



HOW TO BE PREPARED FOR THE MEMBERSHIP IN NATO WITH THE PERSPECTIVE OF INTELLECTUAL PROPERTY

Oksana Kashyntseva,

*Head of the Department of Intellectual Property Rights and Human Rights in Public Health of Scientific and Research Institute of Intellectual Property of National Academy of Law Sciences of Ukraine Ph.D. (Law), associate-professor
ID ORCID: 0000-0002-2598-5614*

The article concerns the necessity to develop the road-map in the field of drafting the national intellectual property legislation in accordance with NATO Recommendations. The article gives the example of so-called «young members» of NATO (Finland and Sweden) on drafting national legislation to be papered for the membership in NATO. Despite the discussions regarding the date of Ukraine's possessing of membership in the Alliance, Ukraine should already draft a legal background for the proper protection of intellectual property in the spheres of defence and security basing on the standards of NATO. Ukraine should pay proper attention for opening the new page of intellectual property — the Intellectual Property legislation of NATO countries. Planning to develop the defense industry on our country we should be papered in the best way to guarantee the intellectual property protection in accordance with NATO standards.

Keywords: intellectual property, NATO, security, defence, patents, reform of legislation, Ministry of Defence of Ukraine

The fundamental document determining NATO policy towards Ukraine is Declaration Standing with Ukraine. The Declaration proclaims: «Standing firmly with Ukraine and the Ukrainian people; Condemning in the strongest possible terms Russia's unprovoked and unjustified war of choice against Ukraine — the gravest aggression in Europe since World War II — and reaffirming its unwavering support for Ukraine's democracy, independence, sovereignty and territorial integrity.» [1]

In 30 June 2022 Gerald E. Connolly in his speech on NATO Leaders Summit in Madrid mentioned: «This Alliance

will not allow authoritarianism to extinguish the flame of democracy. This Alliance will not allow President Putin to stamp out the embers of democratic ambition, wherever they burn. People are dying in Ukraine as we speak for daring to embrace the democratic ideal.» [2]

While the members of NATO are taking the decision, when will Ukraine possess the membership in NATO, we have to fulfil our homework and open a new page of national Intellectual Property Law by implementing of NATO regulations into the Intellectual Property national legislation.



This process requires common efforts of national stakeholders to establish the State Policy on Harmonization of National Intellectual Property Law with NATO standards. This process could be successful basing on multiple cooperation of Ministry of Defence of Ukraine, Ministry of Economic Development of Ukraine and Scientific and Research Institute of Intellectual Property of National Academy of Legal Sciences of Ukraine. Undoubtedly, the experience of new-members of NATO is the most relevant for Ukraine.

The implementation of NATO's Guidelines on Intellectual Property Rights [3] consist of the following general parts:

- implementation of the norms regulating the applying for a patent in the sphere of defence industry;
- implementation of the norms regulating the procedure of granting a patent in member states of NATO;
- implementation of NATO regulations of the technology transfer in the area of defence industry basing on the security standards of NATO.

For Ukraine the relevant experience could be provided also by the states of Baltic region and, how it was mentioned above, by the experience of new-members of NATO. The perspectives and achievements of the development of the intellectual property of new members are presented in the article of Ulf Juhlin-Dannfelt "Why joining NATO could boost intellectual property in the Swedish and Finnish defence industries" [4]. The author stresses that the countries [Finland and Sweden] having developed industries in the defence sector and joining NATO open up new markets for domestic defence companies within both countries, as well as provide fresh opportunities in the intellectual property space. While the ultimate decision to join remains a political one, if Sweden and Finland are accepted into NATO it could open up new markets in which the technologies of Swedish and Finnish defence companies are potentially protected by patents. From an intellectual property rights perspective, this could represent

significant potential opportunity for further investment and growth.

A company working within the defence industry must always be aware of the possibility of their national government making certain patent applications classified in the interest of national security. Should this happen, an application for a patent outside of the state in which it was originally filed may only be filed with government approval. Furthermore, a classified application may only be filed and prosecuted in countries where government agreements ensure that the secrecy of the patent application will be maintained. Ukraine, planning to establish defence industry on its territory, should be ready to guarantee intellectual property and secrets' protection in accordance with NATO standards.

There for the inventions relating to defence are determined to be relevant to national security and is deemed classified, the possibility of obtaining protection for it in countries where the agreements in the framework of NATO are not in place becomes impossible. Because of this we already have to start drafting proper national legal background for entrance into such agreements with member-state of NATO.

At the beginning NATO an agreement to safeguard the secrecy of inventions related to defence entered into force in 1961, to ensure that relevant patent applications that are classified in the country of first filing can also be applied for in other NATO member states.

Presently, Sweden has bilateral agreements with only six of the 30 NATO member states: the USA, Great Britain, France, Germany, Italy and Spain. From the moment when Sweden and Finland join mentioned agreements on safeguarding the secrecy of inventions, Swedish and Finnish classified defence inventions could soon be patented in all member states of NATO. Joining NATO also means that Sweden and Finland will be able to enter research collaborations with NATO countries. In other side all classified defence inventions shall be protected



in Sweden and Finland. Ukraine should reach the same goal.

