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RELATED RIGHTS OF PERFORMERS TO DIGITAL CONTENT: PROBLEMATIC ISSUES

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The article is devoted to the study of problematic issues related to the distribution of performers' related rights to digital content. The authors analyze certain categories of related rights objects in the context of extension of performers' property and personal non-property rights to digital content. It is determined that the protection of performers' property and personal non-property rights applies when their performance is digitally broadcast through the online platform of a digital content provider. In such a situation, the performer is entitled to remuneration from the supplier for the use of such performance. The same rule should apply to the use and distribution of previously unbroadcast performances recorded in phonograms or videograms. The author clarifies the legal status of phonograms and videograms as objects of related rights, since these objects can be directly converted into digital form and become the subject of agreements regulating the circulation of digital content.

It is established that in case of transformation of a phonogram or videogram into digital form by converting a primary signal of any type into a digital signal, such a derivative phonogram or videogram will be considered a digital copy and will lose additional protection of property and personal non-property rights of its producers in accordance with the terms of the digital content supply agreement. Based on the analysis of case law, the author establishes that when entering into a contract for the supply of digital content which is the subject of copyright and related rights on the Internet, the supplier is obliged to obtain permission to use such a protected object or pay an appropriate fee to an authorized person (author or owner of related rights) for any use of the work.

The author substantiates the need to improve the legislation in the field of copyright and related rights protection on the Internet by supplementing Article 1 of the Law of Ukraine «On Copyright and Related Rights» with provisions stipulating that in case of first-time recording of a phonogram or videogram in digital form, such recording will be considered digital content. It is determined that producers of phonograms and videograms are granted the exclusive right to use such works on the Internet. In the event that a phonogram or videogram becomes the subject of a digital content supply agreement, producers are subject to the protection of their property and personal non-property rights, with the possibility of compensation for damages in case of violation of these rights by the digital content provider.

Key words: digital content, related rights, copyright, intangible data, performers' rights.

Поперечна Г.М., Поперечний Ю.Ю. Суміжні права виконавців на цифровий контент: проблемні питання.

Стаття присвячена дослідженню проблемних питань поширення суміжних прав виконавців на цифровий контент. Авторами проаналізовано окремі категорії об'єктів суміжних прав у розрізі поширення майнових та особистих немайнових прав виконавців на цифровий контент. Визначено, що охорона майнових та особистих немайнових прав виконавців застосовується у випадку, коли їх виконання транслюється в цифровій формі через онлайн-платформу постачальника цифрового контенту. У такій ситуації виконавцю належить право на винагороду від постачальника за використання такого виконання. Те саме правило повинно застосовуватись стосовно використання та поширення зафіксованого у фонограмах чи відеограмах раніше не трансльованого виконання. З'ясовано правовий статус фонограми та відеограми як об'єктів суміжних прав, оскільки саме ці об'єкти можуть бути безпосередньо переведені у цифрову форму і ставати предметами договорів, які регулюють обіг цифрового контенту. Встановлено, що у разі перетворення фонограми чи віде-

ограми в цифрову форму шляхом конвертації первинного сигналу будь-якого типу в цифровий сигнал, така похідна фонограма чи відеограма буде вважатися цифровою копією і втратить додаткову охорону майнових та особистих немайнових прав її виробників відповідно до умов договору постачання цифрового контенту. На основі аналізу судової практики встановлено, що при укладанні договору на постачання цифрового контенту, який є об'єктом авторського права та суміжних прав в Інтернеті, постачальник зобов'язаний отримати дозвіл на використання такого охоронюваного об'єкта або сплатити відповідну винагороду уповноваженій особі (автору чи власнику суміжних прав) за будь-яке використання твору.

Обґрунтовано необхідність удосконалення законодавства в сфері захисту авторських та суміжних прав у мережі Інтернет шляхом доповнення ст. 1 Закону України «Про авторське право та суміжні права» положеннями, які визначають, що у випадку першочергового запису фонограми чи відеограми в цифровій формі, такий запис буде вважатися цифровим контентом. Визначено, що виробникам фонограм та відеограм надається виключне право на використання таких творів в Інтернеті. У разі, коли фонограма чи відеограма стає предметом договору постачання цифрового контенту, на виробників поширюється охорона їх майнових та особистих немайнових прав, з можливістю відшкодування шкоди у випадку порушення цих прав постачальником цифрового контенту.

Ключові слова: цифровий контент, суміжні права, авторське право, нематеріальні дані, права виконавців.

