

REGARDING ATYPICALITY OF COPYRIGHTED ITEMS IN DIGITAL FORM AS OBJECTS OF CIVIL-LAW RIGHTS

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Abstract The article presumes that an expressive work in digital form is an atypical object of civil law that does not require “its own” institute of law. Considering this, in revealing the essence of the object of law it is regarded a major premise to accept the theory of the object – an action whose advocates are Ya.M. Magaziner, V.I. Zhukov and others. Moreover, an expressive work in digital form materialized via a digital environment is regarded a

minor premise. Principal differences have been determined between an expressive work materialized via a digital environment and an expressive work materialized via an analogue environment.

Key words: legal regime, copyright law, expressive work in digital form, atypical object of civil law, objects' properties, digital environment.

Problem statement

It is well-known that properties of material and spiritual objects determine the behaviour of a person who is a subject of law. As of today, neither on the national, nor on the international level is there a single research analysing problems arising in the process of realizing copyright rights materialized in digital environment via the properties of such objects. At the same time, understanding this issue is of utmost significance from the point of view of the peculiarities of applying the restrictions of copyright law for the digital environment.

The aim of this article is to reveal the properties characteristic of expressive works in digital form that the law has to relate legal consequences to, taking into account that the term “digital environment” is not juridical.

There is hardly any other sphere of law that is more influenced by technical innovations than copyright law. It is true if we take into account that legislative initiatives in this sphere are not preventive in character, but are an attempt to compensate for the rightsholders the users' new functionality. Moreover, legislators aim at maintaining a fair balance between the effective protection of the rightsholders' interests on the use of their expressive works on the one hand, and the society's interests to access the expressive works on the other, as far as this balance of interests acquires an ever greater significance

in modern information society with a focus on the Internet network. Taking into account that the Network is a specific environment – space [21] limited not by territorial boundaries, but by the spread of technology, Internet substantially differs from the customary, historical conceptions of environment (space) related to physical three-dimensional characteristics. This state of affairs brought about the division of environment into analogue (everything before Internet was invented) and digital (including Internet).

These processes could not but raise the interest of the international community.

As a result, a number of international legal acts were adopted. They were directed at maintaining the balance between the interests of rightsholders and users, at preventing infringement of intellectual property rights on the Internet including World Intellectual Property Organisation (WIPO) agreements on copyright law, on execution and phonograms adopted by the Diplomatic conference of 20 December 1996 that Ukraine joined to in September 2001¹.

These agreements despite numerous comments that they "function as acts of information and offer more freedom" [2], were the first to set out the framework of protection of intellectual property at the digital age.

According to the preamble to the WIPO agreement on copyright law, one of the reasons to conclude this document was the necessity to maintain the balance between the copyright holders and the interests of the public, esp. in the sphere of education, scientific researches and access to information.

It should be noted that the balance of rights presupposes safeguarding the interests of all parties, as far as their public relations are civil matters characterized by legal equality of their subjects. There is no doubt that the most effective method to reach equality of parties (balance) is to limit their rights. Copyright law cannot be an exception despite the apparent monopoly.

For the record, there are heated discussions in the constitutional-legislative aspect to justify limitation of copyright law.

- Public interest is mentioned as an argument. It means free access to information as specified in paragraph 2 of article 34 of the Constitution of Ukraine², namely "this interest has

¹See: The Law of Ukraine "On Ukraine's joining the WIPO agreement on copyright law" of 20.09.2001, the Law of Ukraine "On joining the WIPO agreement" "On execution and phonograms" of 20.09.2001.

² On the issue of the correlation between copyright law and the right for free access to information see: G. Schricker, *Urheberrecht Kommentar*, München, 2006. § 97. S. 1884-1885; D. Kröger, *Informationsfreiheit und Urheberrecht*, München, 2002. S. 136, where the author comes to the conclusion that in compliance with judicial practice of the European court in the process of setting limits to copyright law, the right for free access to information should be viewed as public good, and the member states of the EU are free to choose the actions in the process of setting such limits.

priority over copyright law"³. However, the argument on freedom of information is often mentioned to get "cheaper" access to the expressive work [8].

