

Role of Related Rights in the Digital Economy

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ABSTRACT

At the beginning of the XXI century. intellectual property has become the most important intangible asset. In the context of the digital economy and the fourth industrial revolution, the main points of development of intellectual property law will shift from classical institutions to new legal regimes. Allied rights are perhaps the most dynamically developing new institution of intellectual property law. Purpose of the article: to determine the role that related rights play in the digital economy. Related rights are a flexible and convenient mechanism for establishing protection for those intangible objects that are included in the digital economy through organizational and financial investments. In the digital economy, the development of related rights is focused within the framework of the so-called new producers rights. We believe that such rights are: 1) the right to investment databases; 2) the right of press publishers to use their publications online by news aggregators; 3) the right to coverage of sports events (especially in the digital environment).

Keywords: *intellectual property, digital economy, copyright, related rights, producers rights*

1. INTRODUCTION

At the beginning of the XXI century. Intellectual property has become a critical intangible asset, influencing the value of companies, labor productivity and corporate governance strategies. Intellectual property objects are used everywhere, both in business and in the everyday life of citizens. Professor Ben Depoorter correctly believes that if it were to describe the history of intellectual property law in just one word, that word would be "expansion." (1) However, the flip side of the expansion of intellectual property is the problem of the balance of interests between rightholders and society. The stronger copyright and patent rights are protected, the more the rights of third parties in the free use of protected objects are limited.

Earlier, while examining the evolution of intellectual property law, we found that industrial revolutions have a certain impact on this evolution. (2) For example, the second industrial revolution (the turn of the 19th – 20th centuries) is expressed in the spread of electricity, the introduction of the conveyor belt, the invention of sound recording, radio broadcasting. As a result, the need arose for the protection of rights to sound recordings and broadcasting transmissions. We are currently living in the fourth industrial revolution. Klaus Schwab notes that all the new achievements of the fourth industrial revolution are united by a key attribute - the power of digital and information technology. (3) Therefore, the modern society is often called "digital", and the modern economy is characterized as digital. The main trends in the digital economy are physical, digital and biological. For example, the achievements of the digital trend include the Internet of Things, blockchain technology, artificial intelligence, big data processing, digital broadcasting.

There is no doubt that all new achievements of the digital economy are in one way or another related to legal

regulation and with intellectual property law in particular. However, the problem of the limits and nature of legal regulation in the digital economy is still far from being resolved. It seems that the focus and main points of growth of intellectual property law will gradually shift from classical institutions (copyright, patent law, trademark law) to new, non-classical institutions, to the protection of objects such as virtual systems, big data, software algorithms, elements of content used on the Internet.

Today, the fastest growing institution of intellectual property law is related rights. The expression "neighboring rights" in the middle of the 20th century. used as a shorthand name for legal regimes to protect the interests of performers, phonogram producers and broadcasting organizations. At the end of the last century, the protection of related rights in the European Union was significantly expanded. The protection of the exclusive rights of film producers was established here; the right to works first published after they have passed into the public domain (the right of the publisher); the right to critical and scientific publications of works that are in the public domain; the exclusive right to investment databases, the creation of which requires an investment of significant resources. In Germany, Austria, Italy, the list of related rights goes far beyond the scope defined in the directives of the European Union.

Thus, related rights appear to be a very flexible and convenient mechanism for establishing protection for those intangible objects that are included in the economic circulation due to the organizational and financial investments of certain persons.

The aim of this study is to determine the role that related rights play in the digital economy.

2. METHODOLOGY OF THE STUDY

The study uses methods and approaches characteristic of the social sciences, including legal science. First, the principle of development of the subject of research and the principle of historical concreteness should be outlined. Secondly, these are such general scientific approaches as genetic, system-structural, methods of analysis and synthesis, induction and deduction, analogies; Thirdly, it is important to emphasize the dogmatic-legal and comparative-legal methods used in legal science.

