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The Exercising of Intellectual Property Rights by Some Categories of Natural Persons

The output of intellectual activity (literary and artistic works, computer programmes, inventions, industrial designs, varieties of plants etc) and facilities of individualisation (commercial names, trademarks and geographical indications) are important determinants of economic and cultural development of modern societies. It seems therefore necessary to provide an effective legal mechanism of exercising and protecting intellectual property rights. In this article we shall discuss some problems related to the subjects (persons) exercising intellectual property rights under civil legislation of Ukraine.

First of all, it should be noted that each civil right is vested in a definite subject (subjects), so that, as a rule, they are exercised through the actions of the entitled subject (subjects). This applies to intellectual property law. In accordance with Article 421 of the Civil Code of Ukraine (hereinafter: C.C.U.)¹, the subjects of intellectual property rights are: a creator (author, performer, inventor etc) of intellectual property object and other persons, who have acquired the moral and (or) economic intellectual property rights by law or by contract². Article 421 C.C.U., however, does not contain any statutory definition of the term ‘subject of intellectual property rights’. For this reason it seems justified to give some academic definitions of this term elaborated in the civil law doctrine.

In this respect, N.Myronenko claims that a person who holds the moral and (or) economic intellectual property rights should be regarded as a subject of an intellectual property right³. Another point of view is advocated by E.Kharitonova

¹ Цивільний кодекс України від 16.01.2003 р. // Відомості Верховної Ради України. – 2003. – №№ 40–44. – Ст. 356.

² The term “intellectual property rights” can be employed in two meanings – wide and strict. In a wide sense, the intellectual property rights include all rights for the results of intellectual activity and facilities of individualization, such as non-property (moral) rights and property (economic) rights (art. 418 C.C.U.). In strict sense, this term concerning to property (economic) rights only. In this article we use *mutatis mutandis* the term “intellectual property rights” in last meaning.

³ Суб’єкти цивільного права / За заг. ред. Я.М.Шевченко. – Х.: Харків юридичний, 2009. – 632 с. – С. 477.

who distinguishes between subjects of intellectual property law in an objective sense, i.e. persons who are capable of becoming parties to intellectual property relations, and subjects of intellectual property rights in a subjective sense, i.e. persons who have already acquired these rights, as well as persons who have to perform their duties not to interfere with exercising of the rights by an entitled person⁴.

With regard to the legal basis for acquisition of intellectual property rights, the subjects can be divided into the primary and secondary ones. The first group includes subjects of intellectual property rights, who have acquired their status as a result of creation or registration of rights to the object of intellectual property rights. The other group includes subjects of intellectual property rights who have not created anything by themselves, but have acquired intellectual property rights in official order, by statute or by contract⁵.

As it has been noted that we are going to focus on intellectual property rights of economic character and, as a rule, can be an object of legal transactions (they possess trade ability). Thus, the holders of these rights and, as a result, the subjects of their exercising can be primary subjects (author, performer, producer of phonogram etc) and secondary subjects (successor of an inventor, publisher who has acquired the intellectual property rights by contract etc).

When discussing the issue of exercising of the intellectual property rights, an important role is to be attached to the category of the civil capacity of a person. It is obvious that each subjective right can be exercised only by its subject, who enjoys a sufficient volume of civil capacity⁶. According to Article 30 C.C.U., the civil capacity of a natural person is his ability to acquire civil rights for himself and to exercise them by his actions, to create civil duties for him, to execute them and to bear liability for their non-fulfillment. In civil law literature several points of view as to the content of civil capacity are presented.

Widely spread is an opinion that the basic elements of civil capacity are transaction ability, i.e. person's ability to make a deal, and delictual ability that is an ability to bear civil liability⁷. Similarly, O.Yoffe included to the content of civil

⁴ Харитоновна О.І. Правовідносини інтелектуальної власності, що виникають внаслідок створення результатів творчої діяльності (концептуальні засади): монографія. – Одеса: Фенікс, 2011. – 346 с. – С. 170.

⁵ Суб'єкти цивільного права / За заг. ред. Я.М.Шевченко. – Х.: Харків юридичний, 2009. – 632 с. – С. 477–486.

⁶ Грибанов В.П. Осуществление и защита гражданских прав. – М.: Статут, 2000. – 411 с. – С. 48.