The primary goal of the Science for Peace and Security Programme (SPS) is to enhance the communication, co-operation and understanding between NATO and partner or Mediterranean Dialogue countries while contributing to the improvement of security issues [5]. On the official web-site NATO stresses that the SPS Programme enhances practical, result-oriented cooperation involving scientists, experts and government officials from NATO member and partner countries alike. It responds and adapts to the changing security environment to support NATO's strategic objectives and political priorities in its relations with partner countries. The SPS Programme makes contributions to NATO's efforts to project stability and build capacity in partner countries. SPS activities are guided by security-related priorities such as counter-terrorism, cyber defence, advanced technologies, energy and environmental security, and threats posed by chemical, biological, radiological, nuclear and explosive (CBRNE¹) hazards. Over the past five years, the SPS Programme has initiated more than 200 collaborative activities among NATO member states and partner countries

The concluding of bilateral agreements in intellectual property in the framework of NATO has the following achievements.

In case Intellectual Property will be obtained during the project, the expectation is to achieve a reasonable share of benefits among the Co-Directors and participants in SPS projects considering their respective contributions and their initial know-how.

The NATO Expert Panel will determine whether or not individual projects meet the objectives of SPS. The Expert Panel will make this determination based on a Project Plan that, in the case that Intellectual Property will be obtained during

the course of the Project, must include a draft Intellectual Property Rights (IPR) agreement based on the Principles and Guidelines provided by NATO.

Considering recommendations by the Expert Panel on the draft intellectual property rights agreement shall be prepared and signed by all Parties. Funding of such projects will only be provided after the intellectual property rights agreement is concluded.

Further intellectual property rights agreements may be re-evaluated due to unforeseen circumstances, on the request of any of the parties, to ensure that the benefit-sharing terms remain reasonable to all Parties. If necessary, this process may be mediated by NATO.

The NATO Guidelines on Intellectual Property Rights also determined the frame (scope) of such agreement. Increased standardization and interoperability of NATO weapons is now a major goal of members of NATO and Ukraine has to be ready for this. The success of the cooperative programs necessary to achieve this goal will in large measure depend on the extent to which defense industries in the United States and other NATO countries can agree to share their Intellectual Property. Intellectual Property covers a broad range of technical knowledge and expertise, much of which companies consider to be private information that alone distinguishes them from their competitors.

The implementing Procedures for the «NATO agreement for the mutual safeguarding of secrecy of inventions relating to defence and for which applications for patents have been made» were approved by the NATO Council on 7th March, 1962 [6].

Section F of the Procedures provides that they «shall be examined by the relevant working group of the North Atlantic Treaty Organization for possible revisions once every two years from the date of ap-

¹ CBRNE is an acronym for Chemical, Biological, Radiological, Nuclear, and high yield Explosives. These types of weapons have the ability to create both mass casualties as well as mass disruption of society. Emergency responders are taught how to recognize and mitigate attacks from such weapons.



proval by the North Atlantic Council or whenever specifically requested by one of the participating governments» [ibid].

The first revision of these Procedures, prepared by the Working Group on Industrial Property (AC/94) and submitted through the Conference of National Armaments Directors to the Council, was approved by the latter on 15th March, 1967 [7].

Let overview the general provisions of the mentioned Procedure. According to the Procedures applications for patents received in one NATO country from another with a request that they be placed in secrecy under the provisions of the NATO Agreement shall be placed in secrecy in the receiving country and shall be accorded a degree of security classification at least equal to the degree of security classification given to them by the country of origin, provided that:

- (i) the request for secrecy of the patent application is received from or on behalf of a Defence Agency of the government of the originating country or from the Applicant accompanied by a permit from or on behalf of the Defence Agency;
- (ii) a certificate is furnished by or on behalf of a Defence Agency of the government of the country of origin that the invention, the subject of the patent application, has been placed in secrecy for defence purposes and specifying the security classification assigned by that country.

If the Applicant wishes to be represented or must be represented by a Patent Agent, Attorney or other representative, the Embassy will ascertain from the appropriate Agency of the receiving country whether such Patent Agent, Attorney or other representative is duly authorised:

- (i) to have 'access to classified subject matter, and
- (ii) as being able to provide adequate physical security therefore.

Other important issues are the regime of corresponding in the intellectual property. All correspondence relating to the ap-

plication should pass only through the same secure channels as specified for the original patent application, excepting correspondence exclusively relating to payments of taxes and fees provided that such correspondence contains no information pertaining to the invention, the subject of the application. Other unclassified formal notification (such as extension of time limits or similar notices) may be sent by the foreign Patent Office at its discretion directly to the applicant or his authorised representative without any special security arrangements.

