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IP LEGISLATION AS ONE OF THE OBSTACLES ON THE WAY TO CREATIVE ECONOMY IN RUSSIA

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Статья посвящена проблемам правового регулирования общественных отношений, возникающим в сфере интеллектуальной собственности. Детально проанализированы подходы российского и зарубежного законодательства к урегулированию правоотношений поводу результатов интеллектуальной деятельности, высказаны предложения на предмет совершенствования гражданского законодательства.

Ключевые слова: *интеллектуальная собственность, интеллектуальные права, авторское право, смежные права, креативная экономика, зарубежный опыт.*

Abstract

This article is an attempt to describe some problems of the institute of intellectual property in the Russian Federation, to find out their possible reasons and to speculate about some ways of solutions.

The main idea of the article is based on the statement that Russian legislation is focused mainly on the concept of intellectual property as a kind of legal monopoly and is based old-fashioned theories about understanding the results of intellectual activities as an inalienable component of their authors` intangible assets whereas IP-rights should be considered, first of all, as goods, i.e. something to be transferred, not just owned. I tried to prove this statement taking into account and analyzing the point of view of both Russian and foreign scientists and my personal experience from legal practice, so the following text is the result of that analysis.

Economic necessity and historical references

Vast turnover of intellectual rights is to be regarded as a key feature of modern market economy of today and is considered as main goods of the so-called “creative economy”1. As a result, we can presume that issuing of adequate legislation as a guarantee of appropriate conditions for proper functioning of intellectual property market is an aim of every developed state. At the same time, some countries including Russia have to “tune in” their economy in the international global market. Moreover, regulation of legal relationships in the sphere of intellectual property in a long-term per-

[1] John Howkins. The Creative Economy: How People Make Money from Ideas. Moscow, Klassika-XXI, 2011. P. 37

spective plays not only a part of direct control of subjects` behavior but forms certain models of behavior of all the participants of the market and all associated natural persons and legal entities. Therefore, I can`t but agree with the statement of Ian Hargreaves that "ineffective rights regimes are worse than no rights at all: they appear to offer certainty and support for reliable business models, but in practice send misleading signals"2.

I firmly believe that the idea mentioned above is particularly acute for the Russian Federation as a proper legal regime for intellectual property rights on post-Soviet territory including Russia is a problem difficult to solve and even not a simple one for scientific analysis. The level of Russian legal doctrine development as well as the level of legal practice is incomparable with the legal theory and practice of advanced economies. Having faced some problems of IP rights assignment, I realized that a great majority of participants of these legal relationships don`t even understand the concept of IP (for instance, most contracts with photographers include the contract of repayable rendering of services characteristics and don`t include any conditions about the limits of using the pictures, that is nonsense as the contract is about the pictures). On the other hand, more experienced players on the market of creative economy are acknowledged of the imperfection of the Russian legal system in the aspect of IP law, that`s why they prefer choosing jurisdictions of other countries in the situation of conflict of law (e.g., sometimes Russian residents go abroad in order to conclude the contract there as this jural fact gives an opportunity to apply foreign legislation trying to avoid Russian legislation in general).

The situation which was described above can be explained by a lot of historical prerequisites: there were no legal relationships in the sphere of selling and purchasing IP rights in the soviet epoch (in the framework of planned economy), and this fact determined that a legal culture in the area of IP had been created neither in science and in legal practice nor in society in general. Accelerated ratification of some international conventions and rapid adaptation of out-of-date laws to global market conditions didn`t solve the problem of adequate regulation of IP relations and it, certainly, wouldn`t have been able to do that. Furthermore, it is well known that two fundamental acts of international law which regulate IP issues were passed and signed not even in the 20th but in the 19th century. It was only in 1965, that the USSR became a contraction party of the Paris Convention for the Protection of Industrial Property of March 20, 1883 (nevertheless, it was done not to

[2] Digital. Opportunity. A Review of Intellectual Property and Growth. An Independent Report by. Professor *Ian Hargreaves*. May 2011http://www.ipo.gov.uk/ipreview-finalreport.pdf

protect the rights of creators and inventors3). Turning to The Berne Convention for the Protection of Literary and Artistic Works which was accepted in Berne, Switzerland, in 1886, modern Russia signed it only in 1994 (ad notam: only after new Russian constitution came into force on December 25, 1993). Taking into account the fact that this is one of the most important copyright act, it`s hard to overestimate the extent of the gap in the issues of intellectual rights between the legislation of the Russian Federation and legal regimes of advanced economies (namely the USA and the UK).

