

MYKHAILIUK G. O.

National University «Kyiv Mohyla Academy»,
Associate Professor of International and European Law Department,
Lead Scientific Advisor, Industrial Property Department,
Scientific – Research Institute of Intellectual Property National Academy
of Legal Sciences of Ukraine, Dr. habil., Associate Professor

**IMPACT OF JUDICIAL REFORM IN UKRAINE ON THE DEVELOPMENT
OF LEGAL METHODOLOGY AND INTELLECTUAL PROPERTY LAW**

The essence of methodological principle of interpretation by the European Court of Justice *Marleasing* (derived from the name of one of the parties to the case) has been examined in the article. It is dominant in the part of non-actional proceedings and is supported by the principle of proportionality, as well as national regimes of intellectual property. It has been determined that this principle is appropriate to be introduced to the civil procedural activity of judiciary in Ukraine. Its' goal is to recognize the freedom of states in order to bring their own legal systems closer to the European legal order through the evolutionary process of regulatory compatibility (parallel action of two systems: the national legislation of the EU Member States and the EU law in the context of their structural interaction through gradual harmonization, adaptation to the EU law) without prejudice to their «legal rationality».

Key words: *methodology, legal system, European law, interpretation, intellectual property.*

The amendments to the Constitution regarding justice promise to extend the constitutional underpinning for a more independent judiciary. In particular, the reform of the judiciary is a key conditionality imposed by the EU, IMF and other donors to Ukraine [1, p. 40].

Meanwhile, constitutional rights to objects of intellectual property law urge for development with regard to the institutional reforms and improvements related to the main form of civil rights protection, namely judicial protection (based on Article 55 of Constitution of Ukraine [2]), as a result of the establishment of the High Court on Intellectual Property Issues, as well as changes in the scope and content of powers of the new Supreme Court. Nowadays specialized courts for intellectual property exist in a number of countries, including Germany, Austria, Switzerland and the UK [3, p. 63-64]. Their functioning in these countries has positively affected the quality of the cases on intellectual property and has significantly reduced the time it takes to process them.

It has been widely acknowledged, that Ukraine pertains to the group of countries with codified system of law, however recently the possibility of broader functions for the new Supreme Court has appeared [4] i.e. its judicial opinions may acquire precedential character.

The author of the present paper tends to think that it is important to consider the establishment of a special chamber to review disputes arising on the Internet as a part of the jurisdiction of the High Court on Intellectual

Property Issues [5] (as a result of the constitutional reform and creation of the High Court on Intellectual Property Issues). Moreover, it is highly important due to the constant increase in the number of Internet infringements.

The introduction into the national legislation of a provision that allows the right holder to claim compensation instead of damages resulting from the unlawful use of a trade name or a signage that is confusingly similar to another is justifiable on the grounds that it will provide an opportunity for better protection of rights to commercial signage, because sometimes, to prove the size of damages is extremely difficult. Compensation, in this type of case, acts as an alternative to damages.

As a result of a country's accession to the EU, primary and secondary EU law becomes a part of the national law, which still maintains a certain autonomy. Additionally, the EU authorities promote the correctness and unambiguity of the application of EU law within national jurisdictions [6, p. 595]. This is manifested primarily in the functions of the ECJ which can provide a detailed interpretation of appeals from national courts in cases in which there are doubts about the interpretation of certain legal norms of the EU.

Marleasing is a methodological principle of ECJ interpretation (a term introduced by J. Pila [7, p. 229]), supported by the principle of proportionality and national intellectual property regimes. The central element of the principle of proportionality on the basis of methodology is the doctrine of indirect effect, i.e. the Directives can be applied in private law disputes and in relations between private individuals (however, the decision in the case of *Marleasing* insists on using only the provisions of directives themselves for resolution in such relations) [8, p. 766]. A dispute is solved by using both the Member States law and the Community law, where the norms of the EU law provide the possibility of broad interpretation and the internal rules provide for a maximum consideration of local traditions and characteristics with respect to the dispute.

It is recommended to introduce *Marleasing* to the civil procedure activities of the judicial bodies of Ukraine for a number of reasons, among them it is considered as recognition of the freedom of States to bring their own legal systems towards the European legal order through an evolutionary process of regulatory compatibility (parallel activity of the two systems: the national legislations of the EU Member States and the EU law in the context of their structural cooperation through a gradual harmonization and adaptation of national legislation with the EU law [9, p. 121; 10, p. 358]) without prejudice to their «legal rationality».

Further legislation will definitely be required to provide the legal basis for the activity of new judicial institutions (the High Intellectual Property Court and the High Anti-Corruption Court) and fruitful implementation of all judicial reforms.

References:

1. Mykhailiuk G. O. Implementation of Constitutional Reform on Judiciary in Ukraine on its Way towards European Integration // Journal of Contemporary European Research. – Volume 14, Issue 1. – 2018. – P. 40-46.

2. Конституція України // Відомості Верховної Ради України. – 1996. – № 30. – Ст. 141.
3. Михайлюк Г.О. Принцип пропорційності у праві інтелектуальної власності ЄС // Наукові записки НаУКМА. – Т. 2. – 2018. – С. 63-66.
4. Про судоустрій та статус суддів : Закон України № 1402 – XIII від 02 червня 2016 р. // Відомості Верховної Ради України. Офіц. вид. – 2016. – № 31. – Ст. 545.
5. Про утворення Вищого суду з питань інтелектуальної власності: Указ Президента України № 299/2017 від 29 вересня 2017 року. [Електронний ресурс]. – Режим доступу : <https://www.president.gov.ua/documents/2992017-22722>.
6. Swann S. Response to the Action Plan on European Contract Law : A More Coherent European Contract Law // European Review of Private Law. 2003. № 63. P. 595.
7. Pila J. A Constitutionalized Doctrine of Precedent and the Marleasing Principle as Bases for a European Legal Methodology // The Europeanization of Intellectual Property Law : Towards a European Legal Methodology : Oxford University Press, 2013. P. 229.
8. Amstutz M. In-Between Worlds : Marleasing and the Emergence of Interlegality in Legal Reasoning // European Law Journal. 2005. № 11. P. 766.
9. Henley K. Abstract Principles, Mid-Level Principles, and the Rule of Law // Law & Philosophy. 1993. № 12. C. 121.
10. Itzcovich G. Legal Order, Legal Pluralism, Fundamental Principles. Europe and Its Law in Three Concepts // European Law Journal. 2012. № 18. C. 358.

NIKOLAJCHENKO O. V.

Saratov State Law Academy,
Associate Professor of the Department of Civil Procedure,
PhD in Law

EVOLUTIONARY INTERPRETATION IN JUDICIAL LAW ENFORCEMENT AS A VECTOR OF LAW DEVELOPMENT

A new challenge of our time was the evolutionary interpretation of law, which is gaining popularity in the law enforcement activities of courts. The reasons for this are different, ranging from imperfections and gaps in the current legislation, and ending with insufficient scientific validity of the evolutionary interpretation of law.

Key words: *evolutive interpretation of the law, discretion of judge, the analogy of law, the analogy of the law, authorised by a court procedural duties, court, litigation.*

A unique method of development of modern Russian law is its evolutionary interpretation, the essence of which is that in its application, the content of the legal norm is revealed in new facets. The interpreter finds in this interpretation a different meaning, corresponding to modern ideas about