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ESSENTIAL CHALLENGES OF COPYRIGHT AND ALLIED RIGHTS IN UKRAINE

Abstract. *Determined stability was disrupted in the area of copyright and allied rights in the beginning of digital era. Firstly it became noticeable at the standard usage, and soon - at legislative branch. It is clear that a new fundamentally situation stimulated rapid development of technologies, through that not only new forms arose up to work but also new types of copyright and allied rights using, that new problems caused.*

Keywords: *Copyright, media, allied rights, digital environment, International Law, Ukrainian law.*

Objectives

The modern world undergoes the fundamental and dynamic changes related to rapid development of the newest information technologies. Specific gravity of production industries increases in the world developed countries economy every year, in specific objects of copyright. Strategic course is proclaimed at the national level on forming of the intellectually oriented economy in Ukraine, particularly increasing of hi-tech services granting. It promotes the role of copyright as a industry and provides the legal safeguard of creative results.

At the same time, swift development of information technologies in the world sharpened and educed existing new problems. There are problems of legal status of new copyright objects, guard of copyrights in digital networks, non-admission circumventing of technical equipment, which require immediate permission.

The state of modern Ukrainian authorial legislation represents absence of systematic approach to adjusting of authorial-legal relations in the conditions of digital epoch, that reveals unclearness of legal terminology, dual interpretation and presence of contradictions between the norms of the new Civil Code of Ukraine and Law of Ukraine "Copyright and allied rights" and actually by the norms of the real legislative acts inter se, by blanks in a legislation in questions that concerns

determination of new copyright objects legal status, in specific multimedia works, technical equipment of copyright defense. The regulations of international contracts are not always clearly carried in the area of the copyright, assent to obligatoriness given by Parliament of Ukraine in the process of their implementation.

In addition, a legal base is absent in Ukraine, that would provide adjusting of relations that arise up in connection with the using of copyright objects in digital networks. It is not created effective realization mechanism and guard of copyrights in a digital environment.

Data and Methods

The socio-economic necessity of the guard standard of copyrights increasing in the informative society area, reformation of authorial legislation, and also absence of the integrated investigations sanctified to the decision of copyright issues in the field of information technologies predetermine actuality of theme of this research.

A new concept - "informative society" is appeared descending new of communication technologies. The most widespread infrastructure of this kind is the Internet. A law of copyright and allied rights could not remain aside all of it and began to need changes and bringing to him of additions for the sake of adequate reflection of such economic realities, as new forms of the use.

Acceptance of WIPO [1] Agreement regarding of copyright became the first ponderable deposit on this by World Intellectual Property Organization and Contract of WIPO about implementation and phonograms of WIPO Performances and of Phonograms Treaty. Probably, appearance of the Internet served as reason for a deep revision and systematizations of all normative provisions, which were operating at an international level in the area of copyright and allied rights. At the same time, it is obvious, that after the shortage of sufficient public experience in the contracts of WIPO was not succeeded to decide the package of substantial legal questions, in particular, in relation to a recreation or rent in the digital records environment.

Beginning from 1988 the commission of EU sent the activity to defence of copyright:

“The Green Paper” [2] (1988p.) " Copyright and the Challenge of Technology", legal and economic analysis of urgent problems was done caused by development from the point of EU interests;

The White Paper [3] "Development. Competitiveness. Employment. Calls and ways in the twenty first century", that attracted attention to the growing tendency in a western economy in relation to services in a high value-added, that is predefined by the use of new technologies, "now-how" and results of creative activity.

The Green Paper [4] (1994) gives defense to European audiovisual industry, outlined some problems caused by new technologies also, and marked the necessity of the further forming of environment, that would assist to development of services.

The Report [5] "Europe's Way to the Information Society. An Action Plan" (1994). This document set the scopes of work of Commission and opened a way to more specialized documents on special questions, in particular, right of defense of intellectual property.

The Green Paper [6] (1995) - "Copyright and allied rights in informative space" proclaims about reasons of his acceptance, question of origin, supply of new services and present environment in an informative company, legal base of functioning of informative company, and also about property and moral rights for authorial legal and allied rights subjects, some actual methods the uses of their rights, related to the digital era, about acquisition and stopping of rights, management by them, technical problems of authentication and defense of right objects.