- The principle of cultural country specified in article 11 of the Constitution of Ukraine together with the obligation not to use property in prejudice of people and the society in compliance with paragraph 3 of article 13 of the Fundamental law are often understood as a task set before a legislator to provide access for everyone to the cultural heritage in the sense of "cultural provision of human existence" [4, 7].
- However, this constitutional principle presupposes the legislator's right to protect proprietary rights⁴ to provide for cultural variety.

Analysis of the history of establishment and development of copyright law gives us the grounds to claim that it was formed taking into account striking a balance between these interests by granting the authors (monopoly) exclusive rights for the created expressive work and specifying some exclusions to this monopoly, in other words – restriction of copyright law. Adolf Dietz writes that "the system of copyright law should be understood and comprehended as a balanced and extensive system of norms that correlates all these interests correctly", it "is based on five pillars or subsystems of copyright law as a whole, interdependence and correlation of which has to guarantee the balance of various interests related to copyright law"⁵ It would be plausible to

³ Thus, D. Kress mentions T. Hoeren and Y. Kleinke's point of view who consider it necessary to limit copyright law more in favour of free access to information, see: Daniel Kress, *Die private Vervielfältigung im Urheberrecht*, Hamburg, 2004. S. 96.

⁴A. Dietz views this obligation as evident to protect the rightsholder from economically more powerful users of the expressive work. See: Adolf Dietz, *Das Urhebervertragsrecht in seiner rechtspolitischen Bedeutung*, Festschrift für Gerhard Schricker, 1995. S. 1 (6)).

⁵Дитц А. Пять столпов системы авторского права и угрожающая опасность (official translation from German was made by S. Glotov) // In: Теорія і практика інтелектуальної власності. – 2006. – № 1. – P. 17.

Five-pillar model of modern copyright law according to A. Dietz: (i) material copyright law, (ii) associated rights, (iii) copyright contractual right, (iv) right of organizations on collective

mention that this system is in constant development trying to react to the challenges in the information society that often question the viability of monopoly and the resiliency of exceptions from it. A clear example are the debates going on presently (2007) in the EU on reforming copyright law⁶.

After the ubiquity of personal computers (including those used as copy devices) and the Internet (as a means of sharing information) the significance of setting limits to copyright law, esp. the right for personal copying, grew substantially as far as digital copies of the expressive work did not differ from the original unlike copies made in the analogue environment. Limitation of proprietary rights became the main stumbling point in the relations between rightsholders and consumers (users), its essence being the financial interest of both parties.

In general, technical innovations have long been applied to regulate the use of protectable expressive works. In the analogue environment, it included the protection of videotapes from copying, coding of PAY-TV-programmes, etc. These measures were not effective enough for the copies did not fully correspond to the original. However, everything changed significantly when it became possible to **digitalize** information.

It was significantly influenced by the Internet as a global decentralized network

that enables one to quickly and free of charge copy information in digitalized form. On the Internet, it is theoretically enough to request – Download – of a digital copy of an expressive work to make innumerable identical versions in a short period of time that are as good as the original and sometimes even better. In addition, it is quite natural that with the abundance of equipment of this kind copyright protection is of no use for in the majority of cases the use of expressive works by individuals is anonymous and virtually cannot be prevented.

As a result, authors and rightsholders started applying technical protective measures⁷ – computer software, equipment, etc. aimed at prevention of unauthorized access of users; the latter, in their turn, started inventing technical means allowing one to get around the rightsholders' protection.

At the same time, there is a new problem: technical protection measures do not see the difference between the users who have not obtained the right for use (copying) from the rightsholder, however, they have this right according to law (licence according to law) and other users not having the right for use (copying). In other words, the technical mechanism of copy protection does not take into account the limitations set by legislation. Moreover, in practice this mechanism is an effective measure of threatening to fight with bona fide use of legal restrictions on the technologically new ways to use expressive works⁸.

European Court of Human Rights (hereinafter – ECHR) repeatedly made a point that protection of the proprietary right as a fundamental right including the powers closely related to the intellectual property

management, (v) system of realization of rights. See details in the above-mentioned article.

