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COPYRIGHT REFORM IN THE EUROPEAN UNION

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The article is devoted to the copyright reform in the EU. It shows tendencies, mechanisms and shortcomings of the development of the EU copyright legislation. The author analyzes the process of changing of the copyright regime in the Digital Single Market according to the Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market and the Regulation (EU) 2017/1128 of the European Parliament and of the Council of 14 June 2017 on cross-border portability of online content services in the internal market. Conclusions are made about possible results and prospects of solving the problem of the territorial character of copyright in the context of the freedom of movement of goods and services.

Key words: copyright; intellectual property; EU; Internet; EU Digital Single Market; territorial character of intellectual property rights; private international law.

РЕФОРМА АВТОРСКОГО ПРАВА В ЕВРОПЕЙСКОМ СОЮЗЕ

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Статья посвящена реформе авторского права в ЕС. В ней показаны тенденции, механизмы и недостатки развития законодательства ЕС по авторскому праву. Автор анализирует процесс изменения авторско-правового режима на едином цифровом рынке ЕС в соответствии с проектом Директивы Европейского парламента и Совета по авторскому праву на едином цифровом рынке и Регламентом 2017/1128 Европейского парламента и Совета от 14 июня 2017 г. о трансграничной переносимости услуг по предоставлению онлайнового контента на внутреннем рынке. Сформулированы выводы о возможных результатах и перспективах решения проблемы территориального характера авторских прав в контексте свободы перемещения товаров и услуг.

Ключевые слова: авторское право; интеллектуальная собственность; ЕС; интернет; единый цифровой рынок ЕС; территориальный характер прав интеллектуальной собственности; международное частное право.

The vast majority of the representatives of the modern private international law doctrine point out that "...the issue is not necessarily how much newer or stronger intellectual property regimes are required to be for economic growth, or how far we are prepared to push back on stronger intellectual property protection, but essentially, how intellectual property can be finetuned to respond to the prevailing contingencies of diverse stakeholders" [1, p. 73].

Universal accessibility of intellectual property objects, especially copyrighted works, has been drastically challenged by the Internet. On the one hand, the Internet content is represented by creative achievements belonging to particular persons (rightholders). On the other hand, it is not easy to find and identify real infringers suitable for civil litigation. Instead, it appears to be more attractive for rightholders to protect their rights not by addressing infringers, but professional suppliers of Internet services (information intermediaries). As a result, the Internet has changed the typical subjective composition of the legal relationship of copyright infringement. Nowadays the traditional

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scheme "rightholder – infringer" is not sufficient. Information intermediaries need to be taken into account. The situation is aggravated by the fact that the Internet users, regardless of the battle between rightholders, infringers, information intermediaries, stand strongly for the free access to the Internet content, relying on the freedom of information, human rights and other legal constructions far beyond what most lawyers attribute to the grounds for the free use of works.

Modern literature on intellectual property pays much attention to the possible methods of changing of classical legal rules in order to meet the demands of all mentioned stakeholders. The problem is proclaimed as a knowledge equilibrium framework based on a political economy of intellectual property in the digital era [2, p. 92]. It is worth mentioning that scientific legal analysis are not so vigorous and fast reacting as the EU rule makers.

The aim of the article is to find a possible solution to the copyright problems in the globalized information society in the recently presented EU drafts.

The EU copyright consists of a quite large number of directives which harmonized the law of its member states on a wide range of problems, including digital aspects. The main task of the present reform is to modernize copyright in order to adapt it to the needs of the internal market. Thus, it is not only the progressive development of copyright that we have do deal with. The steps taken by the EU should be evaluated through the lens of the goals and objectives of the process of regional economic integration. The new mechanisms proposed in the EU are interesting not only for the Belarusian legislation, but for the Eurasian Economic Union (EAEU) law as well.

The copyright law harmonisation in Europe was launched in the XIX century and can be rooted in numerous bilateral treaties and the Berne Convention for the Protection of Literary and Artistic Works, 1886 (the Berne Convention). All the EU Member States shall comply with the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights, 1994 (TRIPS), the WIPO Copyright Treaty, 1996. The EU directives concern communitary standards on computer programs protection, copyright term, rental right, resale right, satellite broadcasting right, cable transmission right, orphan works, collective management and other narrow questions in the field of copyright. Thus, there are fertile grounds for the copyright reform.

Nevertheless, the harmonisation of the copyright of the Member States is not complete. As can be seen by the numerous cases in the practice of the Court of Justice of the EU the implementation of the EU copyright directives is controversial. The copyright laws of the EU Member States still vary drastically, particularly between common law jurisdictions (Cyprus, Ireland, Malta and the United Kingdom) and civil law countries. Normative and institutional density, in the meaning of professor K. Raustiala's expression, leaves no doubt that the EU is really moving in the direction of tightening and raising standards for the protection and enforcement of copyright [3, p. 1024].

