

LAW

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Abstract

Purpose: to find out the legal protection of official works. In this article, the authors examine the peculiarities of legal regulation for official works. Separate issues on amendments to labor legislation are considered. **Methods of research:** for the analysis of legal protection for official works in the context of legislation, the method of induction, system approach, formal-legal and case-study methods are used. **Results:** in the course of the research attention is focused on the shortcomings of the current legislation, and the main directions of improvement of the current legislation in accordance with the international legal norms in the context of the protection of objects on official works are formed. **Conclusions:** the obtained results confirm the increase of the efficiency of the system of protection of intellectual property on the service works will have a positive impact on the reformation of the intellectual property protection system in Ukraine. Thus, further improvement of the legislation in the sphere of legal regulation on official works is necessary in order to ensure its effectiveness and compliance with the present challenges.

Keywords: author; intellectual property; intellectual property objects; labour relations; official work

1. Formulation of the Problem

The problem of legal regulation of intellectual property became urgent at the end of XX and at the beginning of XXI centuries and gathered momentum due to appearance of new digital technologies, fast duplication, reproduction and use of intellectual property, change of its carrier and means of distribution (cable distribution, satellite broadcasting etc.), new program means of protection of rights, new objects of intellectual property and change of emphasis from industrial property to copyright and especially related rights.

In Ukraine protection system of the objects of intellectual property is being formed, so the protection of intellectual property is far from being perfect. However, we can not underestimate the role of intellectual property nowadays, as in the nearest future the production will become the means of implementation of intellectual property achievements.

2. Analysis Of the Reearch and Publications

It should be noted that the issue of legal protection in official works designs was considered by both domestic and foreign civil law scholars, such as L. Amelicheva, O. Zaikovskaya, T. Panfilova, O. Pilenko, V. Konovalenko, I. Tomarov, R. Shyshka and others.

3. The Purpose Of The Research

Research of changes in the legal regulation of the rights in official works.

4. Presenting Main Material

The current legislation on intellectual property contains a lot of gaps and contradictions. Therefore, it is necessary to bring this legislation to conformity with both national and international laws. In the opinion of R. Shishka, the problem of the subject of intellectual property is complicated because the result

depends not only on the idea (even brilliant one), but on the ability to demonstrate this idea to the audience and to represent it in the best way by means of masterly performance. A considerable number of people are engaged in this process, each of them makes contribution to the final result by his creative activity.

Among the objects of intellectual property the particular place belongs to copyright and related rights objects. Legal regulation of these objects is carried out according to the norms of the Constitution of Ukraine, the Civil code of Ukraine, international acts, the Law of Ukraine "On copyright and related rights" and other legal acts. The main objects of copyright are literary and art works. The Civil code of Ukraine has determined the following copyright objects: novels, poems, articles and other written works; lectures, speeches, sermons and other oral works; dramatic and music works, pantomimes, choreographic and other stage works; music works (with or without text); audiovisual works; architecture, sculpture, graphic and painting works; photographic works; illustrations, paintings, schemes, sketches and plastic works connected with geography, topography, architecture or science; translations, adaptations, arrangements and other revisions of literary and art works; collected works if they are the result of intellectual activity; computer programs; compilations of database if they are the result of intellectual activity; other works. Copyright does not extend to the ideas, processes, methods or mathematic conceptions.

Computer programs are protected like literary works. Nowadays Ukraine should choose between two possible ways: (1) "end-user" applying copyright norms for the protection of computer programs or (2) "computer programs developer" using not only the norms of the mentioned law but also patent law. The latter system of legal protection is used by the states – leaders in the development of computer programs (the USA, Japan). The majority of European states do not use the norms of patent law concerning computer programs protection, but legal practice knows the facts of their indirect use.

According to the current legislation, computer program is a set of instructions in the form of words, numbers, codes, schemes, symbols or in any other form applicable for read-out by computer in order to achieve particular purpose or result. This concept covers both operating system and application program expressed in source or object codes.

The succession of the operation fulfillment, logical organization of computer program may be objectively expressed in the technical tasks, program description, subsidiary material, source and objective codes. Any of these objects must correspond to the criterion "sufficient to fulfill the set of commands".

The creator of the computer program may demand from other persons to recognize him as a true author, and other persons must admit this fact. The right of authorship is the most important right of the author. All other property and non-property rights arise from the right of authorship [13].

Examining the current legislation of Ukraine one should come to the conclusion that the essential features of the work are:

- 1 – creative character of the work, the result of author's creation;
- 2 – branch of science, literature, art;
- 3 – objective form of expression of the work;
- 4 – reproduction of the work.

