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## SOME ISSUES TO THE HISTORY OF COPYRIGHT LAW IN UKRAINE

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### Abstract.

**Purpose:** review and analyze the ways of acknowledgment and establishment of moral and economic rights of intellectual property under the Soviet copyright law until such rights have been implemented in the Civil Code of Ukraine dated 2003. **Methods:** optimization of enforcement of the provisions of the Civil Code of Ukraine, provided for moral and economic rights of intellectual property under the Soviet copyright law until such rights have been implemented in the Civil Code of Ukraine. **Results:** the Civil Code of Ukraine has restructured the system of the intellectual property rights in Ukraine and introduced the general provisions that apply to all objects of the intellectual property right. **Discussion:** regulations of USSR and Ukrainian SSR on civil laws and copyright, Ukrainian legislation on copyright.

**Key words:** intellectual property, copyright, moral and proprietary rights of intellectual property, Soviet civil law, copyright to the Soviet Ukraine, civil legislation of Ukraine.

### 1. Introduction

Nowadays intellectual property as institution goes through the period of establishment in Ukraine. Since the Soviet system of the civil law was based on acknowledgment and regulation of authors' rights for the authors of literature works, scientific discoveries and invention proposals as the ones having mainly relative, i.e. legally mandatory, but not absolute character.

### 2. Problem and its connection with scientific and practical tasks

We used to think that Ukraine had no own intellectual property law until its independence [1, p.39] and all legislation came from Soviet law, thus the Soviet Ukraine just copied the all-Union IP legislation. Ukrainian scholars and Ukrainian lawyers followed this idea for 12 years since Ukraine's independence. That is why adoption of a new Civil Code of Ukraine in 2003 have been so important.

The Civil Code of Ukraine, which came into force on 1 January 2004 (the Civil Code of

Ukraine) [2] contains general provisions on the intellectual property right (Chapter 35). The Civil Code of Ukraine determinates "intellectual property right" as a person's right to the result of its intellectual and creative activity. According to Article 418, the intellectual property right constitutes personal non-proprietary (moral) intellectual property rights and (or) proprietary (economic) intellectual property rights.

Furthermore, the Civil Code of Ukraine contains a list of moral (Article 423) and economic (Article 424) rights of intellectual property.

Thus, Article 423 of the Civil Code of Ukraine provides for general description of personal moral rights, which are also specified in other designated laws. Such rights are (1) the right to recognize a person as a creator (an author, a performer, an inventor, etc.) of the intellectual property object; (2) the right to prevent any infringement to the right of intellectual property that may damage the honor or reputation of the creator; (3) other moral intellectual property rights established by law.

Similar approach is taken to the economic rights of intellectual property given in Article 424 of the Civil Code of Ukraine. Such rights are: (1) the right to use of intellectual property object; (2) the exclusive right to allow the use of the object of intellectual property by third persons; (3) the exclusive right to prevent the unlawful use of intellectual property object, including to prohibit such use; (4) other economic rights established by law. The Civil Code of Ukraine divides all economic rights in two groups: exclusive and non-exclusive rights. The exclusive rights are the right to allow the use of intellectual property object and the right to prevent and prohibit the unlawful use of intellectual property object. This is, let's say, a "modern" picture.

### 3. Analysis of result research

Numerous of Ukrainian scholars such as Aleksandr Dzera, Galina Dovgan, Vladymir Drobyazko, Elena Orlyk, Elena Kharitonova and many others studied the issues related to the historical and legal development of the civil legislation. The Soviet scholars Sergey Alekseyev, Borys Antimonov, Olympiad Ioffe, Ekaterina Fleyshits devoted their works to the Soviet civil law. Such scholars as Eduard Gavrilov and Mikhail Gordon studied Soviet copyright law in particular. Therefore, the issue of the historical development of copyright and intellectual property rights in general were the object of their interest.

