

LEGAL ASPECTS OF LEGALIZATION OF DIGITAL MEANS DURING CRIMINAL INVESTIGATIONS

**G.A. KUSHNIR, PhD (Law), associate professor,
National University of Life and Environmental Sciences of Ukraine**

In this article are shown the theoretical and practical aspects of legalization in law, checking and estimation of phonograms on the analogue and digital mediums of tape of speech message. With attraction of phonograms, which are fixed on the material medium (phonogram), they have very important demonstrative meaning during the investigation of some cases in criminal, civil, economical and administrative processes.

Aspects, legalization, phonogram, material mediums, criminal, civil, economical, administrative process.

Actualization of principle of competitiveness in the juridical process and general technological changing of the digital speech message recording request some checking of the fixed views about legal aspects of audio recording legalization. Legislative base imperfection in this question leads to the fact that it is impossible to pretend juridical results even with availability of irrefutable objective evidences – phonograms with criminal's talks[1]. Practice shows that law legalization limits of records in courts set a great amount of evidential base aside the judicial investigation, exactly the talk records, taken from illegitimate sources. This issue is complicated with the fact that unlimited possibilities of digital compilation technologies of records loosen the given source of evidences even during the legitimate informational removal.

The establishment of circumstances of crime is realized in the form of procedural proof, based on the testimony of witnesses, victims, suspects, defendant, expert's conclusion, corpus delicti, reports of investigators and judicial actions and other documents [2, p. 64]. Besides, the problems are created by the fact that sound and material track does not conform to the principle of visualization since it can not be given to the investigator or to the court for direct perception like a fingerprint, microshot, trace of erasementure etc [3].

After using phonograms in the process of inquest and then in justice there will be two main questions – the origin of phonogram and its truth.

According to the origin, the phonograms can be: 1) phonograms given during the interrogation (article 224, 99-2 of CPC of Ukraine «The documents of sound recording during juridical inquiry»); 2) phonograms given during the juridical session (Ukrainian Constitution – article 129 p.7 and article 103 of CPC of Ukraine «The forms of fixation of criminal case»); 3) phonograms given during the inquest actions and OIA for court's injunction according to the laws of Ukraine «About militia» and «About OIA»; 4) other phonograms, given by the representatives of institutions, members and casual bystanders, can be enlisted to the report of inquest action according to the article 99 of CPC of Ukraine.

It is of no importance who gives the phonogram with the sound record from the place of perpetration: inquest agency, victim, witness or casual bystander. In all these cases the phonogram must be led to the same procedure – inspection, description in the report, clarification of person, who gave it, finding the content, technical type of fixation and the circumstances during the recording [4].

According to sociological survey [4, p. 5], more than 92 % of investigators and operatives of nature protection agencies marked the phonograms as one of the main factors which assisted the disclosure and investigation of crimes. Moreover, legality of getting of record in all cases is one of the most important criteria according to which the record belongs either to material evidences, or to explanatory material. It means that the record, given with illegal way, can not have direct juridical circumstances, but can assist the establishment of the truth.

Also it is necessary to remember that the informational obtaining with infringement of the effective legislation is the action that can become the reason of the criminal persecution: 1) article 163 CC of Ukraine «The infringement of secret of correspondence, telephone talks, telegraph or other mail, that are transmitted with the means of communication or computer»; 2) article 359 CC of Ukraine «The illegal use of special technical means of private informational obtaining».

According to State Standard 13699-91, assembling is «the deliberate choice and connection of some fragments of one or more phonograms of oral speech in order to change the primary content or the meaning of dictum of one or more persons that take part in taped talk».

More universal definition is: «assembling of the phonogram is the process of joining of some parts of phonogram into the whole with the help

of technical means and with infringement of continuity and succession of reflection of environment» [3, p. 10].

Unfortunately, the given definitions do not enclose such forgery, as the beginning's or end's clipping of tape, that is very important. Moreover it can be fulfilled both in real time scale and out of it. It means that it is enough to interrupt the tape in the necessary moment, and you will have some misrepresentation of talk content. In connection with this fact, the seek of universal expert methodologies of search of digital assembling tracks loose its meaning.

The object of forgery can be not only some transposition or removing of separate fragments, but also some completeness of phonograms, that reflects the objective succession and the fullness of the events, data and time of creating.

The main thing is that phonograms were collected according to the demands of procedural legislation, enlisted to the materials of cases, checked and estimated by court. The examination is only one of different methods of the control, envisaged by procedural proceedings. Herewith expert methodologies of complex discovering of assembling, tracks of phonogram's digitizing and other artifacts, which affirm the breach of authentic recording, are developing all the time.

It is obvious thing that the use of oral speech documenting during procedural actions of different means of telephone recording, on the one hand, assist the formation of demonstrative base, from the other hand – lead to the increase of needs in their procedural checking and estimation.

One of the main elements of expert investigation is the announcer's speech individuality, stipulated for anatomical and physiological building of language- making organs and conscious and subconscious activity of superior nervous system that reflects intellectual and habitual announcer's language rate. The totality of actions of all factors during language-making forms some individual dynamic speech stereotype of announcer that helps to recognize it by voice or language. During sound and language fixation the signals are transformed and can be distorted. Announcer's language can be compiled from other phonograms and distortion of original phrases. Ascertainment of these or that facts, which are taken to technique of video phonogram's creating and form the object of examination, is based on physical and technical regularities of informational reflection in video phonograms. [5, p. 151]

In such a way the object of examination of materials and means of video and sound recording is multicomponent and demands some complex

approach during its expert investigation (appropriate professional preparation of expert himself and expert committee and selection of different methods of investigation). Today criminalistic examination of materials and means of video and sound recording has four specialties:

1. Technical investigation of materials and means of video and sound recording.
2. The investigation of acoustic signals and environment.
3. The investigation of human's oral speech according to physical signs.
4. Linguistic investigation of human's oral speech.

The totality of these specialties includes the object of given examination and helps to solve its problems, which are subdivided into three types according to methodological principle: identifying, diagnostic, classificational [5, c. 152].

References:

1. Закони України № 851-IV «Про електронні документи і електронний документообіг», «Про електронний цифровий запис» від 22 травня 2003 року.

Інструкція про порядок фіксування судового процесу технічними засобами (звукозапис) у судах загальної юрисдикції (крім господарських і апеляційних господарських судів), затверджена Наказом Державної судової адміністрації України від 21.07.2005 р. № 84.

2. Кримінальний процесуальний кодекс України. Закон України «Про внесення змін до деяких законодавчих актів України у зв'язку з прийняттям кримінального процесуального кодексу України» зі змінами та доповненнями станом на 5 вересня 2012 року: (Відповідає офіційному тексту) – К.: Алерта. 2012. – 336 с.

3. Салтевський М.В., Бігів Д.Д. Місце звукових слідів у системі доказів // Техніка спеціального призначення. – 2001, - № 1.

4. Галяшина Е.Г. Теоретичні і прикладні основи судової фоноскопичної експертизи / Автореф. дис. На здобуття ученого ступеня доктора юридичних наук. Воронеж, 2002. – 23 с.

5. Експертизи у судовій практиці./ за заг. ред. В.Г. Гончаренка. – К.: Юрінком Інтер, 2004. – 388 с.