It is important to emphasize that understanding the concept and subject matter of copyright and related rights is associated with the tradition of intellectual property protection adopted in a particular legal system. Usually talk about two classic traditions of copyright - Anglo-American and Continental. As is known, the concept of "related rights" is not recognized in Anglo-American law. Therefore, the question of the role of related rights in such legal systems is meaningless. For example, the interests of performers, phonogram producers, and broadcasting organizations are protected in the United States by copyright law and legal institutions external to it. The rights of performers are protected here in part by the Copyright Act (§ 1101), as well as under such legal regimes as: 1) tort law; 2) the right to unjust enrichment; 3) protection from unfair competition; 4) the right of publicity. (4) The right to publicity is a specific American doctrine. It has no exact counterparts in continental legal systems. (5) The essence of this doctrine is that every person has the right to control the commercial use of his own image.

3. PROBLEM OF THE NATURE OF RELATED RIGHTS

Allied rights, the protection of which is established in acts of international law and directives of the European Union, are exclusive rights. Consequently, these rights restrict the interests of third parties in the free use of the relevant objects. The rapid development of related rights in the past 30 years makes it possible to raise the question of whether there is any concept that unites them into a single whole.

B. Sherman and L. Bently writes that the belief that intellectual property law can be reduced to its core still holds a powerful hold over modern legislation. (6) We believe that today it is hardly possible to talk about the unified essence of intellectual property law in general and related rights in particular, since the diversity of legal regimes in this area of law is becoming more noticeable. P. Drahos correctly believes that trying to define the nature of intellectual property is difficult and that most of the proposed definitions simply list examples of intellectual property rights. (7) J. Hughes goes one step further and rightly claims that the term "intellectual property" is an umbrella term. (8) In our opinion, the difficulties in finding an integrative feature or concept of intellectual property law can be explained by the fact that the legal

regimes in this area of law have different histories and different philosophical and legal traditions.

The classical idea or concept of related rights can be described as a functional approach. According to this point of view, related rights play an auxiliary role in literary and artistic creation. The purpose of their recognition is to protect objects (performances, phonograms, broadcast programs) that contribute to the dissemination of works of literature and art. (9)

However, the functional approach cannot explain the concept of all related rights. First, the protection of broadcasting organizations is not limited to the dissemination of literary and artistic works. News and sports content constitutes a significant part of radio and TV airtime. Secondly, the protection of investment databases and press publications as objects of related rights, again, is mainly not connected with the distribution of works protected by copyright.

Apparently, the problem of the classical idea of related rights was taken into account by the World Intellectual Property Organization in 2016. In clarifying the concept of related rights, WIPO notes that these rights are also aimed at protecting the interests of those who create objects that, without being protected by copyright, contain a sufficient amount of creativity or technical and organizational skills in order to property rights equal to copyright were recognized. (10) This approach, in fact, is objective and open, since related rights are disclosed through a potentially open list of objects that are characterized either by a minimal sign of creativity or by a sign of organizational and technical skills.

The object approach proposed by WIPO is extremely broad and vague in content. In particular, it can be applied to the protection of the topologies of integrated circuits. However, as you know, these objects are protected by an independent legal regime outside of copyright and related rights. In addition, the considered approach does not explain well the protection of the related rights of the publisher. The publisher, publishing a work that has passed into the public domain, does not create a new object.

Thus, today, related rights cannot be explained through a single concept. In the set of these rights, it is not possible to isolate the system-forming connections and, accordingly, to present the studied object as a system. We believe that independent groups should be distinguished in related rights and studied mainly as independent legal regimes.

From the point of view of the purpose of recognition, related rights can be divided into performers' rights, producers rights and atypical related rights. The rights of performers protect the personal and property interests of the performer and his individuality. Producer rights protect interests that are associated with the return of investments in the project. These rights include the rights of producers of phonograms and films, broadcasting organizations, producers of databases, publishers. Atypical related rights are related rights that are not exclusive. Such rights are recognized, for example, in the laws of Italy and Austria. In particular, atypical related rights include: 1) the right to

theater sketches and technical drawings, which are rights to remuneration; 2) rights to titles of works, news and typography, which relate to rights to protection against unfair competition; 3) the rights to correspondence, diaries and portraits, which by their nature are personal rights.

4. NEW PRODUCER RELATED RIGHTS IN THE DIGITAL ECONOMY

In the digital economy, the development and expansion of related rights occurs only within the group of producer rights. Accordingly, the role of related rights in the digital economy is primarily expressed in the provision of protection to the property interests of those persons who create and distribute new content in the digital environment that was not protected by intellectual property rights in the pre-digital era.