Statement of the problem. Due to the development of digital content technologies and streaming platforms, a number of legal issues arise related to the protection of copyright and related rights on the Internet. Of particular difficulty is determining the legal regime of related rights objects, in particular phonograms and videograms, when they are digitized and used through online platforms. The need to clearly regulate the property and non-property rights of performers and producers of such content objects becomes even more relevant in the context of streaming services, where digital copies of performances, recordings and videos can be distributed without appropriate licenses or approvals.

As of today, the legal status of phonograms and videograms converted into digital form is not clearly regulated by law, which gives rise to numerous legal disputes, in particular, regarding the rights to remuneration for the use of such digital copies. Given the absence of a unified legal approach to defining digital recordings as copyrighted content, there is a need to improve national legislation to ensure proper protection of the rights of performers and producers of phonograms and videograms.

Objective of the study. The purpose of this article is to analyze the legal status of digital copies of phonograms and videograms, to investigate the existing gaps in the legislation on the protection of related rights on the Internet, and to develop proposals for improving the legal framework in this area.

The state of development of the issue. The issue of copyright and related rights protection in the context of digital content and streaming platforms is the subject of active research among domestic legal scholars. In particular, Kravets V. and Czajkowska-Dąbrowska M. considered the theoretical and methodological foundations of legal protection of intellectual property in the digital environment and its importance for ensuring the rights of performers and content producers. The specifics of protecting the rights of performers, authors of phonograms and videograms on online platforms were studied by Barta J., Markiewicz R., Nowacka I., and a number of other authors.

However, despite a considerable number of studies, a number of important aspects of legal protection of related rights on the Internet remain insufficiently studied. In particular, the issues of the legal status of digital copies of phonograms and videograms, as well as determining the conditions for protecting the rights of performers in the case of broadcasting their performances via streaming platforms, require more detailed research. In addition, it is worthwhile to study in more depth the mechanisms for protecting the rights of content producers on platforms that do not provide adequate remuneration for the use of such works, as well as the need to improve legislation to effectively address these problems.

Presentation of the main material. Legislation in the field of intellectual property rights protection distinguishes between property and personal non-property rights of authors and their successors in title related to the creation and use of works of science, literature, and art - copyright and the rights of performers, phonogram and videogram producers, and broadcasting organizations - related rights [9]. As V. Kravets aptly notes, related rights are the rights to the results of creative activity of performers, phonogram (videogram) producers, broadcasting organizations, which are formed as a result of their use of copyrighted works (works of literature and art) [8, p. 99].

Ukrainian legislation does not contain a definition of the objects of legal protection of related rights, however, Article 35 of the Law of Ukraine «On Copyright and Related Rights» sets out a list of them. These include: performances of literary, dramatic, musical, musical-dramatic, choreographic, folklore

and other works; phonograms, videograms; broadcasts (programs) of broadcasting organizations.

The list of related rights provided for in the intellectual property protection legislation includes a key place for performances of works. It is worth noting that performances of works are granted legal protection, and therefore one of the prerequisites for the existence of protection is the performance of a work that is individual, original and creative in nature within the meaning of copyright and related rights legislation. As noted by A. Kopff a work may have a certain number of indefinite qualitative features directly added by its performer during the creative interpretation of the work aimed at creating appropriate emotions and impressions in the viewer [18, p. 41].

Another characteristic feature of performance protection is its performance by an actor (theater, cinema, etc.), singer, musician, dancer or other person who performs a role, sings, reads, recites, plays a musical instrument, dances or otherwise reproduces a work of literature, art or folk art, circus, variety, puppetry, pantomime, etc., as well as conducts musical and musical-dramatic works [9].

We agree with I. Yakubivskyi, who states that a public performance of a work by a singer, musician, dancer, circus performer, etc. is a creative interpretation of the work performed [14, p. 66]. That is why scientists consider it necessary to introduce the requirement of personal nature of the performance of the work and the performer's belonging to the category of artistic personnel [15, p. 121]. At the same time, performers are guaranteed protection of their property and personal non-property rights.

In the context of concluding digital content supply agreements, the exclusive right of performers to allow or prohibit other persons from publicly broadcasting their performances is of great importance. The protection of property and personal non-property rights of performers occurs in the case of streaming of such performances, which is carried out in digital form online, directly through the platform of a digital content provider. In this situation, the performer is entitled to remuneration from the provider for the use of such performance. The same rule should apply to the use and distribution of a previously unbroadcast performance recorded in phonograms or videograms.