⁷ Веберс Я.Р. Правосубъектность граждан в советском гражданском и семейном праве. – Рига: Зинатне, 1976. – 229 с. – С. 124; Суб'єкти цивільного права / За заг. ред. Я.М.Шевченко. – Х.: Харків юридичний, 2009. – 632 с. – С. 83–84.

capacity the following elements; the ability to acquire new rights and duties, the ability to exercise own rights and duties, the ability to bear liability for the torts⁸.

However, in modern juridical literature a broader interpretations of the notion of civil capacity is represented. According to R.Stefanchuk, civil capacity encompasses an ability to acquire, exercise, change, terminate and renew civil rights and duties⁹. An even broader understanding of civil capacity of natural person is espoused by O.Kharitonov and E.Kharitonova, who propose to break down the discussed notion into the following abilities: 1) the ability to make a deal (transaction ability); 2) the ability to bear liability (delictual ability); 3) the ability to make the last will (ability of testation); 4) the ability to authorize a representative (representation ability); 5) the business ability; 6) the matrimonial ability; 7) the author's (creativity) ability¹⁰.

It is interesting to note that according to the latter point of view the civil capacity expressly includes the "author's (creativity) ability". In this aspect E.Kharitonova notes that author's (creativity) ability is a capacity of natural person in the realm of intellectual property law¹¹.

Although such an interpretative approach to the content of civil capacity is relatively new and reveals some scientific interest, we think that there are insufficient grounds for regarding the "author's (creativity) ability" as an element of civil capacity. In the C.C.U. there is a fixed single term "civil capacity", which has an over-arching character, i.e. it is applicable to all branches of the civil law in the variety of its diverse institutions, including intellectual property law.

The intellectual property objects can be results of intellectual activity of minors, as well as of persons with a limited civil capacity and of the incapacitated persons. In this respect the question arises as to what extent the mentioned categories of natural persons can exercise their intellectual property rights by themselves. Article 31 C.C.U. sets forth that a natural person under the age of 14 enjoys the right to exercise the personal non-property rights to the results of intellectual, creative activity, protected by law. At the same time, in accordance with Article

⁸ Иоффе О.С. Избранные труды: В 4 т. Т. II. Советское гражданское право. – СПб.: Юридический центр Пресс, 2004. – 511 с. – С. 120.

⁹ Стефанчук Р.О. Особисті немайнові права фізичних осіб у цивільному праві (поняття, зміст, система, особливості здійснення та захисту): Монографія / Відп. ред. Я.М.Шевченко. – Хмельницький: Вид-во Хмельницького ун-ту управління та права, 2007. – 626 с. – С. 151–152.

¹⁰ Харитонов Є.О. Цивільні правовідносини: Монографія / Є.О.Харитонов, О.І.Харитонова. – 2-ге вид., перероб. і доп. – Одеса: Фенікс, 2011. – 456 с. – С. 81–82.

¹¹ Харитонова О.І. Правовідносини інтелектуальної власності, що виникають внаслідок створення результатів творчої діяльності (концептуальні засади): монографія. – Одеса: Фенікс, 2011. – 346 с. – С. 174; Харитонова О.І. Деякі проблеми визначення творчоздатності фізичної особи у віці до 18 років // Актуальні проблеми цивільного, сімейного та міжнародного приватного права (Матвєєвські цивілістичні читання). Матеріали міжн. наук.-практ. конференції, Київ, 10 листопада 2011 р. – К.: Алерта, 2012. – 432 с. – С. 77–78.

32 C.C.U., a person aged between 14 to 18 years has the right to exercise all rights to the results of intellectual, creative activity, protected by law.

From these legislative provisions it is to be inferred that a person under the age of 14 may exercise solely personal non-property rights to the results of their intellectual activity, whereas the ability to exercise property rights with respect to these objects appears upon the completion of 14 years. Precisely this interpretation of Articles 31 and 32 C.C.U. has been represented in the Ukrainian legal literature¹².

However, for example, according to E. Kharitonova, the legal capacity of the persons less than 14 years of age with respect to creative output has a rather passive character; to a large extent it remains within the scope of the ability to exercise copyright by other persons specified by law¹³. The provisions of Article 31 C.C.U. regulating the possibility of persons under the age of 14 of exercising personal non-property rights to the results of intellectual activity are also criticised by some other Ukrainian writers¹⁴. Nevertheless, the subject-matter of our analysis covers just the same intellectual property rights, so we can say that the verbal interpretation of Article 31 and 32 C.C.U. suggests that the capacity to exercise intellectual property rights is vested in persons who have reached the age of 14. The question remains; what the rationale underlying such legislative regulation?