Taking into account the conditions, historical and legal prerequisites for the reform of copyright in the EU described above, there are at least two main questions:

- What will be the substantive changes in material copyright law planned precisely for the internet relationships?
- Shall we see international private law mechanisms regarding international copyright protection for the EU internal digital market impaired by the territorial character of copyright?

A grandiose and ambitious, but timely plan to ensure the freedom of movement of goods and services in the EU internal digital market was outlined in the Communication from the Commission "A Digital Single Market Strategy for Europe" (the Strategy) [4]. The document identified the problems of bringing the digital market in line with the real market. The territorial character of intellectual property rights is brighter for industrial property objects than for copyright. It is explicable by the lack of formalities for works to be protected. The EU real internal market, i. e. offline market, triggered unitary systems of the EU trade mark, Community design, Community plan variety, unitary patent. Two decades after the beginning of this process, the rapid development of the EU online market, almost entirely built on the protected works, marked the task to overcome the territorial character of copyright. Thus, in the near future we will see a comprehensive embodiment of the European intellectual property rights concept according to Article 118 of the Treaty on the Functioning of the EU in relation to the whole system of intellectual property [5].

The Strategy begins from the very decisive and tough words: "to break down national silos in copyright legislation". It is proposed to understand these "silos" as barriers to cross-border online activity, including differences in copyright law between the EU Member States. Directives serve as the main legal instrument of the EU law for harmonisation. However, the Strategy also mentions the barriers to cross-border access to copyrighted content services and their portability. Elimination of these obstacles will demand unification and creation of the communitary legal regime under the legal grounds of regulation.

Before that, the EU copyright law developed primarily through harmonisation directives. The territorial character of copyright was only partially touched upon in some of them. For example: Article 1.2 (d) (an act of communication to the public by satellite outside the Community deemed to be occurred in a Member State), Article 8.1 (obligation of Member States to protect programmes retransmitted in their territory from other Member States) of the Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain

rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission [6]; Article 4.2 (exhausted within the Community of the distribution right) of the Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (Directive 2001/29/EC) [7].

In such manner, cooperation among the EU Member States on copyright issues has not come closely to the elimination of the territorial character of copyright. International copyright protection within the EU is mainly built on the basis of the regime of national treatment under international treaties, primarily the Berne Convention and TRIPS. As of now, there is no single legal regime for the EU copyright as it is for the EU trade mark or the Community design. The works within the EU fall within the purview of copyright protection by laws of particular Member States. The Strategy outlines that consumers at the internal EU market cannot be prevented on grounds of copyright from using in one Member State the content services acquired in another Member State. This method of reasoning directly leads to the problem of the territoriality of copyright (p. 2.4 of the Strategy). The development of the EU intellectual property law has shown that this problem can be effectively resolved by regulations.

Legislative proposals for the copyright reform indicated in the Annex to the Strategy "Roadmap for completing the Digital Single Market" are described in the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions "Towards a modern, more European copyright framework" [8]. The document is less declarative than the Strategy and the reform is not so comprehensive. There are specific works and rights that are outlined as priority areas of interest: distribution of television and radio programmes, licenses for cross-border access to content in the audiovisual works, digitalization of out-of-commerce works, etc. Thus, as of now, the reform is of rather sporadic nature.

The process of normative procurement of the reform, despite much criticism around it, is moving rather quickly. Analyzing the legal grounds of the EU copyright reform, we rely on two reservations. Firstly, we do not touch changes in accordance with the latest trends to expand the grounds for free access to works in order to support culture, education, research or disabled people. It is not a specific feature of the EU copyright reform. The same tendencies are shown by the WIPO Marrakesh Treaty to Facilitate Access to Published Works for Persons Who are Blind, Visually Impaired or Otherwise Print Disabled (2013), which EU is going to join [9].

Secondly, we pass by the misunderstanding of the general public that everything on the Internet is for free and that the intention of the EU authorities to ensure wider access to content across the EU can be understood as an elimination of copyright in online regime. Nevertheless, we acknowledge that such misconceptions and large-scale protests can prevent the adoption of the planned acts. A similar situation was observed with regard to the failure of the Anti-Counterfeiting Trade Agreement [10].

There are two key documents on the EU copyright reform characterizing capability of the newly developed legal ruling to address digital challenges: Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market (the "Directive draft") [11] and Regulation (EU) 2017/1128 of the European Parliament and of the Council of 14 June 2017 on cross-border portability of online content services in the internal market (the "Regulation") [12].

The Directive draft is toughly criticized for attempts to introduce new restrictive norms. However, it contains rules clarifying basic principles of copyright law and adjusting them to the Internet relations. The fundamental copyright elements have remained untouched: rightholders have monopoly; users get access to the protected work with the consent of rightholders and for remuneration; free use is allowed for limited purposes and on special grounds. The Directive draft suggests how to apply them in special surroundings of the Internet. For example, Article 4 of the Directive draft stipulates the conditions of free use for teaching purposes in conjunction with Article13 of TRIPS, Article 5 of the Directive 2001/29/EC. It is clarified that the use takes place on the premises of an educational establishment or through a secure electronic network accessible only by the educational establishment's pupils, students and teaching staff, and is accompanied by the indication of the source, including the author's name, unless this turns out to be impossible. Besides, there are a lot of reservations with regard to specific types of works, licenses, territorial scope, and compensation. Specialists on copyright law even consider the proposed version of Article 4 of the Directive draft insufficiently rigid and demand compulsory remuneration [13, p. 35, 38].

