УДК 342.92

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THEORETICAL AND LEGAL BASIS OF INTELLECTUAL PROPERTY

http://doi.org/10.23939/law2025.46.253

Intellectual activity in the 21st century. becomes the main and decisive factor of socio-economic progress. The level of social production will depend on the level of creative activity. The successes of social production determine the level of material and everyday life of the people.

In modern legal systems, the phenomenon of “intellectual property” has covered a wide variety of spheres of social relations, which are the subject of regulation of various branches of law: economic circulation, socio-political and cultural relations, international, state-legal and other relations. This has led to the fact that intellectual property has become the object of study of a number of sectoral legal sciences (civil law, state, administrative, customs, tax, international, etc.), and the category “intellectual property” has entered their conceptual apparatus. During the development of intellectual property law in world science, many theories have emerged that explain the essence of the relevant rights. The problem of establishing the nature of rights arising from the fact of creating the results of creative activity and determining their place among other legal categories has given rise to a debate that is ongoing to this day, and the accompanying contradictory views on the essence of rights to the results of creativity. Another important feature of intellectual property, if we consider it from an economic and legal point of view, is that it must bring material or other benefits: this may be additional profit, facilitating the promotion of goods or services to the market, promoting the spiritual development of the individual. Thus, the results of artistic creativity are used in the humanitarian sphere to enrich the inner world of a person, forming his worldview, and the results of technical creativity ensure an increase in the technical level of production, the competitiveness of manufactured goods and services.

Keywords: intellectual property law, civil legal relations, legal regulation of intellectual property law, objects of intellectual property law, proprietary theory.

Formulation of the problem. During the development of intellectual property law in world science, many theories have emerged that explain the essence of the relevant rights. The problem of establishing the nature of rights arising from the fact of creating the results of creative activity and determining their place among other legal categories has caused a discussion that continues to this day, and the accompanying contradictory views on the essence of rights to the results of creativity.

Analysis of the study of the problem. Many scientists have paid attention to and investigated the nature of intellectual property rights, among which the following should be highlighted: O. V. Andrienko, V. Bryzhko, V. Y. Bocheliuk, V. I. Varivoda, O. F. Doroshenko, V. O. Zharov, Y. M. Kapitsa, I. F. Koval, S. Y. Lytvyn, N. M. Myronenko, A. S. Nersesyan, O. P. Orlyuk, O. O. Pidoprigora, O. A. Pidoprigora, M. Yu. Pototsky, O. V. Ryshkova, I. S. Stepanov, O. O. Tverezenko, A. V. Tkach, R. P. Tomma, G. G. Kharchenko, I. P. Khvyshuk, R. B. Shyshka, A. S. Shtefan, O. O. Shtefan, N. Yarkina, etc.

The purpose of the article is to study the epistemological and legal nature of intellectual property and introduce a differentiated approach to defining the legal category of "intellectual property", which is primarily due to the wide scope of application and the presence of erroneous stereotypes regarding the understanding of the legal nature of intellectual property in society, as well as the ambiguity of scientists' opinions on this matter.

Presenting main material. From a legal standpoint, intellectual property in its broader notion means the rights enshrined by law to the results of intellectual activity in the industrial, scientific, literary and artistic spheres. At least, this is how the concept of "intellectual property" is established within the Article 2 of the WIPO Convention from July 14, 1967: intellectual property encompasses rights to artistic and literary works, scientific works; performances of artists, sound recordings, radio and television broadcasts, discoveries, trademarks, service marks, company names and commercial and geographical designations and various other. I would like to note that this list is not exhaustive and may be supplemented, and that is something that member states have been actively implementing. The World Academy of WIPO stipulates the following definition: "intellectual property" refers to the types of property that arise as a result of the activity of the human intellect [1].

Intellect (from the Latin intellectus – knowledge, understanding, reason, translation of the ancient Greek "nous" – mind) – means the ability to think, the ability to rational cognition.