It is essential for this research to clarify the legal regime of phonograms and videograms as objects of related rights, since they can directly acquire a digital form and be the subject of contracts for the supply of digital content. The legislator understands a phonogram as a sound recording on an appropriate medium (magnetic tape or magnetic disk, gramophone record, CD, etc.) of a performance or any sounds, except for sounds in the form of a recording, which is part of an audiovisual work [9]. The legislative definition of a phonogram tends to interpret it as a recording of sound made using analog signal recording technology. However, information and computer technologies make it possible to perform and store such a recording of a phonogram in the form of digital data, which in turn allows the phonogram to be classified as digital content [17, p. 100].

A similar construction can be found in the definition of a videogame, under which the national legislator understands a video recording on an appropriate material carrier (magnetic tape, magnetic disk, CD, etc.) of a performance or any moving images (with or without sound), except for images in the form of a recording included in an audiovisual work [9].

It is worth noting that, in accordance with the provisions of copyright and related rights legislation, both phonograms and videograms are source material for making their subsequent copies. Thus, the key argument for the possibility of classifying a phonogram or videogram as digital content is the technology of its first recording. Fixation of a phonogram or videogram in the form of a binary digital data record is a prerequisite for extending the legal regime of digital content to them. The above determines the existence of the exclusive property right of the phonogram or videogram producer to use such digital content and the exclusive right to authorize or prohibit such use by other persons [9]. That is, when concluding a contract for the supply digital content, the supplier will be obliged to obtain permission from the producer to use it.

If a phonogram or videogram acquires a digital form of expression by converting a primary signal of any kind into a digital signal, such a derivative phonogram or videogram shall be considered a digital copy and shall be deprived of additional protection of property and personal non-property rights of its producers under a contract for the supply of digital content.

It is worth noting that despite the existence of the definition of a phonogram and videogram producer in the legislation, there are many contradictions in the doctrine regarding the holder of property and personal non-property rights to phonograms and videograms. Pursuant to Article 1 of the Law of Ukraine «On Copyright and Related Rights», a phonogram or videogram producer is a natural or legal person who has taken the initiative and is responsible for the first video recording of a performance or any moving images (with or without soundtrack); sound recording of a performance or any sounds. The most controversial issue is the definition of the person who «took the initiative and is responsible». According to M. Tchaikovska-Dombrovska, a phonogram and videogram producer is a person who assumes the financial costs associated with the sound or video recording [16, p. 351].

In order to clarify this issue, we will try to analyze the case law related to the enforcement of property and personal non-property copyright and related rights on the Internet. Thus, in a case concerning copyright protection on the Internet, it is noted that posting works on the Internet in a form available for public consumption is their reproduction, and therefore they are subject to Article 15 of the Law of Ukraine «On Copyright and Related Rights», which determines the exclusive right of the author (or other person holding copyright) to authorize or prohibit the use of the work by other persons [10]. Thus, when entering into a contract for the supply of digital content that is the subject of copyright and related rights on the Internet, the supplier must obtain permission to use such a protected object or pay an authorized person (author, owner of related rights) a fee for any use of the work.

In our opinion, in order to improve the legislation in the field of copyright and related rights protection on the Internet, Article 1 of the Law of Ukraine «On Copyright and Related Rights» defining the concept of phonogram and videogram should be supplemented by adding a provision stating that in case of the first recording of a phonogram/videogram in digital form, such recording will be considered digital content. At the same time, producers of phonograms and videograms will have the exclusive right to use the work on the Internet, and if such a phonogram or videogram is the subject of contract for the supply digital content, its producers will be subject to protection of their property and personal non-property rights, and in case of their violation, compensation for damage by the digital content provider.

Ukrainian copyright law guarantees the protection of the exclusive property rights of broadcasting organizations to use their programs in any way, and the exclusive right to allow or prohibit other persons from: publicly announcing their programs by broadcasting and retransmission; recording their programs on a material medium and reproducing them; public performance and public demonstration of their programs in places with paid entrance [9].

As emphasized by I. Novatska, the broadcasting organization has the exclusive right to dispose of its own programs and use them. This provision should also apply in the case of recording (fixation) of programs, including with the use of digital technologies [19].

Similarly, to works, programs of broadcasting organizations are characterized by the individual and creative nature of the united group of their authors. An objective form of representation of the creative result of the activities of broadcasting organizations is the publication of programs and broadcasts of these organizations in a certain way, with the help of technical means [2, p. 9].