Most of the criticism relates to the incompatibility of the provisions of the Directive draft with the freedoms of the information society and the legal regime for the protection of personal data. The unwillingness and even the impossibility of adopting a directive on the basis of the proposed draft is associated with Articles 3 and 13 [14]. Contradictory nature of these provisions is seen in the enormous powers of a rightholder to intervene in the business activity of an Internet provider and in the obligations of the latter to control copyright infringements by means of content recognition technologies.

Actually, the whole body of the Directive draft is built on incomprehensible legal terminology leading to confusion. The wording of its Article 12 raises the debate about a new intellectual property right. These provisions stipulate that publishers of press publications have rights for the digital use of their press pub-

lications for a period of 20 years. The Directive draft gives numerous references to the Directive 2001/29/EC. However, with the exception of the term of protection, the elements of the new construction in the present system of copyright law are not clear. Commentators state that this article should be entirely removed from the Directive draft [13, p. 79]. Thus, the Directive draft does not suggest new material norms ready to be implemented, but only attempts to mark specific copyright law problems on the Internet. The future legislative work is needed to clarify harmonization standards of the new copyright legal ruling in the Digital Single Market. As of now, the EU Member States are not ready to follow the way proposed in the Directive draft. Several of them (Belgium, the Czech Republic, Finland, Hungary, Ireland, the Netherlands, Germany) have submitted opposing questions [14, 1].

As to the territoriality of copyright, this problem is partly touched upon in Articles 7 and 8 of the Directive draft prescribing that licenses for out-of-commerce works may be extended or presumed to apply in the process of cross-border digital use on a non-representative basis in all Member States. However, these provisions look somewhat cautious. The idea of extended collective management was generated by the Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market, and the Directive draft could be more decisive [15]. In addition, the legal technique of Articles 7 and 8 of the Directive draft leaves much to be desired (lack of the normative definition of non-commercial works, narrow scope of use, limitation by non-commercial purposes).

The second key document on the EU copyright reform is the Regulation. It was adopted in order to increase cross-border access to TV and radio programmes by simplifying copyright clearance. The Regulation is closer to the solution of the territorial character of the intellectual property than the Directive draft. It is explicable by the very obvious justification of the Regulation by the freedom of movement of services. It follows from the first recital of the preamble to the Regulation. Freedom of movement of goods and services is practically not reflected in the Directive draft.

The Regulation has the objective of permitting the Europeans to continue to access content (films, books, football matches, TV series, music, e-books or videogames) that they bought or rented online in their residence in one Member State in other Member States. Before that the EU consumers were deprived of these opportunities because of the territorial effect of the licenses given by rightholders and due to the trade practices of service providers (geo-blocking). The Regulation guarantees the portability of online services, allowing a trans-border access to copyrighted works across the EU. Paid online services of the copyrighted content must be accessible outside the place of residence of the consumer and unpaid at the provider's discretion.

In spite of a clear ruling and an obviously good effect for the Digital Single Market, the Regulation also receives criticism. For example: "The Commission is looking here for justification of the proportionality of these measures but it seems very quick to speculate that contractual negotiation will be unnecessary" [16].

Despite some shortcomings of this kind, the Regulation contains rules that can be effective. Article 3 of the Regulation states that providers shall not impose on the subscriber any additional charges for the access outside their residence. Actually it means that providers and rightholders should be sufficiently circumspect in drawing up licensing agreements on the transfer of copyright.

It is stated in Article 5 of the Regulation that upon the conclusion and renewal of a contract for payable online content service, providers shall verify the subscriber's Member State of residence. Providers can use a wide range of means in order to meet this requirement. Perhaps this procedure can be seen by providers as an excessive burden and by consumers as a threat to the protection of their personal data. However, in this way copyright can be cleared. Rightholders may authorize the provision of access to their content without verification of residence. In such case, the contract between the provider and the subscriber shall be sufficient to determine the subscriber's Member State of residence. The main rule of the Regulation (Article 7) is a ban on any contractual provisions between providers and rightholders and between providers and subscribers, which prohibit cross-border portability of online content services or limit such portability to a specific time period. These provisions are unenforceable. The provisions of Article 7 apply irrespective of the applicable law to the contracts.

Summarizing the mechanisms of the Directive draft and the Regulations, it can be concluded that the EU is still far from the unitary European copyright in the meaning of Article 118 of the Treaty on the Functioning of the EU. The territorial character of copyright can be compensated on a contractual basis through the collective management and the obligatory EU territory clause in licenses. The application of the Regulation and the Directive, which should be adopted on the basis of the improved Directive draft, will show whether such an approach is sufficient for the Digital Single Market.

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