence of the law content to the predominant collective interests and public good, at least in its soft version, is the condition for the vector of precepts of law to be in line with the willingness of the citizens to obey it.

However, if the source of the right establishment is legislator's, or state, interest, it is still to be admitted that in case no guarantees are ensured by the state, including enforcement instruments, this right will stay purely declarative, or, in other words, it will be *dead*.

Returning to the subject matter of the study, it becomes clear that due to the absence of the will of the state, in this case, the Russian Federation, to guarantee the enforcement of intellectual property rights and their exercise by non-residents of the aggressor country (for instance, in the examples given at the beginning of the paper), it appears possible to say that the exclusive right is not effective and exercisable, otherwise, it does not exist as the right, and not only on the territory of Russia, but also on the territory of the country of the right holder origin or in all other countries (in respect of worldwide trademarks). The point is that the holder of the exclusive right is deprived of any possibilities to exercise the duly owned right in terms of its negative power to prohibit unauthorized use of the intellectual property item. In the case of the Russian Federation, this situation is further aggravated by the fact that following the adoption at the statutory level of the respective regulatory documents,

legalising the illegal use, the duly exclusive right holder is also deprived of any rights to legal remedies. Therewith, it should be noted that Russia still holds membership in a number of international conventions related to the regulation of intellectual property rights, e.g., Berne Convention for the Protection of Literary and Artistic Works, Paris Convention for the Protection of Industrial Property, and others.

Conclusion

The aforesaid provides the grounds to conclude that despite the seeming communality of the right to ownership and the exclusive right, whose items are effectively recognised as the items of property sui generis, which, in fact, allows considering the exclusive right nature as absolute, there are still doubts not only in the absoluteness of this right, but also in the validity if the intellectual property right as the *right to* in general.

The above doubts are predominantly based on the invalidity and impossibility to exercise the exclusive right in its negative power or prohibition and/or prevention of unauthorised use of the item followed by holding the violator liable for the wrongdoing.

It is common knowledge that judicial defence can apply only to the right that is considered enforceable. Apparently, the exclusive right may be recognised as the right only in the case of existing guarantees from the state or a commonwealth of states, on the whole. It is to be taken into account that the obligations of rights observance are immanent not only in the country where the violation occurs, but also in the country of the right holder origin. That said, there arise doubts as to the validity of the exclusive right due to the absence of effective legal, social and cultural instruments to enforce the observance of the right.

Further, attention is to be paid to the fact that unlike the owner of title, the exclusive right holder is virtually deprived of the possibilities to exercise the right to self-defence of the civil right from violations and unlawful actions. It is hard to imagine any armed right holder physically protecting their work from unauthorised use, which is only natural, considering the intangible character of exclusive right items. The above confirms the absoluteness "quality" of the exclusive right, different from the right to ownership and worsening it.

Additionally, it is not accident that the issue of indemnification for the damage caused to the exclusive right holders due to the war has never been raised within the framework of claims for contributions and reparations. Yet, from the perspective of

the exclusive right being recognised as the right, there seem to be all due arguments for that purpose.

Thus, sufficient grounds have been collected to at least review the exclusive right nature, challenging its absoluteness. It may as well appear that Proudhon was correct in his assessment and the intellectual property right may be recognised as invalid.

REFERENCES

CoolCola, Fancy i Street: «Očakovo» vypustil analogi Coca-Cola, Fanta i Sprite. S «klassičeskimi vkusami» original'nyh napitkov [CoolCola, Fancy и Street: «Очаково» выпустил аналоги Coca-Cola, Fanta и Sprite. С «классическими вкусами» оригинальных напитков]. *TJournal*, 16.05.2022. Retrieved from: https://tjournal.ru/news/623277?fbclid=IwAR22K5l4BWB3qOXrsEQd2dN67iFtnIFnWRX9Uv87xZl0AjLSjrptIv3muT4.

Dovhert, A.S. (2000). Systema pryvatnoho prava ta struktura proektu novoho Tsyvilnoho kodeksu Ukrainy. In: *Kodyfikatsiia pryvatnoho (tsyvilnoho) prava Ukrainy*, A.S. Dovhert (ed.). K.: Ukrainskyi tsentr pravnychykh studii [Довгерт, А.С. *Система приватного права та структура проекту нового Цивільного кодексу України*. В: *Кодифікація приватного (цивільного) права України*, за ред. проф. А.С. Довгерта. К.: Український центр правничих студій].

Epstein, R.A. (1986). An Outline of Takings. *University of Miami Law Review*, 41(3), pp. 3-19. Retrieved from: https://chicagounbound.uchicago.edu/journal_articles/1294/.

Epstein, R.A. (2006). *The Structural Unity of Real and Intellectual Property*. The Progress and Freedom Foundation. Retrieved from: http://www.pff.org/issues-pubs/pops/pop13.24RAE_9_26.pdf.

