

UKRAINE: SPECIALISED APPROACH TO INTELLECTUAL PROPERTY WITHIN THE COURTS – 5 REASONS TO ACCEPT

Oleh Stoiev

Mykolas Romeris University
Institute of Constitutional and Administrative Law
Ateities g. 20, LT-08303 Vilnius, Lithuania
Tel.: (+3705) 271 4545
E-mail: oleh.stoiev@gmail.com

Received 19 October, 2015; accepted for publication 10 November, 2015

DOI:10.13165/SMS-15-7-1-12

Abstract. *The present study aims to prove the necessity of providing the system of specialised Intellectual Property (IPR) Courts in Ukraine for the general benefit of the court system of Ukraine and the Ukrainian society as well as for foreign actors involved in economical processes in Ukraine including protection of the intellectual property rights and related rights. The study revealed that an adoption of such a specialisation in Ukraine will contribute to the Ukrainian court system and the state in general as the solution to the jurisdiction problem by boosting the effectiveness of decision, creates an opportunity to set special court procedures and practice generalizations to enhance efficiency and accuracy, serving as a basis for the consistency and predictability of case outcomes and the source of progressive development and dynamism.*

The advantages and disadvantages of specialised intellectual property courts adoption depend on the model selected. Such models are differentiated and suggest various institutional formats such as specialised IPR Trial Court, specialised IPR Appeals Court, specialised IPR Trial Division and some others, which are briefly analysed within the article.

The study does not cover the analysis of disadvantages of specialised intellectual property courts adoption.

Keywords: Ukraine, court system, intellectual property rights, specialisation.

Introduction

Relevance of the study and the research problem. Joining the World Trade Organization has led Ukraine to significant changes in its legal status. One effect of this is that it has been required to ensure that legislation accords with the standards set out in the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). It is obvious that the protection of Intellectual Property Rights is of great importance to both domestic entities and foreign companies, seeking to invest in Ukraine. However, in May 2013 the “Special 301” Report of the Office of the US Trade Representative, which annually reviews foreign trading partners’ intellectual property protection, designated Ukraine as a priority foreign country (PFC), which means that Ukraine is considered to be a “foreign country that deny adequate and effective protection of intellectual property right”¹. It is also worth mentioning that Ukraine is the only PFC-status country in 2013. The key of the message is that a great enforcement of Intellectual Property Right is highly required immediately. Otherwise Ukraine would no longer keep benefits under the Generalized System of Preferences (GSP). Meanwhile it is just one of the many reasons to consider a major step in intellectual property rights law arrangement – reciprocity of Specialised IPR Courts institute.

At the same time, legislation governing intellectual property rights is obviously complex while as well as the technologies protected by them. This cases the necessity in high level of the judges’ experience to reassure that they are capable to provide accurate adjudication with consistent case outcomes.

Of course, the establishing of a specialised courts on intellectual property rights does not guarantees the competency of the judges within the system automatically, it increases the exposure to intellectual property rights law as the cases are funneled to the limited group of judges which results in the increasing of the quality of the opinions.

Today, as it is stated in the International Intellectual Property Alliance 2014 Special 301 Report on Copyright Protection and Enforcement, Ukraine faces wide problem related to the intellectual property rights. Especially, the major ones are: 1) the failure to implement an effective and systemic means to combat widespread online infringement of copyright and related rights; 2) the unfair, nontransparent administration of the system for collecting societies; and 3) the widespread use of

1 International intellectual property alliance (IIPA). – 2014 Special 301report on copyright protection and enforcement: Ukraine. – [interactive] [Retrieved on 19 October, 2015] from: <<http://www.iipa.com/rbc/2014/2014SPEC301UKRAINE.PDF>>: p. 1–2.

infringing software by Ukrainian government agencies². Therefore, it is obvious that decisive measures have to be taken to solve this and other problems – and the establishment of the separate independent specialised court dealing with the Intellectual Property Rights exclusively seems to be exactly such a solution.