⁶ See details in: Martin Senftleben, Christina Angelopoulos, Giancarlo Frosio, Valentina Moscon, Miquel Peguera, Ole-Andreas Rognstad, The Recommendation on Measures to Safeguard Fundamental Rights and the Open Internet in the Framework of the EU Copyright Reform: «Article 13 of the Proposed Directive on Copyright in the Digital Single Market¹ (DSMD) and the accompanying Recital 38 are amongst the most controversial parts of the European Commission's copyright reform package. Several Members States (Belgium, the Czech Republic, Finland, Hungary, Ireland, the Netherlands and Germany) have submitted questions seeking clarification on aspects that are essential to guarantee fundamental rights in the EU and for the future of the Internet as an open communication medium. The following recommendation urges European lawmakers – the Council and the Parliament alike – to consider these questions seriously. It offers guidelines and background information in the light of the jurisprudence of the Court of Justice...» Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3054967

⁷ Technical measures function in numerous ways. Thus, some expressive works are accessed by entering a code, others are transmitted in a coded regime. Copying control systems are based on additional information that helps determine a protected expressive work and whether a copy of the expressive work can be made according to some prerequisites.

⁸ A clear example is a precedent from American judicial practice: *Felten v. RIAA* (Nov. 28, 2001). Case No. 01 CV 2669. United States District, Court District of New Jersey, according to which RIAA threatened to sue Mr. Felten and his colleagues who had studied the weaknesses of the system of protection of digitalized music, elaborated within the framework of the SDMI programme, if the study was published.

right should be counterbalanced by the protection of other fundamental rights [23]⁹. This evident conflict testifies to complete non-availability of legislation on copyright law for effective regulation of these phenomena and practical absence of balance in the society between the interested parties concerning this issue. Pointing out this problem, Dreyer claimed, "digital technology and network deployment (Internet is meant here – G.S.) made piracy of protected expressive works much easier" [3].

At the same time, the provisions of articles 10, 11 of the WIPO agreement on copyright law provide for a three-stage test of the Bern convention (part 2 of article 9) that used in compliance with the Convention

⁹An interesting example is the resolution of the European Court of Human Rights of 19.02.2013 on the inappropriateness of the claim № 40397/12 *Frederik Neij and Peter Sunde Kolmisoppi*. In the same claim, a Swedish citizen Fredrik Neij and a Finnish citizen Sunde Kolmisoppi challenged the lawfulness of banning the *Pirate Bay* peer-to-peer network and their criminal prosecution. It is well known that this network used *Bit Torrent* to exchange files, thus infringing copyright law, in other words, it used a file hosting network. The claimants considered that criminal prosecution infringed their right for freedom of speech guaranteed by article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Analysing the claimants' argumentation, ECHR agreed that the right for freedom of search, obtaining and sharing information was infringed. The court also pointed out that in case of observance of authors' rights the restriction was set by law to protect the rights of other people in a democratic society where intellectual property is protected by article 1 of Protocol № 1 of the European convention. This approach is consistent and it is specified in all the rulings of the Court against member-states in favour of the rightsholders. Moreover, ECHR emphasized its principal position that real and effective protection of rights protected by this provision is not limited to the country's obligation to refrain from intervention, but also demands positive actions directed at protection (see, e.g. the case of *Öneryildiz v. Turkey*. No. 48939/99, ECHR 2004-XII). In doing so, the respondent state must strike a balance between the competing interests protected by the Convention. Under the circumstances, the state has more possibility for judgement. The Swedish authorities were obliged to protect the claimant's proprietary rights both according to the copyright law and the Convention. ECHR ruled that the character and the seriousness of responsibility are the factors that are to be taken into account while estimating the adequacy of state intrusion into the realization of freedom of speech. That is why in the *Pirate Bay* case ECHR ruled that imprisonment and reparation of damages to the claimants were adequate punishment for the committed offence.

only with reference to the right for presentation for all the rights provided for in this Agreement, and set three stages of protection in the digital environment:

- the first is based on the foundations of copyright law;
- the second is applied as a technological measure to protect against unauthorized access and use of object protected by copyright law;
- the third presupposes legal protection of second level measures of technological protection [19].