"Creation" is an essential requirement set up by legislation in order to consider the work as an object of copyright. Moreover, the legislators agree that "objectivity of the form" and "reproduction" of the work are the obligatory features of the copyright object.

The peculiarity of intellectual property right is that the holder of intellectual property right possess both property and non-property rights. According to the legislation the author of the intellectual property object possesses the following personal non-property rights:

- to demand the recognition of his authorship by indicating his name on the work and its copies and every time while using the work in public if it is possible;
- to forbid mentioning his name if he wants to be an anonymous author while using the work in public;
- to choose the pen name, to indicate and demand indicating the pen name instead of the real name of the author on the work and its copies every time while using the work in public;
- to demand keeping integrity of the work and prevent any distortion, perversion and other modifications of the work and any other encroachment on the work that may harm the author's honor and good name.

Author's property rights (or property rights of another person – holder of copyright) include: the exclusive right to use this work; the exclusive right to allow or forbid using this work by other persons. Property rights of the author or another person –

holder of copyright may be transferred to another person according to the agreement of disposal of property rights. After that this person becomes the copyright subject, i.e. the holder of property rights. The exclusive right to use this work by the author or another person – holder of copyright allows him to use this work in any form and by any means.

Without permission of the author or another person – holder of copyright, but with obligatory indication of the author's name and the source of information it is allowed: using quotations (short extracts) from the published works in the amount that justifies the aim, including magazine and newspaper quotation in the form of press reviews if it is caused by the critical, controversial, scientific or information character of the work which contains these quotations; free use of quotations in the form of short extracts from the performances and works included to the phonogram (videogram) or broadcasting programs; using the literary and art works as illustrations in the publications, broadcasting programs, sound and video recording in the amount that justifies the aim; reproduction in the press, public performance or information of the articles on current economic, political, religious or social issues previously published in the newspapers and magazines or works of the same type in the case when the right to the reproduction or any public information is not forbidden by the author; reproduction with the aim to report current events by means of photography or cinematography, public information of the works which were seen or heard during such events in the amount that justifies the aim; reproduction in the catalogues of works exposed on the exhibitions, auctions, fairs or in the collections to report the above-mentioned events without using these catalogues with commercial aim; publication of the published works by the raised and dotted print for the blind people; reproduction of the works for judicial and administrative proceedings in the amount that justifies the aim; public performance of the music compositions during formal and religious ceremonies; reproduction of public speeches, allocutions and reports or other public information in the newspapers and other periodicals, broadcasting programs in the amount that justifies the aim. Without permission of the author or another person it is also allowed to reproduce hard copy of the work by the libraries or archives the activities of which do not intend to obtain profits.

The special legal regime concerning intellectual property objects is the regime of the right of

remuneration. Article 23 of the Law of Ukraine “On copyright and related rights” defines: “the author during his life and his heirs after his death within the term determined by the article 24 of the Law of Ukraine “On copyright and related rights” concerning the original art works sold by the author have inalienable right to get five per cent from the price of every next sale through auction, gallery, shops etc.”. The author's fee obtained as a result of using the right of remuneration is paid by organizations that dispose of the property rights of the authors on collective basis.

The right of remuneration, i.e. the right of the authors of the art works to per cent share from the sale of their art works on the art market was codified for the first time in the French legal act of the 20-th of May 1920. In the international conventions it emerged after the adoption of Article 14bis of the Berne convention (26 June 1948). The peculiarity of the Article 14bis is that it allows using the right of remuneration by the states-members in case of mutuality. It means that the creators of art works, in contrast to other authors, may sell their art works, sculptures only once. So, if the right of remuneration was not protected they (authors) would be deprived of the opportunity to obtain the share from any auction sale of their works after the first sale. At the same time, according to the norms of the copyright, the creative workers of another sphere (composer, writer) while using their works by means of reproduction, public performance, mechanical copying with help of audiovisual means, telecast, broadcasting may allow such reproduction in individual case or by means of license agreements with the organizations that dispose of the property rights of the authors on collective basis, and demand remuneration. Besides the right of remuneration, art work creators have the right to allow reproduction, broadcast and telecast of their works and obtain the share from payments for private copying. In comparison with other authors they obtain small remuneration as the number of their works is limited.

The right of remuneration is not applied in all countries. There arises misbalance between markets that may influence negatively the art works sold in the countries that recognize the right of remuneration. Nowadays the right of remuneration is recognized by the legislation of 47 countries, in particular, by the Law of Ukraine “On copyright and related rights” (Article 23). But the right of remuneration is applied effectively only in a number of the countries of European Union: Belgium,

Denmark, Spain, Germany, Portugal, France, Sweden and Iceland. On 13 March 1965 European commission proposed to provide harmonization of this right in all countries-members.