Intellectual property can be defined as creative and intellectual objects of the human mind, which may include various objects, but intellectual property rights are legally ensured rights which entitle the use of these objects, this term includes a set of rights to these objects [2]. The WTO considers the objects of intellectual property law as forms of embodiment of ideas and knowledge, and intellectual property rights - granted by the state the right to prohibit others from using these objects and to agree on remuneration for the use of these objects with others [3].

Analyzing the origins of the concept of "intellectual property", the modern Ukrainian scientist R. B. Shyshka identifies the following main theoretical directions:

1. The theory of exclusive rights, which attributes the author's rights to subjective rights, which consist in the entitlements to use the result of intellectual activity in any way not prohibited by law and in the set of specific personal non-property rights associated with the creation of a creative result.

2. The concept of intellectual property, which attributes the set of rights to the class of property rights (proprietary theory).

3. The theory of personality, which places the author's rights mainly in the class of personal rights.

4. The theory of intellectual rights, which calls copyright and patent rights of a special kind (sui generis), which are beyond the classical division of civil rights into property, obligation and personal [4, p. 126].

Of these theoretical directions, two concepts prevail in the legislation and doctrine in the majority of states: exclusive rights and intellectual property (proprietary theory).

Epistemologically, the proprietary theory of intellectual property rights is considered the first and dominant. It proceeds from the natural understanding of property rights, and its representatives identify the rights of authors and other persons to the products of creative activity with the right of ownership to material objects.

Thus, the proprietary theory proceeds from the idea that the results of intellectual, artistic and other activities provided for by law are recognized as its objects. The creator has two groups of rights to these objects: personal non-property and property. The latter are the same as in property law: possession and possession, the right to use and the right to dispose of.

The proprietary theory of intellectual property law is consistently carried out in all international legal acts and influences the modeling of national legislation.

The followers of the proprietary theory of intellectual property law are the famous Ukrainian civil scientists O. A. Pidoprigora and O. O. Pidoprigora. In their opinion, the content of intellectual property law is defined as it is defined for ordinary property law [5].

The theory of exclusive rights, based on privileges as a certain right, mainly received its development in Germany. Its basis is the thesis that the basis of the exclusive right contains a prohibitive function that allows the patent owner to exclude third parties from unauthorized use of the patented invention. The most consistent representative of the theory of exclusive rights in Ukraine is R. B. Shyshka, who notes: "... intellectual property should be considered only property rights that consist in the monopoly right to use the advantages of a novelty yourself, for a certain time to prohibit other persons from doing so or to grant them this right for a fee" [4].

There exists a variety of definitions across different legal systems worldwide. For instance, in Spain, Portugal, France, Great Britain, the Federal People's Republic of China, Japan, the USA and some other countries, the results of intellectual activity are defined as objects of proprietary rights. In its turn, Austria, Belgium, Greece, the Netherlands, the Scandinavian countries, Switzerland, Egypt and some other countries, define these objects as objects of the exclusive right to use [6, p. 63].

The emergence of the concept, and then the category of "intellectual property" in legislation and in legal science was of primary importance not only in the political, economic, but also in the legal life of community.

Firstly, the introduction into the legislation of the category of "intellectual property", was another step towards the systematization of law, which made it possible to consider a number of results of intellectual activity and means of individualization associated to them as standalone objects of legal relations, to identify their common features and to determine the main directions of legal influence on the relations that develop around them.

Then, the authors of intellectual property objects were recognized as having an exclusive and absolute right to the results of their intellectual activity as well as means of individualization associated to them. The functions of this right were similar to the functions of the right of ownership to material objects, but its content was different from the legality that constitutes the content of the right of property.

Thirdly, the social significance of the results of intellectual activity and means of individualization associated to them, as well as the commercial and other (including socio-political) interests of their authors and right holders, was officially recognized.

Thus, with the emergence of the category of "intellectual property", a qualitatively new attitude of the state and law to intellectual activity and its results was established, based on respect for the creative individual and the priority of his interests.

