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The Investigation of Peculiarities of the Occurrence of Subjective Civil Rights in Registration of a Patent

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Abstract:

The main aspects of the impact of patents on technological and social development have been highlighted, and it has been suggested to adapt a powerful world experience in this field. The key aspects of the innovation process and the protection of the results of scientific and technical action with the help of patents, and the peculiarities of the occurrence of subjective civil rights are considered. The authors of the paper analyze the current legislative provisions and determine the direction of its development in the context of globalization. The article explores the theoretical construct of these relations and provides an analysis of civil legislation as applied to industry standards of economic legislation. The practical significance of the study is determined by the fact that the application of the developed provisions will facilitate the harmonization of national legislations in the formation of legal systems. The aim of the article is to supplement and clarify the ideas about patent and of subjective civil rights. The factors that influenced the development of the doctrine civil rights have been considered, in particular, taking into account the experience of European countries.

Keywords: patent; invention; subjective rights; legal fact; transaction; rights and duties.

JEL Classification: K12; K15.

Introduction

During the development of the society and the public relations the new types of civil relations originate and demand the corresponding legal regulation. The presence of the contradictions between spheres of 'due', 'real' and 'knowledge about real and due' points at the existence of the scientific problem in legal literature. In general, accepting such approach, the author methodologically constructed the research in the same sequence (the sphere of 'due', 'real' and 'knowledge about real and due'). The analysis of recent research on the topic in question indicates that the focus is on the positive effects of protection system of the intellectual property rights, in particular on the patenting system. Under conditions of setting up of such a system this was, to a large extent, a completely justified step. However, most experts also consider the negative aspects of existing systems. Thereby, the question arises so as to analyze the existing experience of foreign countries and try to adapt all that positive that exists there, with minimal negative consequences, taking into account the development of the economy and its difficulties, to the present realities.

The aim of this paper is to consider the problematic aspects of patent protection of inventions in terms of its impact on the technological and social development of society.

1. Literature Review

In present realities of time during the development of the society and the public relations the new types of civil relations originate and demand the corresponding legal regulation. A lot of transactions with such personal non-property right as the right on name are being concluded in the sphere of the real but mechanism of regulation of such transactions is not defined. In order to define it the need of research of the possibility of the conclusion of such transactions appears. Relevance of the subject-matter of the research is confirmed by the degree of the subject-matter explication – at the present time there is almost no fundamental work devoted to the possibility of the conclusion of the transactions with the personal non-property right. Status of the research the scientific analysis of the problems of the transactions with the personal non-property right on name. Among the scholars whose studies formed the fundamental base for the further research of the concerned issues it is necessary to name V. Belov, I. Novitskiy, M. Maleina, S. Slipchenko, etc.

2. Methodology

In the conditions of the formation of the modern legal system of Ukraine reconsideration of basic legal categories of civil law to which transactions belong is important. The transaction is the one of the most typical for civil law legal fact with which the law connects accrual, alteration and the termination of the subjective rights and duties.

Transactions can be concluded in different spheres of the social life and allow to reconcile the interests of the participants of the civil circulation: natural persons and legal entities, state and others social and public institutions. As the volitional act transaction has inherent properties which characterize intentions and actions of the subjects of the civil relations. Just by this it is explained that the validity of the transaction depends on the validity of the elements that it consists of. The conclusion of the transaction which has defect of the one of the elements of its structure cannot create those legal consequences that parties were waiting for.

The global economy is inextricably linked to the widespread usage of intellectual resources. Modern economy is based on the latest achievements of science, technics, technology, scientific production, which is the result of human creative activity and is recognized as the category of intellectual property.

The objects of intellectual property include the results of scientific and technical creations (inventions, useful models, industrial design samples); commercial designations (trademarks, trade names, geographical indications, domain names); objects of copyright and related rights (works of literature and art, computer programs); breeding achievements (sorts of plants).

In the modern space, the intellectual property is considered one of the strategic resources, the effective use of which promotes innovation, the spread of new technologies, the increase in national net wealth and the increase of competitive positions in the world markets. With the expansion of the sphere of intellectual property, the demand for its legal protection and reliable protection against the unauthorized usage increases.

