

## Confiscation as one of the methods to protect intellectual property rights

## Confiscação como um dos métodos para proteger os direitos de propriedade intelectual

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## Abstract

It is well-known fact that products and goods produced with the usage of the object of intellectual property rights has additional demand, bring additional profits to their right holders, and as a result such goods often become the object of offenses. It has been indicated that, taking into account the unsatisfactory situation of intellectual property protection and the problems of the state system of intellectual property, Ukraine, like the entire civilized world, pays attention to ensuring private and public interests in the field of intellectual property. The authors of the article have analyzed the situation of legal protection and have paid attention to the measures taken by Ukraine to reform the state system of intellectual property. It has been established that social relations in the researched area concern criminal and administrative legal mechanisms related to seizing. It has been emphasized that different types of fines, criminal or administrative confiscation are applied to the violator depending on the violation of the legal norm. The authors have analyzed national and foreign regulatory legal acts, where attention is focused on one of the types of penalty – confiscation. The shortcomings of the Ukrainian legislation have been pointed out and amendments to it have been offered for the purpose of its improvement.

**Keywords:** Protection; liability for infringement of intellectual property rights; trademark; legal prohibition; systematization of legislation; quality of legislation; improvement of legislation.

## Resumo

É sabido que produtos e bens produzidos com a utilização do objeto de direitos de propriedade intelectual têm demanda adicional, trazem lucros adicionais aos seus titulares de direitos e, como resultado, tais bens muitas vezes tornam-se objeto de infrações. Foi indicado que, tendo em conta a situação insatisfatória da protecção da propriedade intelectual e os problemas do sistema estatal de propriedade intelectual, a Ucrânia, como todo o mundo civilizado, está atenta à garantia dos interesses públicos e privados no domínio da propriedade intelectual. Os autores do artigo analisaram a situação da protecção jurídica e prestaram atenção às medidas tomadas pela Ucrânia para reformar o sistema estatal de propriedade intelectual. Foi estabelecido que as relações sociais na área pesquisada dizem respeito aos mecanismos jurídicos criminais e administrativos relacionados à apreensão. Enfatizou-se que diferentes tipos de multas, confiscos criminais ou administrativos são aplicados ao infrator dependendo da violação da norma legal. Os autores analisaram atos jurídicos regulamentares nacionais e estrangeiros, onde a atenção se centra num dos tipos de pena – o confisco. Foram apontadas as deficiências da legislação ucraniana e propostas alterações à mesma com o objectivo de a melhorar.

**Palavras-chaves:** Protecção; responsabilidade por violação de direitos de propriedade intelectual; marca; proibição legal; sistematização da legislação; qualidade da legislação; aperfeiçoamento da legislação.

## 1 Introduction

It is difficult to imagine the modern world without the intellectual product of a man, created by his creative, mental and spiritual activity. The result of intellectual activity is an intellectual product as an object of intellectual property rights. The specific feature of the object of intellectual property rights is that only the result of creative intellectual search is subject to legal protection, which meets the established requirements of the law and is recognized as protectable. As a result, the ability to protect the object of intellectual property rights provides an opportunity to ensure the protection of the subjective rights of the right holder of such an object. The issue of protection is generally explained by the fact that the process of the economy intellectualization is taking place in the light of global development. Ultimately, this phenomenon affects the economic security of a country (BARANOV et al., 2020, p. 20).

The indicator of the welfare of the country's population is the indicator of the specific weight of the gross domestic product per citizen; this indicator entirely depends on the economic development of the country. The last 10-15 years have been characterized by significant changes in the world economy. There is the process of transition from the economy of things to the economy of knowledge, which is not known to everyone, when additional value is mainly formed due to the results of intellectual, creative activity, which in most cases are objects of intellectual property rights (Intellectual property and patent science, 2021, p. 13).

The Basic Law of Ukraine guarantees the protection of intellectual property. Such a guarantee meets the current challenges, because the economic stability of Ukraine depends on the level of protection of the sphere of intellectual activity.