Apparently, the period of 15 years of market economy is still not enough, and despite the fact that the popularity of the theme of IP-law in legal doctrine is increasing gradually, our legislation fails to regulate real relationships in the area of intellectual rights. After the Internet has become available in most regions of our country the number of violations of rights is rising dramatically. Rapid development of digital technologies leads to a lot of lacunas in Russian law in the areas of domain names, open source regime, digital assets. Consequently, the 4th Part of the Russian Civil Code (which solely regulates legal relationships about the results of intellectual activity in the industrial, scientific, literary and artistic fields) is to be amended to achieve innovation-provoking and balanced legal regime.

There were some attempts of the state to improve the situation with IP. Codification of IP institute was a reasonable step despite all the drawbacks of the 4th Part of Russian Civil Code. IP-rights Court was created in 2013 to unify legal enforcement approach and to improve litigation. So I suppose that disadvantages in legal system take place not because of lack of governmental attempts to solve the problems, but as a result of the problems which exist in modern legal doctrine of our country. For example, some scientists firmly believe that intellectual rights are ‘informational property right’4 and “category of intellectual rights doesn`t exist in other countries” (information hasn`t been an object of Russian civil law regulation since 2006 and informational rights in Roman tradition refer to a vast majority of possibilities to request various information from the government, including environmental, cultural information etc.) There is also no common attitude to the problem of a number of rights which should be included in the institute of IP5 in Russian doctrine. Furthermore, Russian legal doctrine faces a lot of difficulties as most of those who deal with IP and write about it prefer to rely only on the works of native scientists and don`t read or write about

[3] Makovsky. Exclusive rights and the concept of the 4th part of Civil Code // Civil Law of modern Russia. Statute, 2008. P 103-141

[4] Nikulshin A.V. The way to modernization: the role of property rights in governmental issues. // Law and business: collected articles Moscow, Jurist, 2012. 770 P.

[5] Russian civil law: a textbook in 2 volumes / V.S. Em, I.A. Zenin, N.V. Kozlova and others; editor in chief E.A. Suchanov. Moscow, Statute, 2011. Vol. 1.

international achievements in this sphere. Hence sometimes we just don`t know the solution of a lot of problems in foreign legislations. In addition, it`s worth reading foreign articles not only for trying to find out some new tendencies but to get some inspiration even in the aspect of genres – reports of Ian Hargreaves6 and Victoria Espinel7 are wonderful examples of a relatively new form of expression of scientific criticism and thanks to them a new level of relationship between the representatives of legal doctrine and government was established. Whereas our market of IP has been integrated in a global one, there are a lot of things to do to break the barrier and integrate our legal science into a international one, and I`m sure this kind of integration is a must.

Legal Monopoly vs. Creative Economy

This part of the article is dedicated to some problems of the concept of IP institute. As I see this concept should catalyze some renovations of current legislation of the Russian Federation in the area of intellectual rights. The approach of our legislators to IP is an issue of significance as this is an essential condition of intellectual rights turnover (legislation is always imperfect however it contains basic principles which are based on general approach and it helps to cope with legal lacunas in law if the approach is correct).

Why do I insist on great importance of intellectual rights turnover and claim that IP-protection is only thing of secondary importance? Firstly, violation of civil rights is non-typical behavior of subjects (normally they are law-abiding – at least, according to bona fides principle), whereas the transfer of copyright is an adequate behavior, so it should be a prior thing to be regulated by law. Secondly, the mechanism of protection of any civil right is well-known and legal norms of IP-protection are unique to such an extent to what the regime transfer of economic rights of intellectual property to the third parties are unique, not vice-versa. In any case it`s not worth comparing importance of protection and significance of transfer of IP – it just should be stated that legal regime of copyright transfer determines legal issues of IP protection, as capitalization of material benefits, as a rule, precedes their protection.

An example of this legal relationship is the situation when an author has to give to the publisher his right to produce copies or reproductions of

[6] Digital. Opportunity. A Review of Intellectual Property and Growth. An Independent Report by. Professor Ian Hargreaves. May 2011http://www.ipo.gov.uk/ipreview-finalreport.pdf

[7] 2011 U.S. INTELLECTUAL PROPERTY ENFORCEMENT COORDINATOR ANNUA L R EPORT ON INTELLECT UA L PROPERT Y ENFORCEMENT March 2012
http://www.whitehouse.gov/sites/default/files/omb/IPEC/ipec_annual_2011_report.pdf

his book and to sell those copies; alias there is no need to protect the product of the mind when no one is informed even about the existence of it. Moreover, representatives of "creative class professions" earn money selling rights to their results of intellectual activities, i.e. great amount of innovative products are designed just to be sold but not to be used by their creators.