Nowadays the court system of Ukraine is in the process of reforming. Therefore, there is a significant scientific interest in the topic, which embodies in numerous related researches (O. Kostenko – Actual problems of the Ukrainian court system reforming, 2007; O. Koval – Actual problems of the Ukrainian court system functioning, 2003; V. Serduk – Supreme Court of Ukraine and the reforming of the system of the justice, 2010; V. Kryvenko – Ukrainian court system democratization: problems and perspectives, 2006; O. Ovcharenko – Some of the problems of Ukrainian court system reforming, 2008; R. Petrov – Ukrainian court system Europeanization as the part of the European integration policy of Ukraine, 2012; M. Vasilevych – The directions of the Ukrainian court system reforming, 2008; O. Kuzmenko – On the necessity of the Ukrainian court system reformation, 2009; O. Kulokov – On the problems of inefficiency of Ukrainian court system functioning, 2008; N. Dobrovolska – The problems of the Ukrainian court system development in legal doctrine, 2008; A. Butyrskiy – The realization of the specialisation principle within the Ukrainian court system, 2012; V. Tatkov – Reformation of the Ukrainian court system – important part of the statehood formation, 2013). At the same time, mentioned researches do not actually cover the problem of the specialised courts establishing at all, especially – specialised courts dealing exclusively with the Intellectual Property Rights. They are rather facing the reasons of the Ukrainian court system reformation, the hierarchy of the courts and the mechanisms (guarantees) of their independence. But the necessity of the specialised courts dealing with the issues of the Intellectual Property Rights are usually even not mentioned within such an articles. Therefore, there is a great need in specialised researches dedicated to the problem of the specialised intellectual property rights courts only.

1. Method

This article stands on the materials of the International Bar Association Intellectual Property and Entertainment Law Committee's 'International Survey of Specialised Intellectual Property Courts and Tribunals' developed on the basis of surveying Intellectual Property Rights practitioners, judges, policy-makers, and public officials throughout the world on specialised Intellectual Property Rights courts in their countries. Court systems selected within this article were chosen to represent both the range of geographic locations, and the difference in the economic growth. They also represent different types of specialised Intellectual Property Rights court systems and display the specific particularities of the represented states. The

2 IIPA, *supra* note 1, p. 2–3.

article also considers official reports on the state of the Intellectual Property Rights in some countries, particularly – in Ukraine, as well as IIPA recommendations. Another source of the research is an official statistics on Ukrainian court system provided by the State Court Administration of Ukraine. The article also refers to the informational charts on Intellectual Property Rights Courts developed under the control of the Intellectual Property Watch.

2. Results

Specialised intellectual property rights courts were found to enhance efficiency, lead to more timely resolution and foster more consistent ruling and outcomes. Here are some benefits of applying Specialised IPR Court in Ukraine:

1) **Solution to the jurisdiction problem.** Intellectual property rights cases are dispersed between Administrative and Commercial Courts, so as between Courts of general jurisdiction, depending on Party matters, which does not correspond with their legal nature. It also disunites the structure of such Courts, making them unreasonably varied. No other country in the whole Europe has such a complex structure, except of Sweden (see the infoblock below). Objectively, there is no need in such differentiated jurisdiction system in intellectual property rights matters, if the Specialised Court is established. National jurisdiction scheme is too complicated and has no trust in foreigners' eyes. Therefore, the establishment of the specialised intellectual property rights courts will: 1) boost the Ukrainian court system, relieving the judges who usually face cases of general jurisdiction and thus are not competent enough to justify the dispute in time and due to the established principles of the functioning of the Court; 2) increase the trust to the Ukrainian court system within the international society; 3) will reveal the possibility to join related international treaties and therefore – will be the next step towards the cooperation within the region and, on the other side – ease Ukrainian own way towards better regulation because of an access to the proved legal solutions already been developed.

2) **Effectiveness of decision-making.** Specialised intellectual property rights courts make quicker and more effective decisions. While judges in specialised courts are generally encouraged to have specialised knowledge, they are able to understand the procedures and technicalities associated with intellectual property rights cases. Specialist judges recognize case patterns and legal issues, which reduces delays and facilitates the speedy resolution of cases. With increased judicial competence in effectively and efficiently resolving intellectual property rights cases, confidence in intellectual property rights litigation will also increase. It's naive to expect such quality in intellectual property rights matters from Courts of general jurisdiction or Administrative Courts, while the bulk of the cases there is just inconceivable – 139,6 per judge monthly in first instance and 216,7 in Appeal one resp. (in 2011)³.