The dynamic development of the sphere of intellectual activity is due to the progress of information technologies, in particular, the possibilities of reproduction of copyright objects in the Internet.

The international community pays a lot of attention to intellectual property issues. That is the reason for celebrating the International Day of Intellectual Property (World IP Day) on April 26.

The Resolution of the Cabinet of Ministers of Ukraine dated from March 3, 2021 No. 179 ("National Economic Strategy...", 2021) was adopted in order to bring the legislation on the protection of intellectual activity in line with the standards of the European Union. It outlines the principles for the protection of intellectual property rights. Besides, the Law of Ukraine dated from March 20, 2023 No. 2974-IX ("On Amendments to Certain Legislative Acts of Ukraine on Strengthening the Protection of Intellectual Property Rights", 2023) is also important on this path.

A lot of works of Ukrainian scholars have been recently focused on the problems of the protection mechanism and protection of intellectual property. In particular,

V. Shmorhun paid attention to ensuring proper legal protection of a trademark, commercial name and geographical indication (2020). O. Korotun made a theoretical and practical generalization of the issue of administrative and legal protection of intellectual property (2020). V. Teremetskyi in co-authorship with other scholars have studied for the first time in the modern legal doctrine of intellectual property in Ukraine the terms and specific features of legal protection of inventions within medical practice (2019). H. Lebedieva formulated a number of suggestions that made it possible to apply certain levers for the protection of civil rights in case of illegal use of objects of intellectual property rights (2021). The basis and prerequisite of this scientific research was the article of Ukrainian scholars focused on determining existing risks of private property rights in Ukraine and the mechanism for overcoming them, in particular, the risks of depriving private property rights in Ukraine using the examples of nationalization and re-privatization (TEREMETSKYI et al., 2020).

Scholars of the indicated works mostly focus their attention on administrative and legal, civil aspects of intellectual property protection. However, the issue of confiscation as a type of punishment and special confiscation, which is not a regular type of punishment, and which is regulated by different branches of law and is related to the protection of intellectual property rights, remained outside the scholars' scope of research.

The purpose of the article is to provide theoretical and practical views on confiscation as a special feature of the protection of intellectual property rights.

To achieve the specified purpose, the following objectives were set: to characterize the situation of legal protection in the field of intellectual property; to analyze the legislative grounds for the application of confiscation in Ukrainian and foreign legislation; to determine the ways of improving the legislative regulation of the researched sphere of social relations.

## 2 Materials and methods

The system of scientific methods was used during the study of confiscation as a special feature of the protection of intellectual property rights. In particular, general and philosophical method made it possible to study problematic issues related to confiscation, which contributed to uncover the legal nature of confiscation. The method of deduction and induction was used to analyze regulatory and legal application of confiscation by the norms of criminal, administrative and international legislation. The method of abstraction provided a transition from criminal and legal analysis of confiscation to administrative seizure. Modeling and forecasting methods, as well as synergistic approach were used in forecasting the expected results of the research, which made it possible to determine the ways to improve legislation in the researched field of relations.

The regulatory basis of the article is Ukrainian legislation, in particular the Constitution of Ukraine, certain provisions of criminal, administrative and international legislation.

Economic and legal journalism, case-law, analytical materials and Internet resources were used during the research.

### 3 Research Fundamentals

It is difficult to establish possible violations of intellectual property rights, since there is an encroachment on personal non-property or property rights of intellectual property. Practice proves that such violations are mostly related to appropriation of authorship, violation of contract terms, use of intellectual property objects without permission, etc.

The protection of intellectual property at the international level is entrusted to the World Intellectual Property Organization, which operates under the UN. A lot of legislative acts related to the protection of intellectual property, which stipulate civil, economic, criminal and administrative liability, have been adopted and operate in the Ukrainian legislation.