Directive of 2001/29/EU [7] (2001) about harmonization of certain aspects of copyright and allied rights in an informative society, which is a base normative certificate in this field.

Results

Mentioned above documents implemented changes to the regulations of WIPO, which were not able to be clearly determined with a copyright, in particular, on a recreation in the digital area. At the same time, separate norms about technical measures suggest an inconsolable reflection. Norming of separate legal problems were attained in Directive not only in the states-members of EU, but also in other

countries, in particular, to Ukraine. Therefore harmonization of corresponding norms with Directive is needed not only on formal reasons that appear from our obligations under the Agreement on partnership and collaboration between Ukraine and European Communities but also for a practical legal settlement at national level of using copyright objects and allied rights in digital environment.

The authorial law is regulated in the national law and allied rights by Law of Ukraine "Right of intellectual ownership" and by Civil Code the Incoterm "Copyright and allied rights".

Although Agreement of WIPO on a copyright and Agreement of WIPO about implementation of phonograms is presently contained by basic norms that determine and regulate the guard of copyright and allied rights in a digital environment, and also is guidance and model for a national law, at international level separate problems remain still unsolved. In that time as courts in separate jurisdictions deal with the new types of violation of rights, constrained with the use of digital technologies, in some countries already new laws come into question and accepted for providing of effective defense and rights realization in digital era.

Some of major problems are described below and related to:

- dimensions of copyright guard in a digital environment;
- new medias;
- on-line providers responsibility;
- performers rights in a digital environment;
- digital broadcasting organization: web-broadcasting, digital movies and television in online;
- guard of databases, computer programs and media;
- File hosting service.

Three major from these problems are presently discussing in WIPO with the aim of possible development of new international instruments, namely: rights for audiovisual performers, right for organizations of broadcasting, and guard of generis sui (by the special law) databases that does not fall under a guard a copyright. Two first rights are already guarded by multilateral agreements, but require actualization

and perfection; the last can form the new form of international guard. Additional activity in other industries also is in the stage of discussion.

Dimensions of copyright guard in a digital environment

Exceptions and limitations in the field of a copyright. The system of copyright traditionally supports balance between the guard of property creator's rights and his absolute control of copies using and observance of public interests in relation to conscientious access and use of such materials. Copyrighting laws assume exceptions from a copyright for maintenance of this balance. For example, this balance is supported by principle of limitations of rights for authors in case of the "conscientious use" in the USA, while in other countries, such as Australia and Great Britain; this conception will be realized by the exceptions entered by a law for "conscientious agreements" from the list of authorial rights violations.

In Great Britain in 2010 was accepted Digital Economy Act 2010 ("Digital Economy Bill [8] "). This law allows calling from a provider list of IP-addresses from that allegedly there is regular violation of copyrights, in future to block them. It envisages fully serious consequences and for the ordinary visitors of the Internet, fastening a right for the proprietors of copyrights on occasion to labor for users disconnecting from a global network. The investigation of substantive norms of this law is very interesting for understanding of internet-right trends progress as a law occupies an important place among such laws, e.g. American DMCA or French HADOP.

The row of questions was broken in relation to exceptions and limits on rights in a digital environment. Are there existent exceptions and limitations, written with a language that targeted at other circumstances, too wide or too narrow? Some exceptions, if them literally to apply in a digital environment, can liquidate the large sectors of existent markets. Others can largely answer public interests, but here to contain so many limitations, that they cannot be applied for network co-operations. These questions must be investigated in the light of the international standard, worked out for the assumption of exceptions and limitations of certain rights, known as a "three-sedate criterion". In accordance with this criterion, as set by Bern

Convention [9] and TRIPS Agreement [10], exceptions are admitted "to the certain special cases" that "does not harm to normal exploitation" of work and "does not infringe upon legal interests groundlessly [proprietor]".

As stated above, the aim of legislators is an achievement of necessary balance in a law that gives strong and effective rights, but with clever limitations and with clear exceptions. If these efforts will be successful, a result a positive impulse will become for all parties.