In the 1940's, the Soviet scholars discussed an option regarding creation of a unified legal institution that have to combine both copyright and inventive laws in one: The Intellectual Property. These scholars proposed four provisions to be common for authors of the works and authors of the inventions, namely: (1) the right to the author's name; (2) the exclusive right to publish a work; (3) the right to refuse to make any alterations if they are not considered as new creative achievements, and (4) the possibility to use works that are recognized as having public significance by all socialist organizations along with the payment of remuneration to the author [3, p.59]. The right on inviolability got the majority of criticism as non-applicable to inventions.

It is worth mentioning that Articles 571-613 of the Draft of the Civil Code of the USSR dated 1947 (and in the subsequent draft of 1948) regulated only copyright issues and there were no "groupings" of

articles into the sections. This set of articles was entitled "Copyright. Publishing, Staging, Scenario Contracts" [4]. Moreover, this Draft of the Civil Code of the USSR did not contain any provisions related to inventions. The Explanatory Note to this draft stated that "the invention in the USSR has a mass character. However, the civil elements of inventions are so close to administrative elements, thus the separation of civil legal relations from the whole single set of laws on invention is inappropriate" [4, p.3]. The mass character means that Soviet inventors were stimulated to make as much inventions as possible benefiting the enterprises they are employed.

Therefore, the copyright and inventive laws have been developed separately, albeit in the parallel ways. In general, it was agreed that author's, inventive and scientific works were so specific that the creation of a unified legal regime for them was impossible [5, p.10]. And on 1 January 1964 only, when the Civil Code of the Ukrainian SSR entered into force, it contained three sections at once: "Copyright Law", "Scientific Discovery Law" and "Invention Law". That was the first time when these sections appeared in the civil code since previously these issues were beyond of its regulation. The Civil Code of the Ukrainian SSR was adopted based on the Law of the USSR "On Approval of the Fundamentals of Civil Legislation of the USSR and Union Republics" dated 8 December 1961 (the Civil Law Fundamentals) [6]. At least the above sections have been fully incorporated into the Civil Code.

### 4. Setting objectives

During the Soviet times there were the following basic copyright regulations in Ukraine: (1) Resolution of the Central Executive Committee and the Council of People's Commissars of the USSR "On the Fundamentals of Copyright" dated 30 January 1925 (the Copyright Fundamentals 1925) [7], (2) Resolution of the Central Executive Committee and the Council of People's Commissars of the USSR "On Fundamentals of Copyright" dated 16 May 1928 (the Copyright Fundamentals 1928) [8]; (3) Resolution of the Central Executive Committee and the Council of People's Commissars of the Ukrainian SSR "On Copyright" dated 6 February 1929 (the Copyright Law 1929) [9] and (4) Law of USSR "On Fundamentals of the Civil Legislation of the

USSR and Union Republics” on 8 December 1961; and the Civil Code of the Ukrainian SSR dated 18 July 1963 (the Civil Code of the Ukrainian SSR) [10]. We will analyze mentioned legislations within the framework of this study. Please note that this list is not exhaustive. Certain copyright issues were in the competence of Ukraine not USSR, for example, decisions on the remuneration for the use of works, but these documents will not be examined within this study.

### 5. Presenting main materials

The Copyright Law 1929 is considered as the first Ukrainian copyright law which was adopted based on the Copyright Fundamentals 1928, which had a Union-wide effect. Nevertheless, we consider that it is hard to investigate chronology of the development and establishment of the copyright legal provisions, without paying due attention to the preceding Soviet regulations.

In addition to the author’s moral rights mentioned in Article 423, Article 438 of the Civil Code of Ukraine includes the right: 1) to require indication of his-her name in connection with the use of the work, if practicable; 2) to prohibit indication of his/her name in connection with the use of the work; 3) to choose a pseudonym in connection with the use of the work; 4) to the inviolability of the work.

Soviet scholars had different approaches to the classification of these rights on moral and economic rights. Some of them have considered that the economic right was only the right to receive a remuneration and other competences were moral; other scholars considered the right to perform and distribute works as economic right, or, at least, as having a proprietary element [3, p.16-17].