Regarding the application, when a government party to the NATO Agreement is able to implement the procedures and intends to apply them, it should inform the Secretary General of NATO who will notify immediately all other government parties. These procedures shall be applicable at the date of this notification between this government and any of the other governments for which the Secretary General has already given such notification.

NATO must confront the new strategic reality created by Russia's unprovoked and unjustified war against Ukraine, the NATO Parliamentary Assembly declared [8] and Ukraine must be ready to be the member of NATO in the field of intellectual property.

There for Ukraine has to be ready to conclude such bilateral agreements in the sphere of intellectual property rights and should take all necessary further steps to reach this goal. ●



Список використаних джерел / List of references

1. Declaration Standing with Ukraine. URL: <https://www.nato-pa.int/download-file?filename=/sites/default/files/2022-05/111%20SESP%2022%20E%20rev.1%20fin%20-%20DECLARATION%20ON%20UKRAINE.pdf> (Accessed August 20, 2022).
2. Gerald E. Connolly in his speech on NATO Leaders Summit in Madrid. URL: <https://www.nato-pa.int/document/2022-gerald-e-connolly-nato-leaders-summit-madrid-speech> (Accessed August 20, 2022).
3. Implementation of NATO Guidelines on Intellectual Property Rights. Revision Conrad, David M. Collins, Dwight E. Masterson, Michael K. Morse, Mark C. URL: <https://apps.dtic.mil/sti/citations/ADA066805> (Accessed August 20, 2022).
4. Ulf Juhlin-Dannfelt. Why joining NATO could boost intellectual property in the Swedish and Finnish defence industries. URL: <https://www.lexology.com/library/.detail.aspx?g=a69d3bd6-1764-4609-a671-07847b5587f0> (Accessed August 20, 2022).
5. Science for Peace and Security (SPS) Programme. URL: https://www.nato.int/cps/en/natohq/topics_85373.htm (Accessed August 20, 2022).
6. NATO agreement for the mutual safeguarding of secrecy of inventions relating to defence and for which applications for patents have been made. URL: <https://www.state.gov/NATO-secrecy-of-inventions> (Accessed August 20, 2022)
7. The first revision of these Procedures, prepared by the Working Group on Industrial Property (AC/94) and submitted through the Conference of National Armaments Directors to the Council, was approved by the latter on 15th March, 1967. URL: <https://sgp.fas.org/othergov/invention/nato74.pdf> (Accessed August 20, 2022)
8. NATO PA recommends strengthening of eastern flank defences, welcomes membership applications of Sweden, Finland. URL: <https://www.nato-pa.int/news/nato-pa-recommends-strengthening-eastern-flank-defences-welcomes-membership-applications> (Accessed August 20, 2022).

Надійшла до редакції 20.09.2022 року

Кашинцева О. Як бути готовими до членства в НАТО крізь призму інтелектуальної власності. Стаття присвячена необхідності вироблені дорожньої карти в сфері підготовки національного законодавства інтелектуальної власності відповідно до Рекомендацій НАТО. У статті наводиться приклад молодих членів НАТО — Фінляндії і Швеції — на шляху до підготовки законодавства до членства НАТО. Незважаючи на дискусії щодо дати набуття Україною членства в Альянсі, Україні слід вже готувати юридичну платформу для належного захисту інтелектуальної власності в безпековій сфері. І мова іде не про адаптацію чинного законодавства, а про відкриття нової сторінки інтелектуальної власності — Право інтелектуальної власності країн НАТО.

І тут мова про багато планову роботу. Про підготовку особливого корпусу патентних повірених, які представлятимуть заявників країн-НАТО в Національному офісі інтелектуальної власності, налагодження взаємодії між Патентним Офісом та Міністерством оборони України в частині співпраці з відповідними інституціями країн НАТО.

Імплементация Рекомендацій НАТО щодо прав інтелектуальної власності складається з таких основних частин:

- впроваджує норми, що регулюють патентування у сфері оборонної промисловості;
- впроваджує норми, що регулюють порядок видачі патенту в країнах-членах НАТО;



ПОГЛЯД НАУКОВЦЯ

- імплементувати норми, що регулюють передачу технологій у сфері оборонної промисловості відповідно до безпеки НАТО.

Для України найбільш відповідний досвід можуть надати країни Балтійського регіону та досвід так званих нових членів НАТО. Перспективи розвитку інтелектуальної власності таких нових членів представлені в статті Ульфа Юхліна-Даннфельта «Чому вступ до НАТО може сприяти розвитку інтелектуальної власності в оборонній промисловості Швеції та Фінляндії». Автор підкреслює, що країни [Фінляндія та Швеція], які розвинули індустрії в оборонному секторі та приєдналися до НАТО, відкривають нові ринки для вітчизняних оборонних компаній в обох країнах, а також надають нові можливості в просторі інтелектуальної власності.

Відтак Україні слід вже розпочинати роботи з підготовки національної сфери інтелектуальної власності до правого режиму НАТО.

Ключові слова: інтелектуальна власність, НАТО, безпека, оборона, патенти, реформа законодавства, Міністерство оборони України