Therefore, we have come to the conclusion that "the answer for the machine is the machine itself" [1].

As far as the territorial (in the traditional sense) principle of protection of the majority of intellectual property objects cannot guarantee adequate (for modern realia) and effective protection of the rightsholders' interests for the results of creative activity, the legal regime of the expressive work in digital environment is significant. It is related to the fact that the definition and differentiation of the legal regime of an expressive work depending on the environment it is materialized in is of utmost importance from the point of view of the peculiarities of realization of the proprietary right. V.L. Entin claims that "the modern regime of copyright law should not only protect creative work, but also provide the widest possible access to it" [22, p. 21].

Proceeding from the general theoretical understanding of the term "legal regime" (taking into account all the disputable statements concerning this phenomenon), we consider it an important achievement of applying legal means to solve special tasks. It substantially depends on the choice of the optimal legal regime to solve a particular task, its skilful processing depending on the specific character of the task, and the subject matter of the relations to be regulated [9, p. 373-374].

A.A. Gorodov studied the general theoretical foundations of the category "legal regime" as a generic term in the process of defining the legal regime of intellectual property objects and interpreted it as an order of regulation expressed in a complex of legal means characterized by a special combination of interrelated authorizations, proscriptions, as well as positive obligations,

factual competence forming a special direction of regulation [11, p. 56]. It would be plausible to note that this category is rather flexible and is in constant development [13, p. 42].

Virtually all definitions of the "legal regime" refer in some way to typical objects, including those materialized in analogue environment. At the same time, objects of copyright law, in particular expressive works in digital form are *atypical* objects.

V.I. Zhukov studied atypical objects of intellectual property and made a point that the term "legal regime" should be used when we speak of the properties of material or spiritual objects that determine a person's behaviour – the subject of law where indispensable properties of, e.g. an object of information science (perceptible and non-perceptible by a human) should be called attributes (from Latin *attributio* – assign, impart). Removable properties that are only characteristic of objects in particular conditions – it is especially important to take them into account in the process of "movement of knowledge" from one object of information science to another (phase transition) – should be called modes (from Latin *Modus* – measure, method). Each object of information science has three planes, and the three objects of civil law will conventionally be designated by letters "A", "B", and "C". Letter "A" represents a material object of information science, in other words its tangible medium, e.g. a disk. Letter "B" represents a plane as a form of "knowledge" or a form of content of "knowledge". Letter "C" is an objective expression of this form – an expressive work. Mood peculiarities of this plane are represented by three kinds of information: social (human-human), social-technical (human-machine) and machine (machine-machine) [17, p. 191-197].

In this model of legal regime of atypical objects of intellectual property object "A" can be protected by filing a vindicatory action; object "B" needs a new institute of law [18, p.18]; object "C" can be protected on the basis of the principles of copyright law [15, p. 79-83].

If we apply the specified speculations to expressive works that are materialized in digital environment, then they, just like "C" group objects, can definitely be protected on the grounds of the principles of copyright law.

As far as an expressive work in digital form (i.e. materialized in digital environment) does not belong to objects, it is an expressive work as interpreted by the Law of Ukraine "On copyright law and related rights", thus, there cannot be a vindicatory action on this object and there is no need to create a new institute of law. However, if protection of expressive works in digital form is to be efficient, there is no doubt that one has to take into account the properties characteristic of expressive works in digital form that are materialized in digital environment.

Taking into account the above-mentioned facts, we suggest interpreting the legal regime of expressive works materialized in digital environment as the legislator's account of their particular objective *properties* and characteristics to which the law has to attribute specific legal consequences.

An expressive work by itself is a traditional object of civil law being the result of individual creative activity. However, an expressive work materialized via a digital environment, i.e. in digital form has certain characteristics that significantly differentiate it from an expressive work materialized via an analogue environment that is a typical object of civil law. Thus, it would be plausible to state that an expressive work materialized via a digital environment, i.e. presented in digital form is not a typical object that does not require "its own" institute of law. It should be mentioned that this position is substantiated at the level of the legal norm. Thus, e.g., according to the EU Directive "On harmonization of some aspects of copyright law and associated rights in the information society" № 2001/29/EC of 22.05.2001 the principle of the exhaustion of rights does not apply for an expressive work in digital form, unlike an expressive work in analogue form¹⁰.