However, the Ukrainian system of protection of intellectual property rights is insufficiently effective, so it cannot provide adequate protection of subjective rights. This is also evident from the report of the Office of the US Trade Representative (USTR) on enforcement of intellectual property rights. Ukraine was included in the Priority Watch List, as it is concerned about insufficient protection of intellectual property (HENNADI, 2021).

The complexity of solving existing problematic issues in the field of intellectual property makes scientists to search for different ways to solve them. Starting from the implementation of a control function in society (MERNYK, 2023, p. 33), the implementation of changes associated with the formation of a stable and integrated system of state institutions (PETRYSHYN et al., 2021, p. 21), up to mandatory involvement experts in the field of intellectual activity into the process of developing reforms (GUSAROV, 2020, p. 14).

It should be noted that the reform of the state intellectual property system has been launched in Ukraine since 2016, as a result of which significant changes took place in the structure of the state intellectual property system. Thus, the Law of Ukraine dated from June 16, 2020 No. 703-IX established an intellectual property agency at the national level, which ensured the implementation of the state policy in the specified field of activity (“On Amendments to Certain Laws of Ukraine Regarding the Creation of a National Intellectual Property Agency”, 2020).

Besides, the problems of the state system of intellectual property prompted the Cabinet of Ministers of Ukraine to issue the Resolution No. 943 dated from October 28, 2022, which determined that the Ukrainian National Office of Intellectual Property and Innovation should perform the functions of the National Intellectual Property Authority from November 8, 2022 (“Some issues of the National Intellectual Property Authority”, 2022).

Ukrainian legislation on the protection of intellectual property rights is slowly being amended. However, it is necessary to reform the approach to the sphere of intellectual activity in order to ensure European integration of the country and attract foreign capital. It is advisable to have a reliable and stable movement of Ukrainian legislation towards EU norms. Therefore, we should agree with the scholars opinion that the legislation of foreign countries is being developed faster than amendments in the corresponding legislation of Ukraine (IVASHOVA et al., 2022, p. 46).

The study of Ukrainian legislation on the protection of intellectual property rights allows us to note that the protection of intellectual property rights was ensured by civil law norms at the initial stage of the formation of legislation in the specified area. However, such protection of intellectual property rights became insufficient over time. Therefore, there are currently legislative acts in Ukrainian law that provide civil, criminal and administrative liability for the violation of intellectual property rights (LISOVYI, 2021, p. 36).

Analysis of the Art. 41 of the Constitution of Ukraine allows us to state that property rights are protected by the state. Therefore, property confiscation is exclusively applied by the court decision (Constitution of Ukraine, 1996).

In accordance with the provisions of the Council of Europe Convention of 16 May 2005, confiscation is also related to criminal offenses related to counterfeiting and pirated distribution of goods, thus intellectual property rights may be violated (“Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime...”, 2005).

As stated by D. Solove, “the value of privacy cannot be determined empirically by studying individual privacy assessments and cannot be reduced to a monetary figure based on specific transactions. The value of privacy is a constitutive element of society, not a commodity sold at the market” (2021, p. 5).

Therefore, in order to carry out the legal confiscation of property, it is necessary that this type of punishment is established by law, secondly, there should be a court decision, thirdly, information related to the confiscation of property must be confidential in necessary cases.

The institution of confiscation is regulated by a number of legislative acts. We suggest to analyze them. There is a significant number of Articles with the sanctions in the Special Part of the criminal law, the norms of which provide confiscation of

property. In accordance with the provisions of the current criminal law, criminal liability for infringement of intellectual property rights is provided in the Articles 176, 177, 203-1, 229 of the Criminal Code of Ukraine.