Reservation authors' rights online. In practice attention to the dimensions of law on a copyright in an on-line context was important cases in the USA. They raised a question in relation the authors rights for keeping control and licensing of their recompiled and repeatedly spread works in a digital environment. E.g.: In case "The New York Times, Co vs. Tasini", the Supreme Court of the USA made decision in behalf of the American national union of writers against different new distributors, who sold material of independent writers in electronic databases, including Lexis/Nexic, without any additional payment or negotiations about electronic rights with authors. The court set, that the electronic reediting of works is copyright infringement, and that writers have a right to get royalty for secondary using.

In Ukraine publication of work or its distribution in the Internet is prohibited without permission of copyright proprietor and can be appealed in a court with refund of moral harm.

However, a Ukrainian justice enough inertly behaves to the new subcompetence. In particular Presidium of the Higher economic Court of Ukraine in the recommendations "About some questions of practice of decision and spores, related to the protection of intellectual ownership rights" marks that "works' placing in the Internet is their recreation" and do not say about a reflection in the popular electronic systems of information. Consequently works and objects placing of the allied rights in the Internet according to the norms of Law of Ukraine "About a copyright and allied rights" must answer two terms: 1) public accessibility at any time; 2) public availabilities from any place. According to norms of Ukrainian Civil Code such terms for works are: access for the indefinite circle of persons; the objects

of the allied rights are conditions which similar to the Law of Ukraine "Copyright and Allied Rights".

Failure to observe even one of the terms eliminates the guard of work (object of the allied rights) by means of the subcompetence, abandoning a guard only within the limits of recreation subcompetence. However, in practice the circumvention of the law presents no complications.

Software advancement with an open source code. Advancement of "open initial code" in software industry is based on a doctrine, which differs from acquisition of intellectual ownership rights on software that traditionally was a private and guarded by a copyright, and in separate jurisdictions - by a patent law. An open source code belongs to software development that is publicly accessible in form an initial code, in accordance with the certification standard produced by Open Systems Interconnection (OSI). Software, although usually is copyrighted, spreads without the licensed limitations, that thus encourages users to that software was freely used, modified, copied and spread for the observance of certain terms, including a condition to encourage development of software on the basis of collaboration, removing the programming errors or failures and assisting creation of the programs modifications.

On-line providers responsibility

One of questions that cause a certain disturbance in society in relation to intellectual property and in an Internet-concord is a question about that, which must bear responsibility for copyright that takes place online infringement. This question appears from nature of digital networks. When work is passed from one point in other, or given for access to wide public, different parties the transmissions plugged in a process. Among them are organizations that give the Internet access or services ("ISP" or "OSP"). When such providers of services participate in a transmission to access to the materials, given by other parties that violate a copyright or allied rights, or they bear responsibility for violation of rights? Such responsibility can arise up in one of two cases: if it is educed that the provider of service is involved in unsolved actions in relation to a recreation or notification for general known, or if he will be

confessed by accountable for an assistance or for a provision to possibility of feasance of violation act of rights by other person.

Such questions were affected under the China law on a copyright, for example, in judicial business of Wang Ming v. Century Interconnecting Telecom Co, Ltd, related to the services provider, six known China novelists are placed on the website without permission. A defendant denied marking that the China law on a copyright does not relate to the Internet, and that is why digital works cannot violate a copyright. A court spoke out in behalf on a plaintiff, asserting that not a single derivative work was created exceptionally due to the process of translation in a digital form, and that the China law on a copyright gives to the author an absolute title on the use of work and receipt from this income both in online and offline. It was set that ISP could control distribution of works and in this connection was accountable for violation of rights. The question of responsibility has an important international implication. As the Internet is a transmitter that does not have borders, and his mode - global, it is important, that the alike going near this question were accepted in the whole world.

End-point was Internet-agreements of WIPO, essentially, are neutral in relation to this problem, and a question about responsibility remains the article of determination at the level of national legislations. After 1996 the row of legislative acts appeared on this question. All these legislative acts differ: are they devoted only to the copyright or use horizontal approach (only provider’s responsibility). In other words, horizontal approach does not include only copyright infringement but also other laws, such as laws on slander or unprintable expressions. Presently laws that decide this question operate in Germany and Sweden, using horizontal approach.