The terms "digital environment", "digital form", as well as the term "environment" as such are not juridical and do not form the object of the science of law. Consequently, one should turn to researches and results of scientific studies whose authors specialize in a particular field of exact

¹⁰ See details on this issue in: Глотов С.О. До питання про вичерпання авторського права. Вичерпання авторського права в цифровому середовищі // Ін: Теорія і практика інтелектуальної власності. – 2006. – № 1. – Р. 26–37.

sciences. V.I. Zhukov states that the process of researching atypical objects requires solving a number of extralegal and legal issues that border on each other. From the point of view of formal logic, subjects of inquiry of this kind are called common as far as they intersect via a conceptual framework. These problems have not yet been expressed outwardly, have not yet been described in a form that would be easy to comprehend by specialists in the field of exact sciences and by civil law scholars alike [14, p. 132].

In other words, only after revealing and describing the properties expressive works in digital form objectively have, can one put forward and solve the issue whether the protection of the owners' rights for such expressive works is adequate or it would be relevant to restrict proprietary rights for the expressive works in digital form as compared to traditional objects of copyright law. Before we start revealing and describing these properties, let us stipulate that in the process of revealing the essence of the object of law, we are guided by the theory of the object – action whose supporters are Ya.M. Magaziner [20], V.I. Zhukov [16], A.H. Diduk [12] and others. This theory excludes property, other advantages and rights from legal objects and recognizes only another's action as an object of law as far as one can only claim another's action, not one's own.

V.I. Zhukov claims that such a differentiation of objects has a much "greater solving power" [14] than the application of the norms of law. However, if we interpret an object of law as only property or result of creative activity – invention, industrial sample (in our case it is an object of copyright law in digital form), then various rights will have the same object and that is legal nonsense [16, p. 13-21]. Correspondingly, an expressive work in digital form takes the place of property in the context of the chosen theory and can become the object of different laws, while rights can become elements of civil matters that have their own material and legal object, for instance, the "right" to grant access to an expressive work in digital form, in digital environment for a limited number of people. Moreover, the significance of this theory lies also in the fact that, according to V.I. Zhukov "it focuses our attention not so much on the tangible or intangible property as on its

properties that form the legal basis for particular obligatory actions of people, subjects of law" [14, p. 127–137].

If we adopt this theory as a major premise, and an expressive work in digital form, materialized in digital environment as a minor premise, under the condition that the properties of the expressive work are known, they might have particular legal consequences, we can determine what is to be included into the hypothesis and disposition of the norm of law that would specify particular obligatory actions of the subjects of law.

To determine the properties of expressive works materialized in digital environment one needs to compare them with those functioning in the analogue environment. It is well known that analogue environment is the environment of physical objects (phenomena) in the form of permanent characteristics (physical values). If we use this definition for the objects of copyright law, then in its traditional understanding an expressive work exists in the environment that is formed (built) by animate conscious subjects. When an expressive work is used in traditional (analogue) form, the subjects and the expressive work are in the same environment that is natural *prima facie* for the subjects. Perception of an expressive work in analogue form needs no mediators (machines) as far as it is recorded on hard (tangible) medium. Understanding of this kind is performed according to the scheme: subject – expressive work with no influence on the part of equipment and technology.

Doctors of technical sciences V.A. Gadasin and V.A. Kanyavskiy make a point that perception of an analogue document is based on visual thinking, interpretation of its content on the basis of knowledge, experience that has a subject cooperating with the document. Here the notion of information as knowledge, data is feasible and meaningful. However, the notion of coherence in the analogue environment of the document should be interpreted in a wide sense: visual thinking is intrinsically based on "similarity", "approximation" [10]. In other words, comprehension of an expressive work in analogue form is performed via a human mind that forms the basis for comprehension and recognition of images and allows one to

identify text components (elements) of the expressive work with the samples formed in the mind. Only a human can understand and adequately react to an expressive work in analogue form.