Necessary condition of the effective application of the right of remuneration is the availability of the large market of art works with the permanent infrastructure of art galleries and places for auctions.

For the objects of related rights another regime of intellectual property rights is applied.

One of the basic directions of Ukraine's integration into the European Union and world community is improving national system of defence of the intellectual property rights, in general, and copyright, in particular. Under the conditions of increasing role of creative activity and intellectual property objects, it is very important to have proper legal regulation and defence of the rights of creators to results of their creative activity.

It is important to note that more than 80% of intellectual property objects are created by the employees of the enterprises, institutions, organizations during performing their official duties (namely, such intellectual property objects are called as official ones). Therefore, in the legal field they actively discuss changes to the legislation on copyright and the related rights [4], so problems of the rights in official works have scientific and practical significance. Accordingly, the object of our research is an analysis of legal changes in regulation of the rights in official works.

As a rule, scholarly opinion distinguishes two basic concepts under which they assign the rights in official work. According to the first concept (it is typical for the most countries supporting continental law traditions) the primary ownership of the copyright belongs to the author, i.e. he/she has the non-proprietary rights, but all the proprietary rights belong to the employer.

Under the second concept (it is typical for the countries of Anglo-Saxon law "in the copyright law of the United States, a work made for hire (work for hire or WFH) is a work subject to copyright that is created by an employee as part of his job, or some limited types of works for which all parties agree in writing to the WFH designation. Work for hire is a statutorily defined term (17 U.S.C. § 101), so a work for hire is not created merely because parties to an agreement state that the work is a work for hire. It is an exception to the general rule that the person who

actually creates a work is the legally recognized author of that work. According to copyright law in the United States and certain other copyright jurisdictions, if a work is "made for hire", the employer – not the employee – is considered the legal author. In some countries, this is known as corporate authorship. The entity serving as an employer may be a corporation or other legal entity, an organization, or an individual" [5].

The complexity of research of the intellectual product legal nature, namely literary works, is that the intellectual work is regulated from the point of view of labour law and intellectual property right, and therefore consideration of intellectual activity should be carried out in the ratio of these two branches of law. According to the effective legislation, the official work is a work created by the author during performing his/her official duties under the official task or the labour agreement (contract) between him/her and the employer [1]. As a rule, the procedure of realization of the proprietary rights to such object can be regulated by the labour agreement (contract) or civil law contract.

The Law of Ukraine "On Copyright and the Related Rights" is a special legal act regulating the rights in official works. Thus, its Article 16 determines that the author's personal non-proprietary right in official work belongs to its author. The exclusive proprietary right in official work belongs to the employer, unless otherwise is stipulated by the labour agreement (contract) and (or) civil law contract between author and the employer [1]. Under the civil law norms, the intellectual property proprietary rights to the object created during execution of the labour agreement jointly belong to the employee who created it and legal or physical entity, where the employee works, unless otherwise is stipulated by the contract (Article 429 of the Civil Code of Ukraine) [2].

Special legal regime of the rights in official works is provided by the labour law, since the process of creation of official works is regulated under the labour agreement terms. Thus, the effective Code of Laws on Labour of Ukraine defines the labour agreement as a basis for emergence of labour relations. Its conclusion is a way of realization of the right to work (part 2, Article 2 of the Code of Laws on Labour of Ukraine) and it is an agreement under which the employee is obliged to perform work specified in this agreement (part 1, Article 21 of the

Code of Laws on Labour of Ukraine). Respectively, consolidation in the labour agreement contractual provisions on official works, i.e. the employee's obligation to create official works and correlation the rights in official works between the employee and employer, on the one hand, will enable the employer to avoid problems in the future regarding the rights to such objects, and the employee to pretend to the clear and transparent fee for creation of similar objects.

To understand the legal regulation of official works it is important to understand the process of creating the official works that is typically for labour relations. In this case, the main criterion is assignment of the employee's duty to create the objects of intellectual property right, the process of performing his/her duties. Therefore, we share O.P. Zaykovska's and L.P. Amelicheva's opinion that the Code of Laws on Labour of Ukraine should be supplemented by a new Chapter "Official Objects of Intellectual Property" [4]. The same chapter should be also foreseen in the Draft the Labour Code of Ukraine.