Japan entered "Law on responsibility of providers", that sets that a provider respond the only in that case, if there is economic feasibility to caution the material transmission that violates a right; and a provider knows about existence of such material and knows that it is violation of rights or had the opportunity to know that he violates rights. Other countries, including Hungary, Ireland, Singapore and USA,

were accepted alternative approach, namely, special laws introduction to the field of authorial law for determination of online provider's responsibility.

It was tried to decide this problem in Ukraine by the acceptance of project of Law № 6523, which would strengthen consumer's responsibility and would not to providers. All government actions came to disgraceful defeat. The example of it is a recent raid of law enforcement authorities on the portal "www.ex.ua". This portal was source of free films, music and computer programs for a few years for the Ukrainian users.[11] By an official version, attention was attracted by Adobe company complaint. A complaint was related to placing on a web-site by the unknown users of piratic versions of some products of Adobe.

Hackers blocked a Ministry of Internal Affairs of Ukraine web-site, and then web-site of Administration of Ukraine president after closing of ex.ua. Gradually this conflict began to outgrow from domestic in external, which compelled Ukrainian government to make certain concessions and leave global reformation of the Internet.

There are the various systems for audiovisual implementations defense based on legal rights or using contracts in different parts of the world. The complexity is in attaining compromise between these systems. Although some implementations are protected by many governmental laws, and also International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations. But we should state none of multilateral agreement embraces rights for performers in the authorized audiovisual fixing of their compositions. Feasible expansion of international protection of performers on audiovisual compositions can be considered as a general question that is not specific for electronic commerce. At the same time WIPO carries on a dialogue with governments and non-state organizations for settlement of substantial conflicts and reaching the progress on negotiations.

Connection information and copyright online.

The software, like a basis of action of the Internet, provides the "hyperlink" of information or "constrained hyperactive references" into web-sites or between them. Such connection takes place usually, when the creator of one web-site gives reference to other web site, usually represented by the colored text or icon. Software allows to

the user to press on reference and see content of connected website. Such practice also predetermines question of authorial law and gives an opportunity for users freely to move from one website to other.

At the same time other connected practice is more problematic. The "deep binding" connects a user with secondary material on the second web-site, going round the basic or title page of this web-site, and can result in infringement copyright this secondary material. The "inculcated reference" creates a dispatch similar character to maintenance of other web-site so that secondary material is given as proper to the first web-site.

In the USA, where presently there is not a law on the sui generis databases. In case of EBay Inc. vs. Bidder's Edge Inc. it was set that the use web-boats for the receipt of data about auctions present abuse. Case “Ticketmaster Corp. vs. Tickets. Com Inc.”, service Microsoft of Seattle Sidewalk placed a deep copula with the web site of Master Ticket. Users could purchase tickets, going round the main page and advertisement of Master Ticket. However in this case the Circuit Court decreed that the deep binding was neither introduction in an error, nor unfair competition nor copyright infringement, as a web address or as such is not a universal resource (URL) a guard material.

The guard of databases, computer programs and media

As stated above, economic value and value of databases as depositories of digital information quickly grows in a digital environment. There are appeals to expansion of volume of existent international guard of databases. Databases, that are original after a selection and organization of all, that is their content, are already guarded in accordance with a copyright. But a copyright does not guard databases that are not original, such as a database, that contains the enormous amount of the constrained facts, and that is why is not selective, and organized in uncreative commercial or alphabetical raw.

In addition, even those databases that fall under a guard of copyright can get a very limit volume of guard, allowing to the competitors to take away and present at the market substantial parts of information that they contain. Such databases often are

the result of considerable efforts and investments of the creators and for these investments simplicity and cheapness of printing-down of DB present a threat by means of present technologies. In reply to this problem European Concord accepted "Directive of EU about the guard of databases", that adds to the states-members to enter separate sui generis form of guard of data bases. Thus there was a disturbance in relation to that. The new form of guard can result in monopolistic position of information providers, or to inflict harm to the scientific, research and educational sectors.

Legal status of the marked objects defined by a current legislation: the computer programs are guarded as literary works, databases - as such collections of works and other collected works. Legal status of media works remains uncertain.[12]

File hosting service

Musical industry faced with problems in the system of intellectual that arose up in the field of authorial law as a result of development of information technologies. Mainly it is related to that music which distributes over the Internet. In 2012 the sum of profits from the sale of music in a digital kind (including loading of music and services of stream recreation of music) will increase on 17.8% or 8,6 milliards of dollars. In the same time profits from the sale of music on physical transmitters will go down on 12.1%. 39% of music was bought in a digital kind in 2012. With every next year this index will increase and in 2015 will exceed the sales of music on physical transmitters.