Nevertheless, moral rights are always at the head of the list of intellectual property rights. Moral rights are mentioned first. Economic rights are later on. The Soviet civil law scholars also recognized the “leading” role of the moral rights over economic ones and explained this by the nature and unique features of relations governed by Soviet copyright law [12, p.6].

The right to acknowledge a person as a creator (an author, an inventor etc.) is fundamental one among all moral rights. However, at the constitutional level, only the Constitution of the USSR 1977 acknowledged this right of the author and en-

visaged the state protection over such. Therefore, the Soviet law acknowledged the copyright and listed the objects on which copyright applied.

The right to publish, execute and distribute his/her work by all means permitted by law under his/her name, under the pseudonym or without the name (anonymously) was introduced by the Copyright Fundamentals 1925. This regulation in fact has acknowledged moral rights of the author. In addition to the abovementioned, the right to inviolability of work was separately acknowledged in Article 98 of the Civil Law Fundamentals and Article 475 of the Civil Code of the Ukrainian SSR.

Furthermore, the Civil Law Fundamentals, in contrast with acts issued on 1925, 1928 and 1929, provided for cases of use of a work without the author’s permission and without remuneration payment (Article 103) and with such a payment (Article 104). It was stated that it is mandatory to indicate the author’s name. Thus, the value of the person’s authorship right was acknowledged. The third persons were allowed to use works without author’s permission but they were obliged to indicate authors’ name on it at every and each case of use of the work.

The principle of inviolability of the work, as the general obligation for all to refrain from any action in relation to the rights of the author, has not been defined for a long time. For example, the Copyright Fundamentals 1925 contained this right but it existed in the form of prohibitions to the publisher to make additions, modifications and any alterations to the work, to work’s title and to the name of the author.

Four years later, in Article 27 of the Copyright Law 1929, this rule was expanded by establishing that the publisher and the entertainment companies have no right to make alterations, reduction and any changes neither in the work itself, nor in its headline and the author’s name without the author’s consent. Thus, we can say that these provisions have already contained rules for the implementation of author’s moral rights. Article 98 of the Civil Law Fundamentals and Article 475 of the Civil Code of the Ukrainian SSR have directly established the right to inviolability of the work enjoyed by the author. Article 476 of the Civil Code of the Ukrainian SSR provided for the procedure on protection of the inviolability of works and the name of the author during his life, and Article 479 - after his/her death.

Our opinion is that such a wording is more accurate, in contrast to the provision given in Article 439 of the Civil Code of Ukraine.

The Civil Code of Ukraine constitutes the author's moral rights, such as the right to inviolability of the work and the right to protect the reputation of the author, but the literal meaning of these rights, provided in Article 439 of the Civil Code of Ukraine, makes one to think that the right to inviolability of the work will be violated if the alteration of the work damages the author's honor and reputation. However, this cannot be true as the right to inviolability means that without the author's permission, the work is forbidden to make any changes, regardless whether such a change has damaged the author's honor and reputation or not.

One of the fundamental provisions of the Soviet law was that moral rights (a copyright, the right to name and the right to inviolability) cannot be transferred to third persons under no circumstances [3, p.18].

Furthermore, the subject of our analysis is the author's economic rights. Article 440 of the Civil Code of Ukraine duplicates the list of economic rights to the work, which are given in Article 424. The execution of the basic economic right - the right to use the work - is specified in Article 425. As it now stands, the economic rights held by the copyright subjects are as follows: publication (release to the world) of work; the right to authorize or prohibit the reproduction of works; public performance and public announcement of works; public show; any re-public broadcast on the air; translations of works; processing, adaptation, arrangement of work and others.

However, the establishment and acknowledgment of a person's economic rights went consistently, but slowly. It is worth to start from reviewing the key economic right of intellectual property - the right to use the work. First of all, it should be mentioned that above said documents don't define the meaning of "use". Therefore, this term is usually understood as a general one which includes various ways of using copyright works. This is the author's right to use his work in any manner.