To avoid conflicts in the effective legislation the Resolution of the Plenum of the SCU "On the Application by the Courts of Legislation in the Cases on Defence of Copyright and the Related Rights" was adopted on June 4th, 2010. For example, it states that if a work was created by the employee during execution of the labour agreement (contract) and within the period of its validity, i.e. during performing his/her official duties and under the official tasks of the employer, the personal non-proprietary rights of the author of the work belong to the employee; they are inalienable. The proprietary rights to the object of copyright and (or) the related rights created during execution of the labour agreement jointly belong to the employee who created this object and legal or physical entity, where he/she works, unless otherwise is stipulated by the contract (part 2, Article 429 of the Civil Code of Ukraine) (435-15).

If the labour agreement or civil law contract between the employee and the employer (legal or physical entity, where he/she works) does not determine other procedure of realization of the proprietary rights to such created object, they have joint rights to receive a certificate of registration of copyright in the work and use such object. The procedure of realization of the proprietary rights to such object can be regulated by the civil law contract [6].

However, in practice the courts often do not use the rules of the above mentioned Resolution, but often make opposing decisions in similar cases, taking into account differences in the effective legislation. Therefore, we believe that such legal conflict in legislation should be removed taking into consideration the norms of the European legislation in this area. Thus, Article 158 of the Association Agreement between Ukraine and the European Union [7] states that the parties shall ensure the proper and effective fulfilment of obligations under the international treaties in the field of intellectual property to which they are parties. Separate attention should be paid to the problems of legal regulation of the rights to computer program, as Article 181 of the above mentioned Agreement states that the subject of copyright in computer programs is a physical person or a group of physical persons who created the program or, if it is allowed by the legislation of the parties, a legal entity defined as the right holder in accordance with this law. If computer program is created by the hired employee during performing his/her official duties or under the tasks of the employer, the employer shall have all exclusive proprietary rights to such computer program, unless otherwise is determined by the contract [7].

So, as we see only clear formulation of the status of official works in the legislation of Ukraine will make it impossible to interpret the norms in two ways and will comply with the European integration obligations of Ukraine with respect to certain copyright objects, since the Agreement obliges to amend the legislation only with respect to the copyright objects which have an important role in the international intellectual property market.

The official works created under the order of state authorities need separate regulation, so it is advisable to make changes determined in the Draft of the Law of Ukraine "On Amendments to Some Legislative Acts of Ukraine on the Settlement of Copyright and the Related Rights" N 7539 of February 1st, 2018, developed and submitted to the Verkhovna Rada of Ukraine, namely, to Article 16 of this Draft: "4. The proprietary rights to the work created by the author during execution of the labour agreement (contract) with state authority belong to such state authority. 5. The proprietary rights to computer program, database created during execution of the labour agreement (contract) belong to the employer, unless

otherwise is determined by the labour agreement (contract)" [8].

It should be noted that such changes in legal regulation of the rights in official works in favour of the employers cause a number of objections among professionals. For example, V. Konovalenko states "... that problems could be avoided if the proprietary rights in such official works and works created under the order will belong to the author. And state authority will be granted by free non-exclusive license to use computer programs and databases for the entire period of copyright protection" [9].

Other authors argue that using in national legislation the norms on copyright in official works presents a potential threat to the national interests in the commercial realization of copyright, especially in case of Ukraine's accession to the WTO. Therefore, it is considered necessary to remove from the national legislation articles on official works or make changes to the wording, in particular, regarding using and distribution of these works by the legal entity (enterprise, institution or organization, etc.) where they were created, on a royalty-free basis, however, with the recognition of the author's proprietary rights [10].

The proposed changes to the legislation are in line with the European practice and are foreseen at the international level, and Ukraine having undertaken the corresponding obligations should comply with them. Changes in the legislation on copyright and the related rights give answers only to the problems concerning computer programs and databases, as well as official works created by the author during execution of the labour agreement (contract) with state authority. However, in general, the Draft does not answer to the question of the discrepancy between the norms of the Civil Code of Ukraine and the Law of Ukraine "On Copyright and the Related Rights" concerning official works.

Therefore, to properly and unique regulate the rights in official works we consider as necessary to determine in the labour agreement a clear provision regarding the author's duty to create an appropriate official work (clearly defined form of the work, volume, other special requirements, including details on wages for creation of such objects). Of course, it is very difficult to clearly determine in the labour agreement a list of all possible objects that should be created by the employee during performance of his/her official duties. Thus, in practice in the labour agreement they state that all proprietary rights to all

objects created by the employee during performance of his/her official duties should be divided. Moreover, such obligation to the particular list of objects, the rights and duties of the employee should be explicitly stated in the regulations or job descriptions of the relevant institution or organization, and the employee must be familiar with them.

