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Changes in legal regulation of rights in official works

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Abstract. *In the article the authors research changes in legal regulation of the rights in official works. classification of international instruments in the field of space law. The authors emphasize the differences in regulation of the rights in official works and offer their recommendations for their removal. The authors agree with the scientists on necessity to make amendments to the labour legislation in order to properly regulate the rights in official works. Separate attention is paid to the order of registration of labour relations with the employee as the author of official works.*

Keywords: *intellectual property, intellectual property objects, labour relations, author, official work.*

Problem statement

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.

The purpose of the paper.

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

The statement of basic materials. 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' 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].

Conclusion

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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