In modern legislation the phenomena of "intellectual property" stems from the recognition of the exclusive and absolute rights of authors to the results of their creative and intellectual work and its means of individualization associated to them. However, the introduction of the concept of "intellectual property" into the legislation caused criticism from a number of lawyers, due to the need to distinguish between intellectual and tangible property.

Those who expressly oppose to the use of the notion of "intellectual property" as arguments usually pointed out and point to the impossibility of identifying the legal regime of tangible and intangible objects, the limitation of the rights of creators of intellectual products territorially and in time, the specificity of the means of protecting the rights to the creations, their close connection with the personality of the creators, which determines the recognition of specific personal rights for them, the inalienability of a number of powers of the creator to intellectual products, and others.

In response to these and other comments, supporters of the use of the concept of "intellectual property" began to emphasize that in this case we are talking about a specific intangible object of property law, which requires special regulation.

It should be noted that when distinguishing between real property and intellectual property, it is important to take into consideration that the category of "property" is, first of all, economic.

The exceptional and absolute nature of belonging to the creator of intellectual products became a prerequisite for designating the formed relations as intellectual property. From this point of view, the only difference between real property and intellectual property is the difference in their objects.

Special The nature of the object of intellectual property – intangible products – determines the specifics of the content of intellectual property rights in general with the property of the material economic essence of this phenomenon. Regarding intangible objects, the classical rights of possession, use and disposal acquire a specific expression, in some cases, personal rights are added to property rights.

Having analyzed the connections that develop around intellectual property in the legal sphere, as well as the legal form of expression of the phenomenon of intellectual property, we will try to determine what is understood by intellectual property in law, what legal phenomenon the category under study reflects.

Therefore, we believe that intellectual property in law should be understood as the form of relations of an authorized subject to the results of intellectual activity and means of individualization equated to them, which have received legal expression in the recognition and protection by the state of a special kind of exclusive rights to them (intellectual property rights), which establish the exclusive and absolute nature of domination over an intangible object and indicate a certain level of economic, socio-political and cultural development of society and the state. In our opinion, it is this phenomenon of objective reality that has found its reflection in the corresponding legal category.

Disputes regarding the appropriateness of using the concepts of "intellectual property", "exclusive rights", in relation to the results of intellectual activity continue to this day.

Another group of scientists believes that in relation to an intellectual product, instead of the categories "intellectual property" and "exclusive rights", it is more correct to use the category "intellectual rights".

The Constitution of Ukraine declares the exclusive right (intellectual property) of an individual to the results of its creative and intellectual activity. From the interpretation of Articles 41, 54 of the Constitution of Ukraine, as well as Articles 418, 419 of the Civil Code of Ukraine, it becomes clear that intellectual property is related to the results of creative activity and is not regulated by the norms of property rights [7].

The origin of the phenomena of "intellectual property" is associated with French legislation.

In Ukraine, this concept received official recognition only in 1968, when the Presidium of the Supreme Soviet of the USSR adopted a Decree on the ratification of the convention for the foundation of the World Intellectual Property Organization (WIPO). It was from this time that the concept of "intellectual property" began to be used in domestic legislation, scientific literature, and international conventions along with such concepts as "property" and "exclusive rights".

The persistent reluctance of today's legislator to abandon the use of the term "intellectual property" has its roots in the Roman concept of property.

Classical Roman jurisprudence understood the right of ownership as the unlimited and exclusive domination of a person over the thing. The next development of the understanding of property rights occurred, according to R. Jhering, "through Roman law, which individualizes it".

In his theory of property rights, Windscheid, who is considered the "father of the German Civil Code", adhered to two provisions.

The content of the first of them is that the owner can dispose of the object of property rights at his own discretion, if the law and the rights of third parties are not violated.

The second provision can be stated as follows: other persons should not dispose of the thing, ignoring the will of the owner.

However, we must not forget that in Roman law the division of things into corporeal and incorporeal was recognized as appropriate.