3 Official review of administration of Justice in Ukraine till 2012. – [interactive] [Retrieved 19 October, 2015] from: http://court.gov.ua/sudova_statystyka/Oglayd : p. 2-3.

3) ***Opportunity to set special court procedures and practice generalizations to enhance efficiency and accuracy.*** The creation of a specialised court allows establishing specialised rules and procedures which are uniquely suited to intellectual property rights cases. These rules can help manage complex issues of intellectual property rights litigation by allowing courts to appoint associate judges or experts with technical knowledge to assist the presiding judge. Regarding the specific of the intellectual property rights disputes, which usually consider technically difficult procedures and actions, the necessity of such regulation is obvious. It is impossible to regulate in the same way the dispute between the marriage regarding property matters and the authorship of the paintings or the presence/absence of the innovative element in the device. Minimizing the risk of later litigation, it makes it easier for small and medium enterprises to protect their intellectual property rights without expensive court proceedings, while procedures for fast-tracking appeals can expedite the adjudication of intellectual property rights -related disputes. At the same time, it will be possible to regulate the court practice on the intellectual property rights matters through the generalizations of the court practice. This instrument is very effective in Ukraine and allows to increase the level of certainty to the court practice, providing the mechanism which is open to refer to directly. Moreover, no need in three-code-selection will appear whatever the Party is (see p. 1) which means a lot regarding the related procedural differences between them;

4) ***Consistency and predictability of case outcomes.*** The creation of an intellectual property rights court increases the consistency of case outcomes because of the stability and clarity of the court practice as well as because of the increasing of the judges' expertise. This reduces litigation, as it becomes clearer to potential litigants when a case is without merit. Because of such a clarity, businesses have greater confidence that their investments in innovation will be protected, allowing them to better plan their business strategy, spurring economic growth. It also points out typical problems of the field, making it easier to generalize and solve them. Therefore, the reputation of the state concerning the intellectual property rights matters rises (while it is too low nowadays), as well as the chances to detect the typical problems of the relations and regulations within the field.

5) ***Progressive development and dynamism.*** Constantly evolving legal subjects, such as intellectual property rights, require judicial and practitioner expertise in order to adapt to changing technologies and issues which are changing day to day. The establishment of specialised intellectual property rights courts produces more knowledgeable judges and practitioners, who are rather able to manage and preside over intellectual property rights matters because their subject matter is more concentrated⁴.

Generally, there are numerous advantages of applying the Specialised intellectual property rights Courts system, but all of them depend on the way of institutionalizing

4 International Intellectual Property Institute (IPI) and the United States Patent and Trademark Office (USPTO). – Study on Specialized Intellectual Property Courts. – [interactive] [Retrieved 19 October. 2015] from: <http://iipi.org/wp-content/uploads/2012/05/Study-on-Specialized-IPR-Courts.pdf>: p. 6.

greatly. The idea is that there is not the only way to impose the principle of specialisation in this particular case developing the system of entirely independent courts dealing with intellectual property rights issues exclusively. As a matter of fact, there are more than a dozen of models of such a specialisation, and the named option (the creation of the independent courts dealing exclusively with the cases related to the matters of the intellectual property rights) is only one of them. To understand the range of the possibilities, as well as their advantages and the disadvantages, and the reasoning of adoption, we should refer to the international practice of specialising the proceedings. Thus here are most widespread forms of providing intellectual property rights specialised jurisdiction models among European countries due to their relativity and strategically importunity to Ukraine.