In the context of the research, it seems interesting to consider the issue of the mode of transmission by broadcasting organizations of both digital content that can be supplied to users in the form of streaming and digital recording available for viewing online and for downloading to a user's personal technical device.

We believe that the legal regulation of the protection of property rights to broadcasts (programs) of broadcasting organizations that are the subject of agreements aimed at the circulation of digital content should be carried out in the same way as the protection of copyrights to works. Namely, the supplier of broadcasting programs must obtain a license for their use and supply to other persons.

At the same time, we consider it necessary to exclude the extension of property copyrights to digital copies of broadcasts (programs) of broadcasting organizations stored in the memory of a user's personal technical device and used by the user for his or her own use.

The emergence and development of cloud storage technology, which allows users to create and edit their own digital content in the cloud (infrastructure as a service) using the supplier's software (software as a service), has led to the emergence of new legal relations between the supplier and user of these services. At the same time, the meaning of the term «service» used in the context of legal relations for the supply of digital content in a cloud data storage differs somewhat from the legally enshrined and doctrinally defined approach to it.

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Ukrainian legislation does not contain the concept of services, but the doctrine reveals its content through a number of characteristic features. Thus, scholars conditionally divide services into three main groups. The first includes services whose essence is manifested through activities [6, p. 16], the result of which does not receive material or embodied embodiment; and is reflected in legal consequences - the acquisition of rights

and obligations by the subject for which it is created [5, p. 487–489]; activities of a citizen or organization consumed in the process of its implementation, the product of which has no embodied expression [6, p. 41]; an action expressed in a specific useful result created by the work of a person (legal or natural), which is intangible (not material) in form, is not separated from the activity of its performer, and represents objectively achievable changes in the external world or the state of the subject [4, p. 9–11].

The second group includes services aimed at achieving a performance result. Its representatives understand services as the object of binding legal relations, which is a lawful action of the contractor aimed at achieving a certain result of an intangible nature, limited in time, and the consumption of which occurs at the time of its provision [12, p. 8], as well as such activities which necessarily lead to a certain result [3, p. 297].

The third group of scholars introduces the concept of service through an inseparable combination of activity and its result. They define a service as a result of an activity (when its consumption begins after its execution), as an activity itself, and as a combination of activity and result [3, p. 38]. Scientists refer to services initiated by an authorized entity and carried out on the basis of and in pursuance of a legal act, the activity of an entity aimed at meeting certain needs of its initiator, or at creating the necessary conditions and means for this [11, p. 145].

When analyzing the main criteria that distinguish the provision of services from other objects of civil rights, it is worth paying attention to the position of L. Ogieglo, who emphasizes that the concept of services does not include actions aimed at transferring ownership of property or the right to use this property to another person for a fee for a certain period of time. In this context, under a digital content supply agreement, the subject of such supply will be the transfer of digital content to the ownership or temporary use of another person, and digital content cannot be qualified as a service [20, p. 80].

A specific feature of digital content supply agreements is that its subject matter may take on a variety of external forms of expression. In some cases, it will be the development and production of digital content that is independent and long-lasting, while remaining in the form of a digital data record without a material form of expression.

It is worth noting that the initial Proposal for the Directive 2015/0287 on certain aspects concerning contracts for the supply of digital content also included digital services related to the creation, processing or storage in digital form of data received from a consumer and services for the distribution or other impact on digital data received from other users [21]. However, after numerous discussions of the draft by the European Commission, the definition of digital content was modified by distinguishing between the definition of digital content as data generated and delivered in digital form and digital services that allow interaction with such data [13, p. 163].

Conclusions. Analyzing the legal relations for the supply of digital content in the context of the current national legislation, we conclude that the contractual obligations of a digital content supplier differ from the obligations of a service provider. The mechanism of digital content supply is manifested in the provision of a «service» to the consumer by automated software, and the obligation to develop and maintain it is imposed on the supplier. Although the automated transfer of digital content does not exclude the possibility of qualifying the supplier's actions as a service, in our opinion, taking into account the purpose of the contract, namely, obtaining digital content in a manner that allows the recipient to use it on demand under any conditions, the subject of the digital content supply contract will be the digital content itself, and all other actions performed by the supplier to transfer digital content to the user are auxiliary.

Thus, digital content is a new and unique object of civil law. By applying the technique of legal fiction, it is advisable to extend the legal regime of a thing to legal relations related to its circulation. In addition, given the creative activity of the author and performer of digital content, it is necessary to obtain a license for its use when entering into agreements under which it is circulated.

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