The Copyright Fundamentals 1925 contained an explicit provision on the author's right to use his work by releasing it to the world and reproduce and distribute it by all means permitted by law for a time allowed by law (at that time - 25 years), as

well as to obtain all benefits from his exclusive right. In addition to this general rule, this document emphasized the exclusive right of the author to an unpublished work to the public performance of his/her dramatic, musical, musical-dramatic, pantomime and choreographic work. These provisions remained unchanged in the Copyright Fundamentals 1928 and in the Copyright Law 1929 (Article 7).

In 1928 a new requirement for the registration of a work as an evidence of the initial moment of copyright appeared. Such registration was not a subject to confirmation of copyright as it is, but to calculate terms and to claim authorship. Nevertheless, it was an entirely new instrument of the governmental regulation of copyright. At the same time, the refusal to register a work did not deprive the interested persons of the right to set the time of the publication of the work in other ways [13, p.3].

The logical development of the right to use is the right to authorize (to allow) the use of other persons.

This right is "consequential" from the author's right to use his own work himself, because author must have the authority to allow others to use his work. The key word "to allow" has its history in the Soviet theory of the civil law as a "permission" theory which appeared in the Copyright Fundamentals 1928 [3, p.196]. Thus, Article 16 of the Copyright Fundamentals 1928 stipulated that copyright law "may be alienated by a publishing contract, by will or other lawful means". In accordance with Article 17 of the Resolution "On Copyright" dated 8 October 1928 [14] the publishing contract was defined as "an agreement by virtue when the author transfers his/her exclusive right to publish a work on certain period". The said contracts were considered as exclusive copyright assignment contracts entered into for a certain period. However, later on, in the 1950's, Soviet scholars began to say that according to the author's contract, the author retains all his exclusive copyright, but he/she allows the contractor's organization to use his/her work only in the manner specified in the contract. Thus, the Copyright Fundamentals 1925 acknowledged the author's right to acquire, by all legal means, material benefits from his/her exclusive right. Since Article 12 provided for the possibility of the alienation of copyright under a publishing contract, that was

the way for the author to dispose his/her copyright and receive an applicable remuneration.

It is important to note that the Copyright Fundamentals 1925 and the Decree "On Copyright" dated 11 October 1926 [15] acknowledged the author's right to remuneration for the use of his/her work. But the latter one contained restrictions which, on the one hand, substantially changed the essence of this right in its modern sense, and, on the other hand, demonstrated the actual ways of its execution. Thus, according to Articles 14 and 15, based on the contract, the authors had the right to transfer copyright to the publisher for a specified period of five years only. There was an exception: a contract with the state publisher, as well as professional, communist and cooperative organizations, could be concluded on indefinite period. Such limitations were in line with the other author's rights restrictions, namely, with a large number of cases when other persons could use the work and such use was not considered to be an infringement of the rights of the author ("free uses").

Article 16 of the Copyright Law 1929 acknowledged the "assignment" of the author's right under the publishing contract, by will or other lawful means, in part or in whole. It means that the author assigned to the publisher the right to publish and distribute his/her works under such contract.

At the same time, it was acknowledged that the author enjoys his/her exclusive economic right to unpublished work, meanwhile, with respect to unpublished but at least once publicly performed works, the People's Commissariat of Education of the Ukrainian SSR was authorized to allow to publicly perform such works without the author's consent, but with payment of a remuneration (Article 8). This regulation provided for important changes to the "free use" provisions. In addition to previously constituted cases of such "free use" without the author's permission, it was introduced requirement to pay a remuneration to the author. The remuneration rates were regulated by laws, however, such significant changes showed that the State reevaluated the importance and value of copyright of citizens.