Table 1. European IPR institutional arrangement⁵

IPR instance/ Country	Specialised IPR Trial Court	Specialised IPR Appeals Court	Specialised IPR Trial Division	Specialised IPR Appeals Division	Commercial Trial Court	Commercial Appeals Court	Trial Court that exclu- sively hears IP	Appeals Court that exclusively hears IP	Administrative Tribunal	Specialised IP Judges on 99 court of general jurisdiction	Considering IP Court / Division / Tribunal
Austria			*	*					*		
Belarus			*	*							
France			*	*					*		
Germany [1] ⁶			*	*							
Italy			*	*							
Lithuania							*			*	
Russia	*	*			*						
Sweden		*	*	*				*		*	
United Kingdom	*	*							*		
European Union											*

5 Intellectual Property Watch: International IP Policy. (2013, March 1). Russia establishes Specialized Court for Intellectual Property Rights. – [interactive][Retrieved October 19, 2015] from: <http://www.ip-watch.org/2013/03/01/russia-establishes-specialised-court-for-intellectual-property-rights/> : p. 13.

6 In order to Chapter Nine of the Basic Law for the Federal Republic of Germany – “Administration of Justice”

To compare with, here is a table of the same structure regarding the classification of countries worldwide not regarding the criteria of relativity to Ukraine or the interests of any kind of foreign policy:

Table 2. IPR institutional arrangement worldwide – selected states⁷.

IPR instance/ Country	Specialised IPR Trial Court	Specialised IPR Appeals Court	Specialised IPR Trial Division	Specialised IPR Appeals Division	Commercial Trial Court	Commercial Appeals Court	Trial Court that exclusively hears IP	Appeals Court that exclusively hears IP	Administrative Tribunal	Specialised IP Judges on court of general jurisdiction	Considering IP Court / Division / Tribunal
Australia			*	*					*		
Belgium					*						
Bhutan										*	
Brazil	*			*							
Canada							*			*	
Chile	*	*							*		
China			*	*					*		
Croatia					*						
Denmark					*					*	
Ecuador									*		*
Egypt					*					*	
Finland			*						*		*
Greece			*	*							
Hungary			*								
Iceland							*				
Indonesia					*					*	
Iran							*	*			
Iraq					*						

7 Intellectual Property Watch: International IP Policy. (2013, March 1). Russia establishes Specialized Court for Intellectual Property Rights. – [interactive] [Retrieved October 19, 2015] from: <http://www.ip-watch.org/2013/03/01/russia-establishes-specialised-court-for-intellectual-property-rights/> : p. 13.

Israel										*	
Japan		*	*	*							
Kenya							*		*		
Mexico				*							
Netherlands			*	*							
New Zealand							*		*	*	
Norway							*			*	
Panama		*									
Peru	*	*							*		
Portugal	*	*									
Romania			*	*							
Singapore									*		
Slovakia							*	*			
South Africa					*						
South Korea		*							*		
Sweden		*	*	*				*		*	
Switzerland	*				*	*					
Syria				*							
Thailand	*			*							
Turkey	*		*								
United Arab Emirates											*
United States of America								*	*	*	

As we can see, none of the countries of the first table, except of Sweden, is as complex in intellectual property rights arrangement as Ukraine is because of Party matters. At the same time, Sweden got completely different traditions and practice in regulating the Intellectual Property Rights, as well as the philosophy of Intellectual Property Rights is completely different. Moreover, the market of Intellectual Property in this particular state is of another structure while the problems of Intellectual Property Rights regulation are of another nature. It is also true for the disputes to be heard in courts. Respectively, the Sweden court system deals with completely different objectives which justify the complexity of the Swedish court system. Though, such a reasoning obviously cannot be justified considering Ukraine.

The tables above tells us the following. Firstly, there is only a little sense in establishing **Trial Courts that exclusively hear only IP cases**. Countries which have

chosen such a way of courts system development (Canada, Iceland, Iran, Kenya, New Zealand, Norway, and Slovakia) are mostly small countries with very differentiated court system without any stable court practice (Kenya, New Zealand, Slovakia, and Iran) with typically dependent court system or countries with the strong traditions of intellectual property rights protecting where it plays a significant role (Canada). At the same time, both the features are not really typical for the Ukraine – large country with high (comparatively) population and vast array of the trial disputes where Intellectual Property Rights are not playing the central role they usually enjoy in, for instance, Canada.