Musical piracy, at the same time, attained an extraordinary level through appearance of the peer-to-peer systems (P2P) that assist exchange musical, video files between users. The first share system was the system Napster, however then numerous services of P2P appeared already. 99% of all in P2P does not have a license of authors by current estimation. International Intellectual Property Alliance (IIPA) calls the government of the USA to revise a right for Ukraine on the privileges at trade, preferences. But there are advantages: in a great deal due to computers, internet, P2P and Piracy allowed to the musicians considerably wide a musical outlook, know about new musical directions and hear thousands of new groups that

they never heard.

No doubt, young film directors are one of the most active users of P2P. Where do they have to get to know with the pictures of classics, get novelties and art-house, wide an outlook and ladle creative inspiration? Sales fall because of P2P too.

Conclusions

We consider, punishment for piracy is one-sided measure. Prices for legal products have to be lower than pirate goods will reduce. Consumers will help reduce Antipyretic efforts. They give preference to high quality licensed software, antiviruses etc. Piracy is most widespread in countries with the low life level wherever people cannot buy production with films and games. Here is an example of calculating for Ukraine: young man gets in a month 5 games and 20 films, 5 musical albums and 5 units of software. Let calculate - 10 films ($7 per film), 5 games ($7 per game), 5 music albums ($5 per albums) 2 software ($20 per item).In total it cost $170). It is a half of middle salary in Ukraine regions.

From the expounded material becomes clear that politics of the foreign states in the area of the authorial rights protection is sufficiently effective, it is explained by introduction certain legislative innovations that are based on increasing of property approvals and such input of punishment measure as a stigmatization.

In addition, possible to notice certain miscalculations in realization of the national program of authorial rights protection in the Internet, as a result of absence of normatively-legal acts that would concern exceptionally this challenge.

Thus, it was expedient to take advantage of well-known and tested in practice international methods of fight against piracy by national program development of authorial rights protection in the Internet, and taking into account psychology and mentality of the Ukrainian population. We consider inadvisable creation for media the separate legal mode because of absence for this purpose legal and economic base. We suggest defining legal status of media, going out the general authorial law regulations.

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Анотація. *З початком цифрової ери певна стабільність у сфері авторського права і суміжних прав була порушена. Спочатку це стало помітним на рівні застосування, а невдовзі – і на законодавчому рівні. Зрозуміло, що принципово нова ситуація стимулювала бурхливий розвиток технологій, через які виникли не тільки нові форми творчості, але й нові види використання об'єктів авторського права і суміжних прав, що й викликали нові проблеми.*

Ключові слова: *Авторське право, медіа, суміжні права, цифрове середовище, міжнародне та українське законодавство.*

Аннотация. *С началом цифровой эры была затронута определенная стабильность в сфере авторского права и сопредельных прав. Сначала это стало заметным на уровне применения, а вскоре - и на законодательном уровне. Понятно, что принципиально новая ситуация стимулировала стремительное развитие технологий, из-за которых возникли не только новые формы творчества, но и новые виды использования объектов авторского и смежного прав, что и вызвали новые проблемы.*

Ключевые слова: *Авторское право, медиа, смежные права, цифровая среда, международное и украинское законодательство.*

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ФОРМУВАННЯ КЛАСТЕРНИХ СИСТЕМ ЯК НАПРЯМУ ПІДВИЩЕННЯ КОНКУРЕНТОСПРОМОЖНОСТІ МОЛОКОПРОДУКТОВОГО ПІДКОМПЛЕКСУ АПК

Анотація. *В статті розглянуті теоретичні аспекти створення кластерних систем в молокопродуктовому підкомплексі АПК, проаналізовані сучасні проблеми в створенні молочних кластерів, запропонована структура молокопродуктового кластера.*

Ключові слова. *Конкурентоспроможність, кластерні системи, молокопродуктовий підкомплекс.*

Постановка проблеми. В умовах конкуренції та глобалізації досягнення рівня розвинених країн по показникам добробуту населення та ефективності