Remuneration for the use of works by other persons (both under permission of the person and in case of "free use" without the author's consent but with the mandatory payment of a remuneration) has been first acknowledged and envisaged in Article

98 of the Civil Law Fundamentals and Article 475 of the Civil Code of the Ukrainian SSR. The provisions of Article 101 of the Civil Law Fundamentals were a true novelty. It was stipulated that the use of a work of the author by another person is permitted only on the basis of a contract with the author or his successor, with exception of the cases specified by the law. Such exceptions were cases of "free use".

The Civil Code of the Ukrainian SSR, in its turn, by acknowledging the author to assign his/her rights to third parties under the contract, imposed certain restrictions on the use by third parties of the work. Thus, according to the Article 506, the author was limited to transfer his/her work to third party other than a contractor for three years next to contractor's approval of the work. It means that the economic rights assignment was limited in time.

## 6. Conclusions

With respect to the "negative" right - the author's right to prevent the unlawful use of the work - the Copyright Fundamentals 1925 did not contain provisions on establishment and regulation of such a right. Nevertheless, given that, on the one hand, the Copyright Fundamentals 1925 has acknowledged the copyright of the author (Article 1) and the exclusive right to reproduce and distribute his/her work (Article 3); on the other hand, there were cases of "free use" (Article 4) along with possible to request for damages in case of copyright infringement (Article 14). Thus, broadly speaking, by this regulation in 1925, a person who believed that his/her copyright had been violated, had legal grounds to appeal to the court. However, the subject of such claim would have been related on collecting remuneration rather than the protecting authors' right due to unlawful use of his/her work. All regulations, that have been examined in this study, contained an exhaustive list of cases of "free use" of the work. The Copyright Fundamentals 1925 listed 14 cases of "free use". The Copyright Fundamentals 1928 acknowledged 15 of such cases. The Copyright Law 1929 specified those 15. In fact, having such a wide list means that the copyright was essentially limited. Mentioned regulations did not make any difference for cases when one allowed to use the work without the author's permission but with or without paying remuneration for such use. These significant changes have been introduced only in the of Civil Law Fundamentals by

providing two separate articles devoted to such issue.

Prior to the adoption of the Civil Code of Ukraine, the author's rights were limited to the right to publish, reproduce and distribute his/her work, that did not correspond to the current condition of the economy and law. Although the Civil Code of Ukraine contained and still contains certain gaps and inconsistencies, it has restructured the system of the intellectual property rights in Ukraine. It introduced the general provisions that apply to all objects of the intellectual property right as well provided unified approaches both in terms of terminology and protection of the objects of intellectual property rights, that is very important for rapid technological development and for the birth of new objects of intellectual property rights in the future.