The notion of subjective civil rights was first formulated by S.M. Bratus, who noted that the subjective civil law is a measure of possible behavior recognized and provided by law (Anatolii *et al.* 2019). N.G. Alexandrov proposed to complete the S.M. Bratus's notion with an indication not only of measure, but also of the type of possible behavior, given that the category of 'measure' characterizes subjective law only on the quantitative side (Bratus, 1949). In support of this, M.I. Matuzov noticed that the subjective civil right, from the point of view of legal science,

is only an opportunity of a subject to act within the appropriate limits (measure of behavior) and appropriately (type of behavior) (Bratus, 1950).

The onset of subjective rights for intellectual property objects by type of intellectual activity does not coincide. There is a significant difference between copyright and industrial property right. Subjective copyright arises for works of science, literature, and art from the moment this item was submitted to an objective form. Nowadays, industrial property objects have different interpretations of the moment when subjective rights began. The Law of Ukraine 'On Protection of Rights for Inventions and Useful Models' in item 1 of Art. 28 states that the rights conferred by a patent shall take effect from the date of publication of the information on its grant. The same norm is contained in the Law of Ukraine 'On Protection of Rights to Industrial Designs'.

Nowadays, there are three main types of security documents in the world that certify the authorship and the exclusive right to use an intellectual property object during its term in the territory of the country concerned:

- the patent for invention, utility model, industrial design;
- the certificate for a sign for goods and services;
- the certificate of registration of copyright for a work in the field of science, literature, and art.

The registration of security documents is carried out according to either national or international procedures (Bratus, 1949). At the international level, the legal regulation of relation arising in the field of intellectual property takes place within a number of international agreements, such as the Patent Cooperation Treaty, Madrid Agreement Concerning the International Registration of Marks, The Hague Agreement Concerning the International Deposit of Industrial Designs. International agreements regulate intellectual property relations, simplify the procedure for filing national applications, and facilitate the legal protection in different jurisdictions. The administrative functions of international agreements are performed by the World Intellectual Property Organization (WIPO) (Bratus, 1950).

In addition to the global intellectual property protection system, there are regional systems that represent the largest technological markets (European Patent Office, patent offices of the USA, Japan, and others).

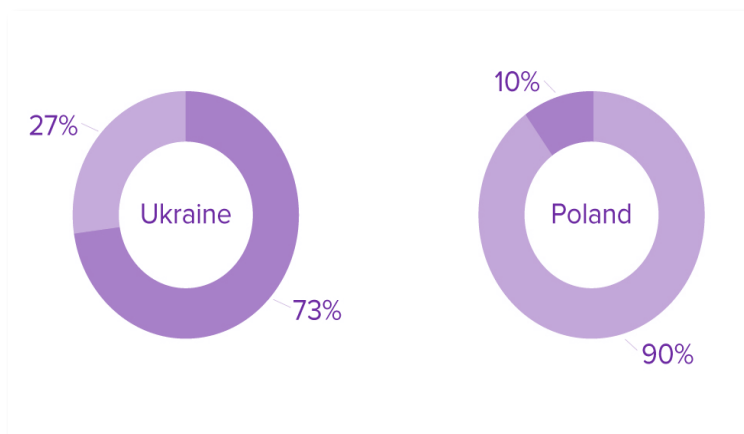
Under conditions of strong innovation and scientific and technological development, the importance of intellectual property is growing as one of the obligatory mechanisms for the transformation of knowledge into commercial assets. According to the rating of countries in the world by number of patents (Iasechko *et al.* 2019), high-income countries are leading from year to year, which confirms the correlation between income and progress in the field of intellectual property. In innovative countries, due to stimulating invention and creating effective mechanisms for commercializing the results of intellectual activity, the lion's share of the GDP growth is formed at the expense of new knowledge embodied in technics and technology.

An invention patent is a kind of contract between the inventor and the society, where the former shares their invention with the society, revealing its essence in the patent application, and the society, in return, undertakes to protect the inventor's rights to a certain extent over a period of time [6].

One of the key aspects of the innovation process in many industries is the protection of the results of scientific and technological activities through patents, in particular at the international level, by patenting inventions abroad, which is the basis of competitiveness on equal rights in the context of more global actions.