An expressive work materialized in digital environment can only be perceived by means of a machine. It takes place because technically digitization is presentation of an object in binary code form consisting of numbers 1 and 0 that is again transferred into "analogue form" for the purposes of perception of the object by a human [6]. Just like in the Morse code, there are set schemes for each letter, each sound, etc. consisting of the binary step – binary code – bit. Bit as a fundamental unit of information processing can go with either a "-" sign or a "+" sign. Bit with a "plus" sign transmits the information "and" or "correct" and is represented by figure "1". Bit with a "minus" sign transmits the information "no" or "incorrect" and is represented by figure "0". Eight bits make up one byte. Therefore, any expressive work can be processed and presented as a number of figures: 1 and 0. The only thing that differentiates such an expressive work from an expressive work presented in analogue form (let us specify it here once again) is that it can only be understood by means of a computer or another technical device capable of reading and understanding a binary code.

This digital binary code, unlike analogue transmission and storage, has a number of specific characteristics.

Exactness: digital environment and digital operations are characterized by exactness and coherence [10].

Logical perception and processing of an expressive work that is materialized via a digital environment: a machine can only read an expressive work with the help of software functioning on the basis of an algorithm with abstract, logical rules of the type: "If a, b, c are fulfilled, then A, B, C are true.

Common data format: the characteristic feature of digital equipment is that for the transportation and storage of information a corresponding data format is applied. Until recently, transmission of information media in analogue environment was in a state of specific type of information, but now at the digital age these borders are gone. "Bits of

all kinds of information can be combined to any taste" [5], consequently, now transmission of expressive works of any kind is possible by means of a corresponding information media. Common data format enables one to set convergence between such data and the equipment for their processing. This means that the equipment can be used for reading texts, watching films and playing music. Common data format also solves the issue of information transportation without a tangible medium by means of wired or wireless network. Phone cable, for example, is now not only a means of communication, but also a means of transmitting information of any kind. Something of the kind happens via a cable network aimed at transmitting a radio signal. Taking into account its structure, provided there is a communication feedback channel, it can also be used for telephony. Great innovation of recent years has been the spread of broadband internet nodes that help transmit extensive volumes of data via a telephone line, cable network, satellite, radio channel or electric cable.

Source coding Although literary expressive works (as texts) in analogue form require small volume of data – one page of typed text takes about 2KB, thus one CD-ROM may include a whole encyclopaedia, music and audio-visual expressive works require much greater volume. One digitized musical expressive work requires about 50Mb, digitization of a ten-minute video file in TV resolution without source coding would require at least 6.18 GB and that corresponds to 10 CD-ROMs. Source coding solves the issue of data transportation when it becomes necessary, solves the issue of data volume on the one hand, and enables a quicker access to transmitted information on the other. Here belongs data compression with practically no visible quality loss depending on the kind of information.

High-capacity memory (high-capacity storage medium) Winchester, CDs, DVDs, etc. are used to record expressive works in digital form on a tangible medium. This allows one to update saving of expressive works of various types on a particular medium. At the same time, the size of such media is not large. Thus, a medium of the size of a cigarette packet can store a whole library of books and can be accessed with the

help of a search software in a matter of seconds.

Therefore, a traditional expressive work (carbon copy) in analogue form and an

expressive work in digital form can only be compared under the condition that the machine (computer) is used as a "big typewriter".

Conclusion

Taking into account the above-mentioned facts, we can determine the following principal differences between an expressive work materialized in digital environment and an expressive work materialized in analogue environment that are systematic in character, are diametrically opposed, and asymmetric:

	Analogue environment	Digital environment
1	The environment handles the categories of similarity and approximation.	The environment handles the categories of coherence and exactness.
2	Two samples of the same expressive work are definitely different from each other.	Two samples of the same expressive work have no differences whatsoever.
3	Perception of an expressive work is instantaneous and complete.	Perception of an expressive work is consistent and fractionary.
4	An expressive work is perceived according to the scheme: person – expressive work.	An expressive work is perceived according to the scheme: person – machine – expressive work.
5	An expressive work is inherently static.	An expressive work is inherently dynamic (provided access is granted).

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