However earlier situation was quite different as the results of intellectual activity were used just by their creators. Consequently, the origins of IP can be seen in Middle Age`s statutes which granted inventors a kind of legal monopoly: it is well-known that Leonardo da Vinci and Galileo Galilei were vested with exclusive rights to produce their inventions (most of all, optics which were very valuable at that time) as well as some cooks had monopolies for dishes they invented8. I presume this was the best way to capitalize innovations taking into account the level of technological development personal non-property component noticeably prevailed at that time and as we know, personal non-property relations are closely connected with the name of the person (we can observe it even today when sometimes the value of the picture depends on the name of the painter).

However, nowadays exclusive right itself is not enough and there are some better strategies for a long-term perspective. There is a good example of two fast-food companies` market strategies. "Taco Cabana", a casual restaurant specializing in Mexican cuisine once sued its competitor ("Two Pesos") for illegal copying of the decorations and interior: color scheme, doors` design etc, hence, the rival had not only to pay a great amount of money as a compensation but to change its design too9. It should be emphasized that "Taco Cabana" was interested in legal monopoly on its design not to be used by other firms. Such a strategy can be useful even now. But there is another example of "McDonalds`" who preferred not only to protect its trademark. The McDonald's Corporation's business model was different from that of most other fast-food chains as they started to sell franchises (and nowadays less than 20% of the restaurants are controlled directly from their headquarters). And what is more, the price of the license itself was not so high – the Corporation decided to collect percentage fees and rent instead of a single payment. A proper marketing strategy of capitalization IP helped McDonalds` to become the world's largest chain of fast food restaurants and dominate the market.

[8] Daniel J. Gervais The Internationalization of Intellectual Property: New Challenges from the Very Old and the Very New // http://iplj.net/blog/wp-content/uploads/2009/09/Article-THE-INTERNATIONALIZATION-OF-INTELLECTUAL-PROPERTY-NEW-CHALLENGES-FROM-THE-VERY-OLD-AND-THE-VERY-NEW.pdf

[9] William W. Fisher III The Growth of Intellectual Property: A History of the Ownership of Ideas in the United States // http://cyber.law.harvard.edu/people/tfisher/iphistory.pdf

That`s why besides the protection mechanisms IP-legislation should include flexible and comprehensive procedures how to transfer IP.

The Concept of Intellectual Property in Russia and Fragmentation of Rights

Turning to the Russian Federation, intellectual property is protected by law according to the Constitution of Russia. The Constitutional Court of the Russian Federation considers IP as a legal monopoly (The Decision N 393-O, 02.10.2003). As for the Russian Civil Code, it had to adopt one of the two main approaches to IP.

There are two dominant conceptions of intellectual rights – droit d'auteur и copyright which reflect respectively points of view the representatives of the Continental and Anglo-Saxon legal families. Continental approach has an idea of personal connection between the author and his or her creation, therefore, according to that theory, personal component is contained in both property (material) and personal non-property relations10. In contrast to the approach mentioned above, Anglo-Saxon IP-model is founded on the view that the aim of the personal rights of the subject is to capitalize the results of intellectual activity and to turn them into goods in civil turnover11. Initially they were as a kind of privilege to create legal monopolies according to the British Statute of Anne (1710) and the Statute of Monopolies (1624) which are considered as the origins of copyright and patent law respectively. So IP is a loose cluster of rights and each of them is economically valuable to some extent. In spite of tendencies of harmonization and unification of civil law all over the world, the approaches are still different and Anglo-Saxon one seems to be more progressive nowadays. In a case of Russia, the legislators haven't made a choice, and there are features of both of the IP systems in the Civil Code of our country (I mean a combination of exclusive right as an object of transfer and a vast majority of personal non-property rights with the dichotomy of legal regimes) which can be estimated as a drawback.