Criminal liability in accordance with Part 1 of the Art. 11 of the Criminal Code of Ukraine is provided for the commission of a socially dangerous criminal act (action or omission) committed by the subject of a criminal offense. Criminal offenses according to Part 1 and Part 2 of the Art. 12 of the Criminal Code of Ukraine are divided into criminal misdemeanors and crimes. (Criminal Code of Ukraine, 2001). Regarding misdemeanor as a type of criminal offense, it is worth noting that the range of criminal misdemeanors against intellectual property rights in the current Criminal Code of Ukraine is limited. A bright example is the Art. 232 of the Criminal Code of Ukraine. Analysis of the Articles of the Criminal Code of Ukraine related to the protection of intellectual property rights gives grounds to note that sanctions include the following types of punishment: fine, correctional works, confiscation, special confiscation, imprisonment. However, such a punishment as confiscation was excluded in 2016 from the sanctions of the Articles 176, 177, 203-1, 229 of the Criminal Code of Ukraine. We believe that such a step was premature. Therefore, in order to strengthen liability in the field of protection of intellectual property rights, it would be advisable to implement legislative amendments to the sanctions of the Articles 176, 177, 203-1, 229 of the Criminal Code and return confiscation.

The institution of special confiscation as another measure of a criminal and legal nature was supplemented into the Criminal Code of Ukraine in 2013 along with confiscation as a type of additional punishment (KULCHYTSKYI; SLIUSAR, 2020). The Constitutional Court issued a decision stating that special confiscation does not terminate either the right of ownership or illegal and dishonest possession (BAKONINA, 2022). It can be assumed that the special confiscation provided in the Art. 96-1 of the Criminal Code of Ukraine may create separate opportunities to legally reintroduce counterfeit products into circulation. In order to make such actions impossible, agreeing with scholars, it is expedient to exclude special confiscation of counterfeit products from the sanction of the Art. 96-1 of the Criminal Code of Ukraine, since such products must be destroyed (“On the Adoption of the Protocol on Amending the TRIPS Agreement”, 2016).

It is worth emphasizing that special confiscation as a type of punishment is contained among the EU countries in the criminal legislation of Belgium and is applied for crimes and misdemeanors regarding things specified in the legislation. The Belgian law provides the possibility to apply special confiscation to things that have been created by an offence, it is important for the prevention of offences, including infringements of intellectual property rights, since offenders, depending on the object of intellectual property, can create counterfeit (piracy) products by means of their reproduction, manufacture, replication or production.

The source establishing administrative liability for offenses against intellectual property rights is the Code of Ukraine on Administrative Offenses. The Articles providing administrative liability in the field of intellectual property include the Art. 51-2 and the Articles 156-3, 164-3, 164-6, 164-7, 164-8, 164-9 and 164-13. The analysis of the provisions of those norms gives reason to note that offenses against intellectual property rights provide according to the legislation two types of administrative penalties: a fine and confiscation of an object that became the instrument of commission or the direct object of an administrative offense; funds received as a result of committing an administrative offense. According to the sanction of the Art. 51-2 of the Code of Ukraine on Administrative Offenses there is administrative penalty in the form of a fine, confiscation of illegally manufactured products and equipment and materials intended for its manufacture for the illegal use of an object of intellectual property rights, appropriation of authorship of such an object or other intentional violation of the rights to an object of intellectual property rights protected by law (Code of Ukraine on Administrative Offenses, 1984). At the same time, small fines for infringement of intellectual property rights in the Code of Ukraine on Administrative Offenses, which are provided by the Art. 51-2, do not correspond to the current realities, do not perform either a preventive or a punitive function, and therefore are ineffective combating mechanisms. To strengthen liability in the field of protection of intellectual property rights, we should introduce amendments to the sanction of the Art. 51-2 of the Code of Ukraine on Administrative Offenses, namely to introduce the possibility of destroying counterfeit products, raw materials used for their production.

The following administrative penalties may be imposed for violation of customs rules: warning; fine; confiscation of goods, commercial vehicles. Counterfeit product is a violation of intellectual property rights. It carries socio-economic risks, since it is a product of unknown origin and quality.

According to the Art. 461 of the Customs Code of Ukraine, the objects of intellectual property rights violations can be various objects of intellectual property rights, in respect of which offenses are committed at the customs border, trademarks, geographical indications, etc. (Customs Code of Ukraine, 2012).