### References

1. Fundamentals of Legal Protection of Intellectual Property in Ukraine: For the students of non-governmental higher educational establishments / edited by O.Pidoprygora, O.D.Svyatotsky, - Kyiv: Con-cern "Publishing House "InYure", 2003 – 236 pages.
2. The Civil Code of Ukraine, the Law of Ukraine dated 16 January 2003, №435-IV [Electronic resource] - Access mode: <http://zakon.rada.gov.ua/go/435-15>
3. Gavrilov E. Soviet Copyright (Basic Provisions, Trends in Development). - Publishing House "Science", Moscow. - 1984. – 222 pages.
4. Draft of the Civil Code of the USSR prepared by the Commission for Draft-ing the Civil and Civil Procedural Codes of the USSR, - Moscow - 1947. – 36 pages.
5. Ioffe O. Fundamentals of Copyright. Copyright, Inventive Rights, the Right to Science Discoveries. - Textbook / Publishing House "Knowledge", Moscow: 1969 – 127 pages.
6. Fundamentals of Civil Legislation of the USSR and Union Republics: The Law of the Union of Soviet Socialist Republics of 8 December 1961, - Moscow: Pub-lishing House "Juridical Literature". - 1964 – 120 pages.
7. On the Fundamentals of Copyright. Resolution of the CEC and CPC of the USSR dated 30 January 1925 [Electronic resource] - Access mode: <http://libertarium.ru/ap-1925>
8. Fundamentals of Copyright. Resolution of the CEC and PCP of the USSR dated 16 May 1928, Civil Legislation of the USSR. - Moscow: 1957. - p. 156-159.
9. On Copyright. Resolution of the CEC and the CPC of the Ukrainian SSR dated 6 February 1929, Collected Laws and Decrees of the Workers 'and Peasants' Government of Ukraine No.7 of 1929. - p. 277-290.
10. Civil Code of the Ukrainian SSR. Law of the RSFSR dated 18 July 1963 [Electronic resource] - Mode of access: <http://zakon2.rada.gov.ua/laws/show/1540-06/ed19991030>
11. Shust Nataliia. Correlation Between Intellectual Property and Scientific Activity// Proceedings of the National Aviation University, №2 (2017), p.148-155.
12. Torkanovskiy E. Personal and Property Rights of the Authors of Literary Works in the Soviet Law. The dissertation author's abstract on competition of the Ph.D. Kharkiv Law Institute named after L.M. Kaganovich, Kuibyshev Planning Institute. - Kuibyshev, 1953. – 14 pages.
13. Drobyazko V. To the History of Copyright in Ukraine in 20' of the twentieth century / Theory and Practice of Intellectual Property: Scientific and Practical Journal, 2006. - №1. - p. 3-12.
14. On the Copyright. Resolution of the CEC and the CPC of the RSFSR dated 8 October 1928 [Electronic resource] - Access mode: <http://pravo.levonevsky.org/baza/soviet/sss6644.htm>
15. On the Copyright. Decree of the CEC and the CPC of the RSFSR dated 11 October 1926 [Electronic resource] - Access mode: <http://museumreforms.ru/node/13947>

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**ДЕЯКІ ПИТАННЯ ДО ІСТОРІЇ СТАНОВЛЕННЯ АВТОРСЬКОГО ПРАВА В УКРАЇНІ**  
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**Мета:** спроба дослідження, яким шляхом відбувалось становлення та визнання у радянському авторському праві особистих немайнових та майнових прав інтелектуальної власності до моменту їх закріплення у Цивільному кодексі України 2003 року. **Методи дослідження:** оптимізація правозастосування норм Цивільного кодексу України щодо особистих немайнових та майнових прав інтелектуальної власності. **Результати:** Цивільний кодекс України здійснив перебудову системи права інтелектуальної власності, започаткував уніфікацію підходів до термінології та щодо охорони об'єктів права інтелектуальної власності. **Обговорення:** нормативні акти СРСР та Української СРР (Української СР) з цивільного законодавства та авторського права, законодавство України щодо авторського права.

**Ключові слова:** інтелектуальна власність, авторське право, особисті немайнові та майнові права інтелектуальної власності, радянське цивільне право, авторське право Української СРР, цивільне законодавство України.

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**НЕКОТОРЫЕ ВОПРОСЫ ИСТОРИИ СТАНОВЛЕНИЯ АВТОРСКОГО ПРАВА В УКРАИНЕ**

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**Цель:** попытка исследования того, каким путем осуществлялось становление и признание в советском авторском праве личных имущественных и неимущественных прав интеллектуальной собственности до момента их закрепления в Гражданском кодексе Украины 2003 года. **Методы исследования:** оптимизация правоприменения норм Гражданского кодекса Украины в отношении личных имущественных и неимущественных прав интеллектуальной собственности. **Результаты:** Гражданский кодекс Украины осуществил перестройку системы права интеллектуальной собственности, положил начало унифицированным подходам к терминологии и защите объектов права интеллектуальной собственности. **Обсуждение:** нормативные акты СССР и Украинской ССР по гражданскому законодательству и авторскому праву, законодательство Украины по авторскому праву.

**Ключевые слова:** интеллектуальная собственность, авторское право, личные имущественные и неимущественные права интеллектуальной собственности, советское гражданское право, авторское право Украинской ССР, гражданское законодательство Украины.