Unfortunately, this is not the only disadvantage of our IP legislation. The Civil Code of the Russian Federation doesn`t meet the requirements of modern market in general. Firstly, in accordance with the article N 1225 IP is the results of intellectual activity. This contradicts directly with the Convention establishing the World Intellectual Property Organization: "intellec-

[10] Thorvald Solberg. Foreign copyright laws a list of the foreign copyright laws now in force, with citations of printed texts and translations, etc. Washington, D.C. Gov't. Print. Off. 1904 Bulletin (Library of Congress. Copyright Office), no. 7 // http://www.worldcat.org/title/foreign-copyright-laws-a-list-of-the-foreign-copyright-laws-now-in-force-with-citations-of-printed-texts-and-translations-etc/oclc/14022456

[11] Morgunova E.A. Copyright/ editor-in-chief V.P. Mozolin. – Moscow.: Norma, 2008. – P.22-23

tual property" shall include the rights relating to literary, artistic and scientific works, performances of performing artists, phonograms, and broadcasts… and all other rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields." (Article 2 of the Convention)

As a result, a product of German civil doctrine, a legal construction "right to right" (which is to be regarded as one of the most common explanations of legal phenomenon of intellectual property) has transformed into "right to right to right" (because of the "rights to intellectual property") so there are a lot of difficulties during negotiations between counteragents from different jurisdictions. Furthermore, whereas all over the world assets are supposed to be divided into two groups: property and intangible assets (IP) we can`t speak about "rights to IP" in the context of intangible assets in Russian legislation as some "rights to IP" are personal non-property rights which can`t be a part of intangible assets.

And this is time to analyze th so-called "fragmentation" of IP rights in the legislation of the Russian Federation. As provided by the Article N1226 of the Russian Civil Code, intellectual rights shall be recognized for the results of intellectual activity and means of individualization equated to them, which include 3 (three!) groups of rights: an exclusive right that is a property right (the first group); in cases provided for by the Code personal non-proprietary rights (the second group); and other rights (droit de suite, right of access, and others) – the third group. Hence, the second and the third issues of this part of the work – a problem of transfer of different groups of rights and an issue of different protection mechanisms. However, the root of all evil is a fragmentation of rights.

There is only one proprietary right in the IP according to Russian legal norms – an exclusive right which means right to use the result of intellectual activity or the means of individualization at subject`s discretion in any legitimate manner. Therefore, two types of contracts which are available to transfer IP (here and further using the term "IP" I mean IP in its conventional meaning), a license agreement and an exclusive right transfer agreement (sometimes it is translated in English as "Contract for the Alienation of an Exclusive Right"), deal only with this property right. In a case of license agreement the object of the obligation is a right to use the result of intellectual activity with limitations provided for by the contract. I believe, this can be explained as a transfer of a part of exclusive right as a "right to use the IP object" is not mentioned as an independent right, while an exclusive right is not just one right but the countless number of legal possibilities (subrights, rights). So there are a lot of subrights which can be an object of the contract, or there may be an exclusive right in general, but there is no legal option to make non-property rights or "other rights" an object of the license agreement or a contract of transfer of exclusive right. It is justified

when we deal with the right to be recognized as the author of a work, for instance. However, in all other cases it is obvious that the rights of nonproprietal nature (in Russian Civil Code) are very important for civil turnover. The right of the author to his name is inalienable and nontransferable (and the person is presumed to be asked for permission to mention or not to mention his name (nikname) in every certain case) but de facto a lot of people sell this right (e.g. it`s easier for a customer to pay more but to be permitted to use the work of design without naming all the authors). I do not speak about the cases of abusing of author's rights, on the contrary, the situation which was described above was determined by the market (a company is interested in promoting it`s product, not in mentioning 33 names of designers, for instance). The issue with inviolability of the work and the right to make the work public is just the same. Surprisingly, these rights are closely connected with an exclusive right and are transferable (for example, according to the Article 1266 of the Russian Civil code in the use of a work after the death of the author, the person possessing the exclusive right in the work shall have the right to allow changes, abridgements or additions to the work, on the condition that this does not distort the thoughts of the author and does not disturb the completeness of the perception of the work and does not contradict the desire of the author specifically expressed by him in a will, letters, diaries, or other written form). So why isn`t there isn`t any legal option to transfer mentioned non-property tight along with exclusive right (if this right is transferable in general)? As an evidence, there are enough cases in photo stocks when authors sell their right to allow image changing or not to mention their names for extra payment.

Finally, sometimes situations in law practice are complicated because of uncertainty. Before the entry the of the 4th part of our Civil Code Policy into force the opinion of courts showed a tendency that even usage of the modified results of intellectual activity when there isn`t a transfer agreement between the owner of the right of modification and the person who modifies a program is an example of violation of rights (According to the 4th Section of the Informational Letter of the Supreme Commercial Court of the Russian Federation from 13.12.2007 N 122). The problem is, what kind of agreement is it supposed to be now if a right to modification can`t be transferred?