It appears that the protection of new producer related rights began with the recognition within the European Union of the rights of manufacturers of investment (non-original) databases. (11) Although in relation to such databases the EU Directive recognizes not a neighboring law, but a *sui generis* right, many members of the European Union have implemented this right in their legal order as a neighboring right. Interestingly, in the framework of a diplomatic conference held by the World Intellectual Property Organization in December 1996, a draft Intellectual Property Treaty regarding databases was discussed. This act was not adopted, since the conference participants failed to agree on their positions. The text of the WIPO draft Treaty does not define the nature of the investment database right, but the accompanying commentary to the draft states that such a right is a *sui generis* right. (12)

A significant update of the paradigm of related rights is associated with the discussion and adoption in 2019. EU Directives on Copyright and Related Rights in the Digital Single Market. (13) A draft Directive was submitted by the European Commission back in 2016. It has been discussed for several years, and significant changes have been made to it several times. The Directive contains the main proposals for adapting copyright and related rights to the digital environment and the digital economy.

The Directive under consideration establishes the protection of a new related right, which, in our opinion, should be included in the group of producer rights. It is about the right of press publishers to use their publications online by news aggregators. News aggregators (GoogleNews, Yandex.News) and social networks have become new participants in the digital economy. These digital platforms display a structured news feed from a variety of media. The purpose of recognizing the new allied right of press publishers is to protect property interests that are affected by the activities of news aggregators. This right is a separate right in relation to copyright for the texts of articles.

Interest is the search for the optimal duration of the related rights of news publishers. Initially, the draft Directive set a

time limit of 20 years. After serious scientific and public criticism of the draft Directive, this period was reduced to one year, but then increased to 5 years. As a result, a compromise was reached over a period of 2 years. This story shows that related producer rights should be justified not by abstract reasoning about the balance of interests, but by more specific arguments and data about the impact of certain legal decisions on the digital economy.

Another new producer related right is the right to cover sports events. Provisions on this right were included in the draft Directive on Copyright and Related Rights in the Digital Single Market, but they were excluded from the final text. The reason for this inconsistency was the ambiguous attitude towards the harmonization of the right to coverage of sports events within the EU. According to T. Margoni, the legal regulation in the member states of the European Union is good at protecting investments in the sports competition industry. (14) However, according to another point of view, in most countries of the European Union there is no clear regulation of the rights to sports competitions. (15)

The content of the exclusive right to coverage of sports events is the ability of the organizer of the competition to control their recording and subsequent reproduction or communication to the public. It should be clarified that the origin of this right took place in some countries (for example, Brazil) in the pre-digital era. Obviously, the technical ability to record sporting events came with the invention of radio and television. However, it is in the digital economy that the relevance of protecting the right in question has increased many times over. At the beginning of the XXI century. Thanks to digital broadcasting and new technologies for video recording and content presentation, the sports broadcasting industry has shown significant growth in audience and market. Accordingly, the organizers of sports competitions were able to generate substantial revenues by selling rights to sports broadcasts, and through them to develop and popularize the sports industry.

It seems that both in Russia and in other states, the legal regulation of the market for sports broadcasts, including broadcasts on the Internet, is still in its infancy. In all likelihood, the recognition of a new allied right to cover sports events will take place in the next decade.

5. CONCLUSION

The development of the digital economy and intellectual property rights is largely due to the achievements of the fourth industrial revolution.

At present and in the future, the main trends in the development and expansion of intellectual property rights will gradually shift from classical institutions to new, non-classical legal regimes. One of them is related rights. These rights are a flexible and convenient mechanism for establishing protection for those intangible objects that are included in the digital economy through organizational and financial investments.

At the present stage of their development, related rights do not have a universal, single concept. The explanation of the role of related rights in the digital economy is based on the fact that these rights should be divided into three groups and studied mainly as independent legal regimes. These groups of related rights include the rights of performers, producers rights and atypical related rights. Classic producer related rights include the rights of sound producers and the rights of broadcasting organizations. In the digital economy, the development of related rights is concentrated within the framework of producer rights. The role of new producer related rights is expressed in the protection of the property interests of those persons who create and distribute new content in the digital environment that was not protected by intellectual property rights in the pre-digital era. Such rights in this work include: 1) the right to investment databases; 2) the right of press publishers to use their publications online by news aggregators; 3) the right to cover sports events.

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