In ancient Rome, the object of law was designated "res", and the well-known formula "Digest" "dominium rerum" (dominion over a thing) was recognized as its most common characteristic. However, the term "ges" had many meanings and most often acted as the antithesis of another concept – "regson" (personality).

In the classical period, the concept of things in a narrow and broad sense developed in Roman law. In a broad sense, a thing was understood not only as things in the usual (narrow) sense – material objects of the external world, but also as legal relations to this thing and rights to it.

"Corporeal things – those that can be perceived... Incorporeal things – THOSE THAT CANNOT BE PERCEIVED: such things that consist of law are rights" was indicated in Justinian's Digests. The division of things into corporeal ("cognate"), which can be perceived by touch, and incorporeal ("incorporeal"), which cannot be perceived by touch, was mentioned by the Roman lawyer Gaius in his "Institutions". The content of the latter was that "all rights belong here: real, obligatory, family, and hereditary rights also belong here". Revealing the concept of incorporeal things, Guy wrote, "incorporeal are those things that cannot be tangible; such include those contained in law, for example, inheritance, usufruct, obligation, no matter how it was concluded, and it is not at all important that the inheritance contains physical things, because the fruits that are collected from the earth are of a physical nature, as well as what comes to us under some obligation is mostly a physical object, such as, for example, land, a slave, money; but it is the inheritance, the right of usufruct, and the rights of obligation that are considered incorporeal things. Among them are the rights of urban and rural estates, also called easements".

The modern stage of development of legal thought is characterized by the expansion of the subject area of property law.

Other approaches to the essence of rights to the results of intellectual activity were already applied through the prism of the concept of "exclusive rights".

The concept of "exclusive rights" takes its roots from the "theory of private monopoly", developed at the end of the last century by Rogen, who saw the essence of copyright not in the possibility of using the subject by the authorized person, but in the ability of an induvial creator to prevent the appropriation of the subject, the idea by all other persons [8, p. 25]. Proponents of the theory of exclusive rights were convinced that the legal regime established for things cannot regulate the results of creative and intellectual work. Pointing out the fallacy of the views of supporters of the identification of ideas with material objects, supporters of the theory of exclusive rights note that "an invention cannot be identified with the machine in which it is embodied". A literary work cannot be identified with a manuscript or a book.

In countries with the Anglo-American legal system, copyrights, both personal non-property (moral) and property rights, can be enshrined in a contract (for example, under a contract of employment), or the possibility of a full assignment of only property rights is established, and the personal non-property rights of authors are simply not included in the concept of copyright and cannot be assigned. In the French legal system, personal non-property rights are non-transferable, and property copyrights can be assigned. The German copyright law states that copyrights are not transferred either in whole or in part. In theory, legislation and practice, German In the European courts, property copyrights are as if "split", and their main part participates in civil circulation, without being called "author's" .

Continental law has always been characterized by an approach according to which the center of regulation of continental copyright systems is the protection of the rights of the creator of the work, while the Anglo-American copyright system is aimed at its protection as such.

Protection under the Anglo-American system extends to the work, as it were, regardless of its pocket. Protection under the continental copyright system is based on civil law, its main idea is that works are the product of creative activity and are inextricably linked to the personality of their creators. Accordingly, the approach to the protection of the creator's personal non-property rights (successors of intellectual property rights) was implemented in different ways.

For example, Canadian law allows for the waiver of personal non-property rights and his written consent, but the transfer of such rights is impossible. In the UK, waiver is possible, but it must be in writing.

If the concept of "intellectual property law" cannot reflect the essence of the processes that occur in the sphere of creation and use of the results of intellectual activity, it is not entirely correct to recognize the use of the concept of "exclusive rights".

This concept reflects only property rights that are owned by an authorized person.

Attempts by some scholars to apply the term "exclusive" to personal non-property rights are unlawful, because by their nature they are personal intangible benefits (non-property rights) and the legislator has clearly defined their place in the legislative system [5].