Fragmentation of rights can be an obstacle in the way of protection of intellectual rights too. Property and non-property rights have different protection mechanisms. And if there are some special guarantees for copyright owners when their exclusive right is violated, they do not cover non-property rights and "other rights" (I mean, the article 1301 about liability for infringement of an exclusive right when the author or other rightholders are able, along with the use of other applicable methods of protection, demand

at he thinks best from the infringer instead of remuneration for damages the payment of remuneration in the amount from ten thousand rubles to five million rubles determined at the discretion of the court). Some lawyers have a point of view that this separation of rights is caused by their different nature and do not call in question with this idea12, the others13 have the opposite opinion.

Practical consequences of the fragmentation are so that in order to enforce the principle of different regimes of intellectual rights in case of infringement of personal non-proprietary rights their enforcement is to be exercised, in particular, by the recognition of a right, restoration of the situation existing before the infringement of the right, prevention of the activities infringing the right or creation of a threat of its infringement, remuneration for moral damages, publication of the decision of a court on the infringement committed. Therefore, courts make a conclusion that there is no norm of substantive law which provides the counteragents with an opportunity to demand an remuneration14. It seems that it`s not worth protecting your rights sometimes when legal costs considerably exceed the result (as personal dignity, the honor and good name are seldom violated along with the right to modify the result of creative activity or inflicts moral damage; furthermore, sums of compensation are not expected to be reasonably high even in the case of violation).

In brief, it turned out that a large cluster of rights which are essential for IP-market are both beyond the transfer and beyond reasonable protection as there no concept as a foundation of IP-legislation was chosen.

The concept of exclusive rights affected also the understanding the institute of co-authorship in Russian legislation. It`s hard to imagine creation of a lot of kinds of results of intellectual activity without co-authorship. This institute is expected to create a mechanism of protection of rights of all of the authors and simultaneously not to let one of them block the attempts of others to have some benefits from the object of their intellectual rights. The most complicated issue in that case is a situation when the work of the authors is an inseparable whole which means that two or several persons have one exclusive right to one object. That causes a lot of questions to arise about the matter of disposal of exclusive right. Unfortunately, our Civil Code came to nothing more than a phrase that ‘no coauthor shall have the

[12] Russian civil law: a textbook in 2 volumes / V.S. Em, I.A. Zenin, N.V. Kozlova and others; editor in chief E.A. Suchanov. Moscow, Statute, 2011. Vol. 1.

[13] A.P. Sergeev. IP-right in the Russian Federation M., 2001. P. 19

[14] The decision of Moscow City District Court from 24.11.2011; case number N 33-38188; Appellation decision of Moscow City District Court from 20.05.2013; case number 11-11791; Appellation decision of Moscow City District Court from 13.05.2013 ; case number 33-5169/2013

right to prohibit the use of such work without sufficient basis' without any hint on what the term "sufficient basis" means. Moreover, it`s not explained if this phrase covers both the disposal of property and non-property intellectual rights or not.

As some reforms of the Civil Code are expected (and some have been already implemented) some novations can appear in new a version of the Russian Civil Code. As we can observe in the project of the amendments15, it is allowed to have the agreement about the disposal of their exclusive right which should give a chance to solve the problem of disposal. However, the mentioned project introduces a new category: a part of exclusive right, which can be sold to the other co-authors but not to the third parties. The connection between this kind of share in IP and non-property rights is still not regulated. So the problem still remains – if one of the authors wants to capitalize his labour and sell his IP-rights in the complex product of mind, project and so on he strongly depends on the will of the other authors.

Summary

To sum up, it turns out that a large cluster of rights which are essential for IP-market are both beyond the transfer and beyond reasonable protection. The legal division of IP rights influences every institute of IP including co-authorship and the approach of Russia to regulating of exclusive rights and IP can`t be called innovation-stimulating.

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ЗАКОНОДАТЕЛЬСТВО ОБ ИНТЕЛЛЕКТУАЛЬНОЙ СОБСТВЕННОСТИ КАК ПРЕПЯТСТВИЕ К СТАНОВЛЕНИЮ КРЕАТИВНОЙ ЭКОНОМИКИ В РОССИИ

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The Article deals with some problems of the legislation in the sphere of intellectual property in Russia. It is an attempt to analyze the approaches of Russian and foreign legislators to legal regulation of IP in detail and to introduce some improvements of Russian civil legislation.

Key words: *intellectual property, intellectual rights, copyright, related rights, creative economy, foreign experience.*

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