For the second, we should state that the existence of the Trial Courts that exclusively hear only IP cases is not, actually, followed by the presumption of the **Appeals Court that exclusively hears IP cases existence**. As a matter of fact, such courts do not exist in most of the countries from the list above except Iran and Slovakia. At the same time, they are established in the United States of America, and Sweden while there is no separated Trial Court of the First instance which hears the IP cases only. Therefore, the existence of the one never guarantees the existence of another: it is rather justified by the complexity of the cases to be heard within the Appeals Court.

On the other side, such a justification cannot stand the ground considering the option of establishing the position of the specialised judges within the system of the general courts which hear the IP cases exclusively. This scheme works in Bhutan, Canada, Denmark, Egypt, Indonesia, Israel, New Zealand, Norway, Sweden, and in the United States of America. It is traditionally caused by two reasons: 1) lack of the necessity in establishing the separately functioning court to deal with IP disputes exclusively (Bhutan, Indonesia, Egypt), and 2) the need of additional expertise justifying the case due to the high dynamic of the intellectual property rights within the state (Canada, Israel, New Zealand, Norway, the United States of America).

This correlation is also typical for the **Specialised IPR Trial Courts and Specialised IPR Courts of Appeal**: while the first one functioning in Brazil, Chile, Peru, Portugal, Switzerland, Thailand, and Turkey, the Specialised IPR Courts are working in all of the named countries except of Turkey, Thailand, Brazil and Switzerland, it is also functioning in Sweden, South Korea, Panama, and Japan. Although there are no Specialised IPR Trial Courts at there, the amount and the complexity of the Intellectual Property Rights cases are so high that the adoption of the Specialised IPR Courts of Appeal came out as a ‘must’.

At the same time, the **Specialised Intellectual Property Rights Trial Divisions** are even more widespread than the Specialised IPR Courts of Appeal. They are functioning in Australia, China, Finland, Greece, Hungary, Japan, Netherlands, Romania, Sweden, and Turkey. Usually they are functioning both at the level of the courts of the first instance and at the Appeal one. Connecting the capability of providing qualified judges to hear the case and the economic advantages of the general jurisdiction courts, it offers the best solutions for wide range of countries where IP considered to be an important, but not the strategic issue.

Intellectual Property Rights disputes are heard by the **Commercial Trial Courts**

in Belgium, Croatia, Denmark, Egypt, Indonesia, Iraq, South Africa, and Switzerland, as well as in Russia. At the same time, the court system of the countries below is much plainer than in Ukraine (except of Russia), the Intellectual Property Rights disputes are not heard by different court instances depending nor on the status of the Party, nor on their correlation. We should also state that in some of the named states there are movements on adopting the specialised courts concerning exclusively intellectual property rights issues⁸. The general trend is clear: it is up to the specialisation.

As for the **Commercial Court of Appeal** as the instance for the disputes on Intellectual Property Rights hearing, it is adopted only in Switzerland which, as a matter of fact, seems to be the most complicated jurisdiction in the terms of Intellectual Property Rights regulation.

On the other side, one of the most widespread institution to hear the Intellectual Property Rights disputes is the **Administrative Tribunal**, which is functioning in Australia, Chile, China, Ecuador, Finland, Kenya, New Zealand, Peru, Singapore, South Korea, and the United States of America. It usually offers operative solutions for cases which demand high qualification. We should state, however, that such tribunals are usually not the court institutions and not a part of the state's court system at all – they are quasi-court institutions with an administrative authority.

Discussion and Conclusions

As we can see, the statement that there are pretty numerous ways to arrange the specialised hearing of the Intellectual Property Rights disputes has some basis to stand on. As the interest and the importance of the Intellectual Property Rights are different for each country we select, the mechanisms of the regulation are also different. They can be numerous and complex, as in the case of the Switzerland, or very few as in the Singapore, Iceland or Croatia. Generally, practice of Specialised intellectual property rights Trial and Appeals Divisions is dominating, which is natural: it makes no need of differentiating the Trial or Appeals instances whatever the Party is. But whatever the choice being made is, the general message is clear: specialised intellectual property rights arrangement is in force and highly required in matters of European unification, which tends a lot, especially for Ukraine due to its accession preferences.