The Constitution of Ukraine defines the fundamental principles of intellectual property rights protection. Everyone has the right to own, use and dispose of their property, the results of their intellectual and creative activities. No one may use or distribute them without their consent, with the exceptions established by law. No one may be unlawfully deprived of property rights, including intellectual property rights.

The Civil Code of Ukraine in article 420 explicitly provides for a list of objects of intellectual property rights that are regulated and under legal protection in Ukraine. In particular, these objects include: literary and artistic works; data compilations (databases) and computer programs; phono- and video-grams, broadcasts (programs); inventions and scientific discoveries; utility models, industrial designs; rationalization proposals; plant varieties, animal breeds; commercial (company) names, trademarks (signs for goods and services), geographical indications; trade secrets [7].

The Law of Ukraine "On Copyright and Related Rights" not only regulates the relevant relations, but also determines the need to apply certain sanctions to persons who have violated these rights, including criminal liability [9].

The situation has dramatically changed with the gaining of independence by Ukraine. Thus, on December 23, 1993, the Universal Copyright Convention was ratified in Ukraine, on May 31, 1995, Ukraine became a participant to the Berne Convention for the Protection of Literary and Artistic Works. In 1999, Ukraine has ratified the Geneva Convention for the Protection of the Interests of Producers of Phonograms against Illegal Reproduction of Their Phonograms, and in 2001, the Rome Convention for the Protection of the Interests of Performers, Producers of Phonograms and Broadcasting Organizations, etc.

It is worth noting that the Agreement on Trade-Related Aspects of Intellectual Property Rights (Agreement on Trade-Related Aspects of Intellectual Property Rights, 1994) (Chapter 5, Part 4, "Criminal Procedures") emphasizes the need to undertake criminal actions in cases of infringement of copyright for commercial purposes. Furthermore, it is noted that in order to prevent violation of copyright, penalties should include imprisonment, fines, confiscation and destruction of counterfeit goods, any materials and means of production used in the commission of this crime [10].

Legal relations that arise in the process of exercising intellectual property rights are a type of property relations in general. First of all, this is confirmed within the analysis of Art. 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which interprets quite broadly the right to property, including intellectual property in this concept, and second of all, within the analysis of Art. 41 of the Constitution of Ukraine, which narrows down the right of individuals to own, use and dispose of their property, the results of their creative and intellectual activities, and, finally, the interrelation between the property rights and intellectual property rights is precisely the fundamental idea which is laid down in the works of well-known scholars in the field of civil law O. A. Pidoprihory and O. O. Pidoprihory.

Of course, property rights and intellectual property rights have significant differences. Let us name the main ones: the right of ownership of property is not limited in time, while, for example, after 20 years, an invention becomes the property of society; the establishment of property rights, as a rule, in most cases does not require special consolidation or registration, while legal protection is established for objects of intellectual property rights only after state registration; the most significant difference lies in the objects of property rights, which are things of the material world and in the objects of intellectual property rights, which are incorporeal ideas embodied in the corresponding material carriers (materialized, reproduced); a significant difference between intellectual property rights and "ordinary" property rights is the ability of the intellectual property object to be replicated, which cannot be said about material objects of property [11, p. 68].

But at the same time, both rights are the right to own, use and dispose of the objects. Therefore, the authors see the following as real approaches to improving legislation on liability for infringement of intellectual property rights: the norms provided for in Articles 176, 177 and 229 of the Criminal Code of Ukraine should find their place in Section VI of the Special Part of the Criminal Code of Ukraine "Crimes against Property".

According to Art. 61 of the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement, 1995) members of the organization must provide for the possibility of criminal prosecution, at least in cases involving intentional counterfeiting of trademarks and piracy of copyrights on a commercial scale. Judicial protection measures should include imprisonment or the imposition of significant fines, confiscation of counterfeit products, materials and tools for their production.