Epstein, R.A. (2010). The Disintegration of Intellectual Property? A Classical Liberal Response to a Premature Obituary. *Stanford Law Review*, 62(2), pp. 522-523. Retrieved from: https://ssrn.com/abstract=1236273.

Galli, C. (2022). Russian IP Measures Worry International Companies and IP Counsel. *Lexology*. Retrieved from: https://www.lexology.com/commentary/intellectual-property/d33f9230-8ecd-4309-9915-1f165a8e54bf?utm_source=ilo%20newsletter&utm_medium=email&utm_content=newsletter%202022-05-09&utm_campaign=intellectual%20property%20newsletter&fbclid=IwAR09qfeDV1I2jmpm2ZeeZFn3ByuBKLYNF--w4QB0wW5EscIHIhjjgqiLDjc.

Hobbes, T. (1989). *Sochynenyia v 2 t.*, t. 1, per. s lat. y anhl.; Sost., red. yzd., avt. vstup. st. y prymech. V.V. Sokolov. M.: Mysl [Гоббс, Т. *Сочинения в 2 т.*, т. 1. пер. с лат. и англ.; Сост., ред. изд., авт. вступ. ст. и примеч. В. В. Соколов. М.: Мысль].

Keeling, D.T. (2004). *Intellectual Property Rights in EU Law*. Vol. 1: *Free Movement and Competition Law*. Oxford.

Locke, J. (1985). *Sobranye sochynenyi v 3 tomakh*, t. 2. M.: Mysl. [Локк, Дж. *Собрание сочинений в 3 томах*, т. 2. М.: Мысль].

Menell, P.S. (2000). *Intellectual Property: General Theories. Encyclopedia of Law and Economics*. Vol. 2: *Civil Law and Economics*. Cheltenham.

Merges, R.P. (2011). *Justifying Intellectual Property*. Cambridge, Mass.

Merges, R.P. (2017). What Kind of Rights Are Intellectual Property Rights? *UC Berkeley Public Law Research Paper*. March, 17. Retrieved from: https://ssrn.com/abstract=2959073.

Pidopryhora, O.A. (2000). Problemy systemy zakonodavstva Ukrainy pro intelektualnu vlasnist. *Pravo Ukrainy* [Підопригора, О.А. Проблеми системи законодавства України про інтелектуальну власність. *Право України*], 3, pp. 13-21.

Pototskyi, M. (2007). Mistse prav na rezultaty intelektualnoi diialnosti v systemi absoliutnykh prav. *Pidpryiemnytstvo, hospodarstvo i pravo* [Потоцький М. Місце прав на результати інтелектуальної діяльності в системі абсолютних прав. *Підприємництво, господарство і право*], 11, pp. 81-83.

Proudhon, P.Zh. (1865). *Lyteraturnie maioraty*. SPb.: Yzdanye Zhyrkevycha y Zubareva [Прудон, П.Ж. *Литературные майораты*. СПб.: Издание Жиркевича и Зубарева].

Pylenko, A.A. (2005). *Pravo yzobretatelia*. M.: Statut [Пиленко, А.А. *Право изобретателя*. М.: Статут].

Vytsyn, A. (ed.) (1873). *Russkoe hrazhdanskoe pravo: Chtenyia D. Y. Meiera*. Moskva [Вицин, А. ред. *Русское гражданское право: Чтения Д. И. Мейера*. Москва].

Roguin, E. (1889). *La règle de droit : analyse générale, spécialités, souveraineté des états, assiette de l'impôt, théorie des statuts : système des rapports de droit privé : précédé d'une introduction sur la classifications des disciplines*. Lausanne.

Shershenevych, H.F. (1891). *Avtorskoe pravo na lyteraturnie proyzvedenyia*. Kazan [Шершеневич, Г.Ф. *Авторское право на литературные произведения*. Казань].

Shershenevych, H.F. (2005). *Uchebnyk russkoho hrazhdanskoho prava*, t. 1. M.: Statut [Шершеневич, Г.Ф. *Учебник русского гражданского права*, т. 1. М.: Статут].

Smith, H. (2007). Intellectual Property as Property: Delineating Entitlements in Information. *Yale Law Journal*, 116(8), pp. 1742-1822.

Spasybo-Fatieieva, I.V. (2012). *Tsyvilistyka: na shliakhu formuvannia doktryn: vybr. nauk. pratsi*. Kh.: Zoloti storinky [Спасибо-Фатеєва, І.В. *Цивілістика: на шляху формування доктрин: вибр. наук. праці*. Х.: Золоті сторінки].

Spence, M. (2007). *Intellectual Property*. Oxford.

V rossijskih kinoteatrah prohodât neoficial'nye pokazy zarubežnyh fil'mov. *Argumenty i Fakty*, 27.04.2022 [В российских кинотеатрах проходят неофициальные показы зарубежных фильмов. *Аргументы и Факты*]. Retrieved from: https://aif.ru/culture/movie/v_rossiyskih_kinoteatrah_prohodyat_neoficialnye_pokazy_zarubezhnyh_filmov.