The uncontrolled leakage of innovative technical solutions abroad from Ukraine has a negative impact on the economic security of the country. Bypassing Art. 37 of the Law of Ukraine 'On Protection of Rights for Inventions and Useful Models', which provides the registration of a priority application for an invention (utility model) in Ukraine, many inventors apply for inventions directly to other countries without filing an application for invention (utility model) in Ukraine. The unauthorized flow of inventions, the so-called 'patent migration' from Ukraine, is steadily increasing. The level of fugitive patents is 10-12% of the annual patent volume. The most active sectors of migration are: medicines, IT technologies (systems and equipment), pharmacology. The geography of migration is expanding as well: the Russian Federation (51%), the United States (11%), South Korea (9%), Taiwan (3%), Germany (2%). As a rule, the group of 'fugitive patents' includes the most competitive inventions, which are then returned to Ukraine as innovative products of foreign companies (Androshchuk, 2020).

In Ukraine, utility models are patented more than inventions. There are 73% of models and 27% of inventions. In Poland, for each utility model there are 9 inventions (Figure 1).

Figure 1. The comparative statistical data on patenting in Ukraine and Poland

The main reason is financial. A utility model patent can be obtained cheaper, easier and faster (figure 2).

Figure 2. Sample utility model patent

At the same time, the level of legal protection for such patents is lower. It is valid for 10 years instead of 20 years. It is a characteristic feature of Ukraine and, to a lesser extent, CIS countries. In the West, this form of protection for new developments is less popular. From the notion of 'utility model' and the practice of its registration, it follows that such models usually protect less significant developments. Novelty is required, but it is not necessary that the decision be not obvious to experts in a particular field. Thus, in most cases there is no point in exporting it to the developed markets. More than 90% of utility model patents registered by Ukrainian inventors abroad for the

2007-2017 period have been obtained in Russia. Under conditions of an unannounced war with Russia, which has continued since 2014, such dynamics are alarming.

The results of technical creativity and individual means of legal protection, as opposed to works of literature, science or art, must be properly qualified as the objects of industrial property. It is only after their state registration and the issuance of the relevant law enforcement document (patent or certificate) that the set of rights arising from their registration is enforced [9]. Thus, industrial property contracts should provide not only the creation of a creative output, but also its subsequent patenting and usage on the basis of the received law enforcement document.

The Law of Ukraine 'On Protection of Rights for Inventions and Useful Models' states that the ownership of the invention and utility model arises from the date of application to Ukrpatent, as this right is certified by a patent. Patents for the invention and for the industrial design also come into force from the moment of application to Ukrpatent.

Thus, the patent action and the subjective ownership of the invention, utility model and design as defined therein arise from the date of application [8]. The peculiarity of the occurrence of personal non-property and property rights over the same industrial property as indicated in the patent arises from the date of publication of the patent information. Thus, the questions arise as to when personal non-property rights arise.

A considerable amount of the results is created custom. Such relations of the parties with the creation of new results of intellectual, creative activity are governed by the contract on the performance of research or development works, the employment contract or the contract on the creation and commissioning of the object of intellectual property right, provided for by Art. 1112 of the Civil Code of Ukraine. Also, this contract is devoted to part 6 of Art. 33 of the Law of Ukraine 'On Copyright and Related Rights' and Art. 430 of the Civil Code of Ukraine concerning the allocation of intellectual property rights to a custom created object.

The Art. 430 of the Civil Code of Ukraine defines the division of property and personal non-property rights in intellectual property created custom. According to its provisions, the personal non-property rights of the intellectual property, as a custom-made object, belong to the creator of this object. However, in the cases provided for by law, individual personal non-proprietary intellectual property rights in such an object may belong to the customer. Thus, under the contract, the personal non-property rights can be reversible. The intellectual property rights of the custom-made object belong to the creator of the object and the customer jointly, unless otherwise agreed by the contract.

Conclusions

It is possible to draw a conclusion that at present day scientists directly or mediately state the possibility of the conclusion of transactions with the non-material goods only in certain works. Thus, it should be noted that S. N. Berveno when analyzing transactions with the non-property content states that the issues of an admissibility of actions of non-property nature as the subject of contractual obligations is a topic of scientific discussions.

Lack of research despite of lighting of some aspects of the conclusion of transactions with the personal non-property goods by certain scholars conduces to uncertainty of the theoretical and methodological base, contradictory law enforcement practice concerning such transactions.

Summarizing all the above mentioned, we can point out that the subjective civil right to a patent has its own structure, which includes the set of legal possibilities provided by a legal norm to a particular subject. Based on the aforementioned, we propose to clearly determine the moment when such rights come into force at the legislative level. The possibility to transfer property and personal non-property rights. It is often not easy to draw a clear line between abuse of the patent protection system and activities that are truly beneficial to the public.