With the creation in Ukraine of appropriate legal protection of intellectual property in the context of globalization of scientific achievements, new technologies, the Internet can no longer be regarded today only as an internal affair of Ukraine. Therefore, the development of national legislation in the field of intellectual property reflects the transformations taking place in society. This is a logical and understandable reaction to the changes taking place in the economic life of the state, an attempt to create conditions for the implementation of citizens' rights to creative activity provided for by the Constitution of Ukraine. At the same time, this is an attempt to create a reliable mechanism for protecting rights to the results of intellectual activity. For this purpose, national legislation implements the norms and rules adopted in the world community. The need for such harmonization is dictated by the objective requirements of the time, which cannot be ignored. Economic, political, cultural or any other civilized coexistence of our state with the European Community, countries of the whole world in volves the acceptance of international standards in the field of intellectual property, which world civilization has been creating for centuries, but their extraordinary activation has been traced only in recent decades. The mentioned standards provide for certain rules of conduct in international trade, protection of the rights and interests of authors and owners of protective documents in the field of intellectual property. The principles and basic provisions of these rules are established, first of all, by the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement), and EU Council directives. The course of integration into the EU and accession to the World Trade Organization, declared by Ukraine, requires ensuring the protection of intellectual property rights at the level of economically developed countries.

Conclusions. Based on the above, we can conclude that intellectual property has a complex economic and legal nature and is capable of being revealed only in the aggregate of subjective volitional and objective economic relations. At the same time, the specified set should be reflected in specific legal norms that are relevant at a specific time, at a specific stage of development and in a specific society.

The appropriate level of regulation of intellectual property remains one of the most important tasks of legal science. In today's conditions, this is of particular importance, since an intellectual product, which is an intangible substance by its nature, is the basis for the development and prosperity of society.

In our opinion, for the correct understanding and construction of a system of legislation that regulates social relations in the sphere of intellectual activity, a clear definition of the categorical apparatus is necessary. This is not an invented theoretical problem.

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Дата надходження статті: 25.04.2025 р.

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ТЕОРЕТИКО-ПРАВОВА ОСНОВА ІНТЕЛЕКТУАЛЬНОЇ ВЛАСНОСТІ

Інтелектуальна діяльність у XXI ст. стає основним і вирішальним чинником соціально-економічного прогресу. Від рівня творчої діяльності залежатиме рівень суспільного виробництва. Успіхи суспільного виробництва визначають рівень матеріально-побутового життя народу. У сучасних правових системах явище "інтелектуальна власність" охопило найрізноманітніші сфери суспільних відносин, що є предметом регулювання різних галузей права: економічний обіг, соціально-політичні й культурні зв'язки, міжнародні, державно-правові та інші відносини. Це призвело до того, що інтелектуальна власність стала об'єктом вивчення низки галузевих юридичних наук (цивільного права, державного, адміністративного, митного, податкового, міжнародного та ін.), а категорія "інтелектуальна власність" увійшла до їх понятійного апарату. За час розвитку права інтелектуальної власності у світовій науці виникло чимало теорій, що пояснюють сутність відповідних прав. Проблема встановлення природи прав, що виникають з факту створення результатів творчої діяльності та визначення їх місця серед інших правових категорій, спричинила дискусію, що ведеться досі, і супутні їй суперечливі погляди стосовно сутності прав на результати творчості.

Ще однією важливою особливістю інтелектуальної власності, якщо розглядати її з економічного та юридичного поглядів, є те, що вона повинна давати матеріальну чи іншу користь: це може бути додатковий прибуток, полегшення просування товарів чи послуг на ринок, сприяння духовному розвитку особистості. Так, результати художньої творчості використовуються в гуманітарній сфері для збагачення внутрішнього світу людини, формування її світогляду, а результати технічної творчості забезпечують підвищення технічного рівня виробництва, конкурентоспроможність вироблених товарів і послуг.

Ключові слова: право інтелектуальної власності, цивільні правовідносини, правове регулювання права інтелектуальної власності, об'єкти права інтелектуальної власності, пропрієтарна теорія.