In the case of creation of the copyright objects which are not determined by the labour agreement, the employer can conclude the agreement with the employee on creation of such work or using the proprietary rights to the existing object. As a rule, they should conclude an author's agreement if creation of official works is not foreseen by the labour agreement, or such agreement does not settle question on the proprietary rights in work, i.e. it refers only to some issues regarding official works.

The creator's right to the fee should be separately regulated, but not taking into account the proper remuneration for creation of such objects. So, to O.P. Zaikovska's and L.P. Amelicheva's mind, "... a fee for creation by the employee the official objects of intellectual property exists in legislations of many countries. Particularly interesting is the experience of Poland. According to the legislation of this state authors of official objects of intellectual property have the right to fee in proportion to the profit received by the enterprise from this object. Moreover, if such fee is lower in comparison with the profit earned, the author may request its increase. Such rules on the material fee for the creation of intellectual property objects should also be introduced in Ukraine by improving the effective legislation, including the Code of Laws on Labour of Ukraine. The second important guarantee stipulated in a separate norm of the Code of Laws on Labour of Ukraine will be the employer's duty to assist the employee's creative work. Such assistance can be made in providing free access to the equipment, information ensuring, provided with materials, financing ..." [4].

5. Conclusions

The introduction of such changes will result in a series of conflicts in applying the norms of both international law and national legislation. Accordingly, in order to resolve the conflicts arising from the application of the norms of the national legislation and national legislation, it will be

necessary to take into account each particular situation and form the relevant judicial practice. Creation of the specialized IP court which is today actively formed will enable to improve the legal regulation of intellectual property. In opinion of the domestic experts in intellectual property issues, a formation of such court will contribute to the solving the problem of delimitation of jurisdiction of courts in the consideration of cases on intellectual property issues and, accordingly, will ensure the application of unique and correct judicial practice in resolving relevant disputes. Creation of such court will also be aimed at building an effective system of defence of intellectual property rights taking into account international standards and, in addition, improving the investment attractiveness of our state [11].

To overcome the collisions and gaps in the intellectual property right, many scientists believe that it is necessary to make codification in the intellectual property field. In 2004 the Draft of the Intellectual Property Code of Ukraine was submitted to the Verkhovna Rada of Ukraine, but unfortunately it was rejected [12, p. 61]. The idea of adopting a single, codified act to regulate the intellectual property relations deserves attention and should be supported, as it should help to ensure better legal regulation in this area, especially in the context of introduction of separate jurisdiction in the intellectual property issues.

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Службові твори як об'єкти правової охорони

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Мета: з'ясувати правову охорону на службові твори. В даній статті автори досліджують особливості правового регулювання на службові твори. Розглянуті окремі питання про внесення змін до трудового законодавства. **Методи дослідження:** для аналізу правової охорони на службові твори в контексті законодавства використано метод індукції, системний підхід, формально-юридичний та case-study методи. **Результати:** в процесі дослідження акцентується увага на недоліках чинного законодавства, та формуються основні напрямки вдосконалення чинного законодавства у відповідності до міжнародно-правових норм в контексті охорони об'єктів на службові твори. **Висновки:** отримані результати підтверджують підвищення ефективності системи захисту інтелектуальної власності на службові твори матимуть позитивний вплив на реформування системи охорони інтелектуальної власності в Україні. Таким чином, подальше вдосконалення законодавства у сфері правового регулювання на службові твори є необхідним для забезпечення його ефективності та відповідності викликам сьогодення.

Ключові слова: автор; інтелектуальна власність; об'єкти інтелектуальної власності; трудові відносини; службові твори.

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Служебные произведения как объекты правовой охраны

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Цель: выяснить правовую охрану на служебные произведения. В данной статье авторы исследуют особенности правового регулирования на служебные произведения. Рассмотрены отдельные вопросы о внесении изменений в трудовое законодательство **Методы исследования:** для анализа правовой охраны на служебные произведения в контексте законодательства использован метод индукции, системный подход, формально-юридический и case-study методы. **Результаты:** в процессе исследования акцентируется внимание на недостатках действующего законодательства, и формируются основные направления совершенствования действующего законодательства в соответствии с международно-правовых норм в контексте охраны объектов на служебные произведения. **Выводы:** полученные результаты подтверждают повышение эффективности системы защиты интеллектуальной собственности на служебные произведения имеют положительное влияние на реформирование системы охраны интеллектуальной собственности в Украине. Таким образом, дальнейшее совершенствование законодательства в сфере правового регулирования на служебные произведения необходимо для обеспечения его эффективности и соответствия вызовам современности.

Ключевые слова: автор; интеллектуальная собственность; объекты интеллектуальной собственности; служебные произведения; трудовые отношения

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