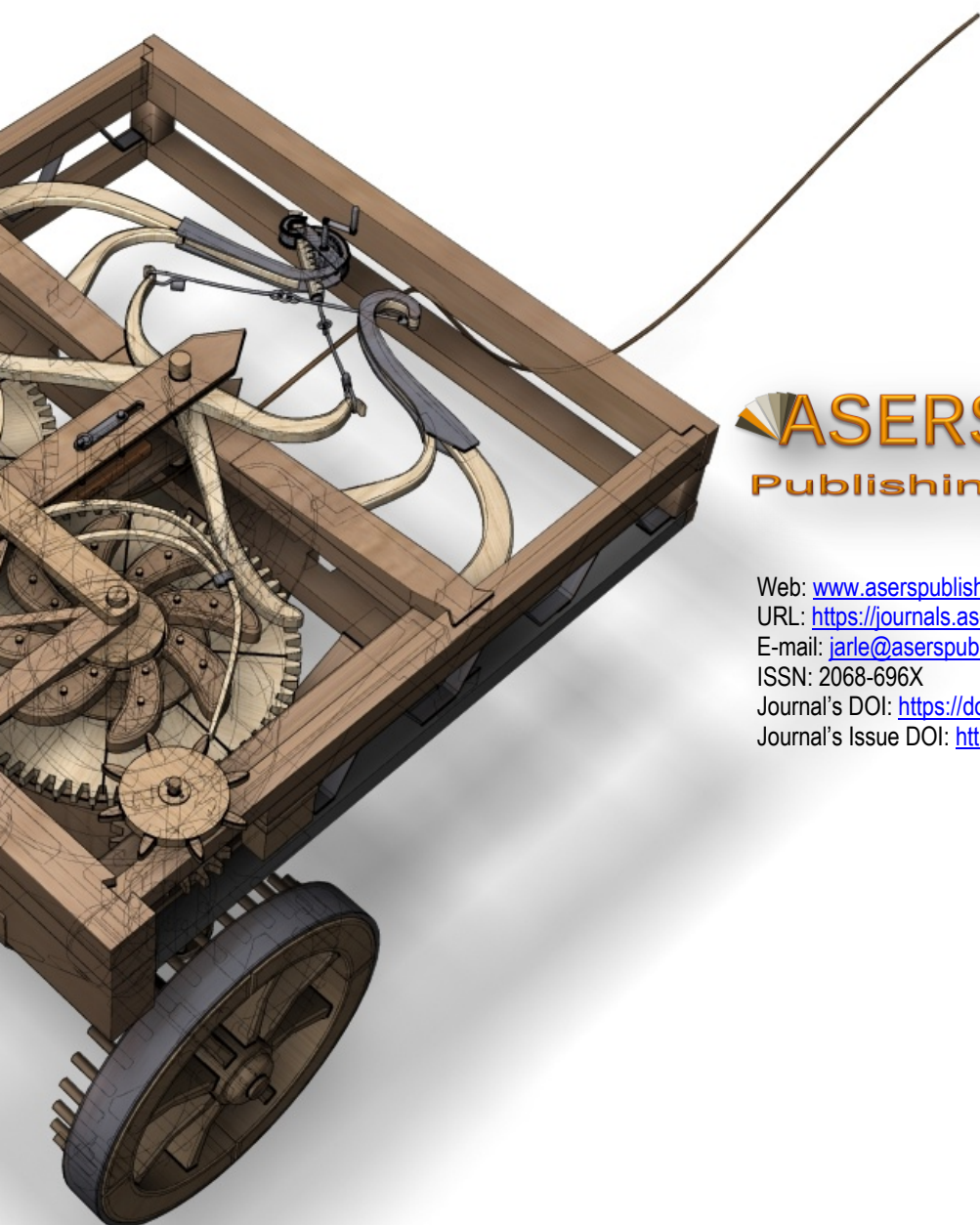
Despite the positive effect of applying the patent system, which include the promotion of inventive activity and the enrichment of public knowledge, it has to be noted that excessive patent protection poses a threat to the monopolization of the market, the burden of which lies on the shoulders of consumers and does not contribute to either social or technological development.

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