The course towards the specialisation offers numerous advantages, especially regarding the Intellectual Property Rights. An adoption of such a specialisation in Ukraine **will contribute** to the Ukrainian court system and the state in general as the:

- Solution to the jurisdiction problem.
- Boost the effectiveness of decision.

8 Intellectual Property Watch: International IP Policy. (2013, March 1). Russia establishes Specialized Court for Intellectual Property Rights. – [interactive][Retrieved October 19, 2015] from: <http://www.ip-watch.org/2013/03/01/russia-establishes-specialised-court-for-intellectual-property-rights/>

- Opportunity to create special court procedures and practice generalizations to enhance efficiency and accuracy.
- Basis for the consistency and predictability of case outcomes.
- Source of progressive development and dynamism.

At the same time, the course on specialisation barely carries any significant disadvantages. Of course, it will result in certain confusion at first, but it is an inalienable part of any reform. And bearing in mind that Ukraine is already at the path of global reforming – court system included – it seems that there will be no better time to impose such changes. The reform of the court system and the adoption of the specialisation in hearing the Intellectual Property Rights disputes will become an organic part of the Ukrainian course towards the Europeanization resulting additional investments and the rise of Ukrainian reputation in the international community as well as the trust of foreign businesses. It will make the hearing of the Intellectual Property Rights disputes more effective and predictable while all other disputes will also contribute in efficiency because the judges of general jurisdiction will not be disturbed with issues they are not capable to settle. Professional judges who have passed special trainings and whose qualification is beyond doubts will hear the disputes relying on special procedural norms and the generalizations of the court practice which will contribute to both efficiency of the process and the predictability of the court practice. There will be no more similar disputes in administrative, commercial courts and the courts of the general jurisdiction with the different outcome and designed with different codes and – therefore – completely different procedures which means differences in procedural rights and duties of the Parties as well as the different status of the Courts in each case.

Ipso facto the specialising of national Courts system is highly required. Whole legal world tends to specialising in a great way: even those countries, which used to be conservative ones, are transforming due to principles of specialising⁹. Meanwhile it is necessary to choose the form of specialising wisely, it is in principle to determine the general direction – the direction to specialisation.

References

Basic Law for the Federal Republic of Germany. (1949). – [interactive] [Retrieved October 19, 2015] from: <<http://www.iuscomp.org/gla/statutes/GG.htm>>.

Intellectual Property Watch: International IP Policy. (2013, March 1). Russia establishes Specialised Court for Intellectual Property Rights. – [interactive] [Retrieved October 19, 2015] from:

9 Intellectual Property Watch: International IP Policy. (2013, March 1). Russia establishes Specialized Court for Intellectual Property Rights. – [interactive][Retrieved October 19, 2015] from: <http://www.ip-watch.org/2013/03/01/russia-establishes-specialised-court-for-intellectual-property-rights/>.

<http://www.ip-watch.org/2013/03/01/russia-establishes-specialised-court-for-intellectual-property-rights/>.

International intellectual property alliance (IIPA). (2014 Special 301 report on copyright protection and enforcement: Ukraine. – [interactive][Retrieved October 19, 2015] from: <<http://www.iipa.com/rbc/2014/2014SPEC301UKRAINE.PDF>>.

International Intellectual Property Institute

(IIPPI) and the United States Patent and Trademark Office (USPTO). – Study on Specialised Intellectual Property Courts. – [[interactive][Retrieved October 19, 2015] from : <<http://iipi.org/wp-content/uploads/2012/05/Study-on-Specialised-IPR-Courts.pdf>>.

Official review of administration of Justice in Ukraine till 2012. – [interactive][Retrieved October 19, 2015] from: <http://court.gov.ua/sudova_statystyka/Oglayd>.

Oleh Stoiev, Mykolas Romeris University, Institute of Constitutional and Administrative Law, student. Research interests: court systems, organization of justice, international legal regulation of intellectual property.