In addition to confiscation, the Art. 401 of the Customs Code of Ukraine provides the destruction of goods that have been registered in violation of intellectual property rights. Destruction of this type of goods can be carried out at the request of the right holder. An example of the implementation of the requirements of the Art. 401 of the Customs Code can serve as: the founder of the Archpole furniture brand was informed that the customer of this products had placed an order with another manufacturer – “Metal Plex”, whose furniture design was very similar to Archpole furniture. The owner of the brand refused to go to court, but demanded that Metal Plex should destroy the tampering (“The Archpole design bureau accused Sheremetyevo of plagiarizing furniture”).



The peculiarity of confiscation in case of violation of customs rules is that it: 1) acts as administrative penalty; 2) consists in forced seizure of goods, vehicles; 3) free transfer of them into the ownership of the state; 4) confiscation of vehicles, is applied regardless of whether those goods or vehicles are the property of the person who committed the offense, including in relation to intellectual property rights; 5) can be applied both as the main and as an additional administrative penalty. Regarding both administrative, criminal offenses and offenses of customs legislation, we adhere to the opinion that the relevant penalties do not fully correspond to both the harmfulness and severity of the offenses against intellectual property rights.

Despite certain differences in the confiscation provided by the norms of administrative and customs legislation, it is worth noting that considering cassation case No. 400/548/19, the Grand Chamber of the Supreme Court came to the conclusion that confiscation according to the Art. 461 of the Customs Code of Ukraine is one of the types of administrative penalty for the violation of customs rules. On the basis of Part 1 of the Art. 487 of the Customs Code of Ukraine, proceedings in cases of violation of customs rules are carried out in accordance with the Customs Code of Ukraine, and in part not regulated by it, in accordance with the legislation of Ukraine on administrative offenses (Grand Chamber of the Supreme Court, 2020). Thus, according to the results of the research, it was established that legal argumentation should be considered as a process of the concept, which reflects the legally significant activity on justifying the statement by certain means – legal and non-legal arguments. Such activity is communicative in nature and is carried out in various types of legal activity, often in the form of discourse (RABINOVYCH; DUDASH, 2022, p. 23).

The following statistical data indicate the problematic nature of applying confiscation in the field of intellectual property, in particular trademark rights. According to the data of the Supreme Court of Ukraine, 31 persons were convicted in 2015 by verdicts that entered into force under the Art. 176 of the Criminal Code of Ukraine (“Infringement of copyright and related rights”); in 2016 – 10 persons were convicted. In regard to the offenses provided by the Art. 229 of the Criminal Code of Ukraine (“Illegal use of a mark for goods and services, company name, qualified indication of the goods origin”), the numbers are even lower: in 2015 – 13, in 2016 – 6 people (ORTYNSKA, 2018). In general, it can be stated that Ukraine has the legal mechanism for the protection of intellectual property rights. Confiscation is an effective mechanism that provides an opportunity to form a legal culture in the field of protection of intellectual property rights.

## 4 Conclusion

Thus, taking into account the above considerations, systematic analysis of certain provisions of criminal, administrative, international legislation, case-law and other sources that regulate the issue of confiscation and special confiscation as a type of penalty, there are reasons to assert that those issues are not sufficiently regulated by Ukrainian legislation.

Theoretical and sectoral aspects of the protection of intellectual property rights indicate that in order to improve the mechanism of application of special confiscation in the Ukrainian criminal law, it is advisable to apply it to things and objects that can be created as counterfeit (piracy) products of the object of intellectual property rights through its reproduction, manufacture, production, replication.

It is also expedient to provide the destruction of counterfeit products in addition to confiscation in the Art. 51-2 of the Code of Ukraine on Administrative Offenses in order to improve administrative and legal confiscation.

It is also appropriate that the Customs Code of Ukraine should provide that goods seized by a court decision are subject to processing, disposal or destruction.

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