In this respect it should be emphasised that the exercising of intellectual property rights may consist in the factual or juridical actions. As E. Kharitonova rightly notes, the exercising of intellectual property rights does not always require to conclude a contract or to make other legal transaction¹⁵.

As far as the juridical actions (authorising for the use of intellectual property object by license contract or other forms of disposition of intellectual property rights) are concerned, it is understandable that a person under the age of 14 cannot

¹² Науково-практичний коментар Цивільного кодексу України. – Вид.2, змін. і доп. / За ред. В.М.Коссака. – К.: Істина, 2008. – 992 с. – С. 27–28; Цивільний кодекс України. Постатейний коментар у двох частинах. Частина 1. / Кер. авт. кол. та відп. ред.. проф. А.С.Довгерт, проф. Н.С.Кузнєцова. – К.: Юстініан, 2005. – 680 с. – С. 43–44; Ромовська З.В. Українське цивільне право. Загальна частина: Академічний курс: Підручник. – 2-ге вид., допов. – К.: Алерта; КНТ; ЦУЛ, 2009. – 594 с. – С. 245; Суб'єкти цивільного права / За заг. ред. Я.М.Шевченко. – Х.: Харків юридичний, 2009. – 632 с. – С. 476.

¹³ Харитонова О.І. Правовідносини інтелектуальної власності, що виникають внаслідок створення результатів творчої діяльності (концептуальні засади): монографія. – Одеса: Фенікс, 2011. – 346 с. – С. 176–177; Харитонова О.І. Деякі проблеми визначення творчоздатності фізичної особи у віці до 18 років // Актуальні проблеми цивільного, сімейного та міжнародного приватного права (Матвеевські цивілістичні читання). Матеріали міжн. наук.-практ. конференції, Київ, 10 листопада 2011 р. – К.: Алерта, 2012. – 432 с. – С. 78.

¹⁴ Гарєєв Є.Ш. Правова охорона винаходів: автореф. дис. ... канд. юрид. наук: 12.00.03; Одеська нац. юрид. академія. – Одеса, 2007. – 20 с. – С. 12.

¹⁵ Харитонова О.І. Правовідносини інтелектуальної власності, що виникають внаслідок створення результатів творчої діяльності (концептуальні засади): монографія. – Одеса: Фенікс, 2011. – 346 с. – С. 179–182.

perform such actions because of the insufficient degree of civil capacity. However, the matter related to the possibility of the factual actions remains unsolved. So, among the intellectual property rights there is a right to make use of an object (Article 424 C.C.U.). Using the object of intellectual property has the factual nature, because it does not entail any legal effects.

For instance, let us assume that a 10 - year- old pupil wrote a poem and, as a result, acquired moral and property copyright with respect to it. Can he or she declaim this poem at a school competition for young talents? The public performance of a poem before a school audience undoubtedly is one of the manners of using the intellectual output (Article 441–442 of C.C.U., art.15 of Ukrainian Copyright and Related Rights Act (U.C.R.R.A.)¹⁶). Thus, drawing on provisions of Article 31 C.C.U., a person under 14 cannot exercise a public performance of work created by them, because that action falls within the ambit of exercising of intellectual property rights. We do not think it is an appropriate legal solution.

When trying to answer the question as to the possibility of a person under 14 to exercise their intellectual property rights, not only the character of rights at issue (personal, non-property (moral) rights or the property (economic) ones), but also the nature of action aiming at exercising them should be taken into account. Concerning the using the object (the factual action), there is a reason for recognising that a person younger than 14 years should have a possibility to carry out such action by themselves. In turn actions of a legal character (authorising for using of an intellectual property object by license contract or other forms of disposition of intellectual property rights) have to be performed by their legal representative (parent, adopter or guardian).

According to Article 32 C.C.U., a person aged between 14 and 18 has the right to exercise all rights with respect to results of their intellectual, creative activity, protected by law, including the right to dispose of intellectual property rights without the consent of their statutory representative. Not only does such a person enjoy the right to use of object on their own, but also, for example, he or she is allowed to issue public license for using their work, such as Creative Commons, to conclude a license contract (Article 1109 C.C.U.) or a contract on transfer exclusive intellectual property rights (Article 1113 C.C.U.).

At the same time we are of the view that a person aged between 14 and 18 cannot conclude the contract on creation by request and using intellectual property object (Article 1112 C.C.U.). Certainly, according to Article 32 (1) C.C.U., such person can exercise the rights to the results of intellectual, creative activity, protected by law, since this norm refers to exercising of rights, which already exist. In contrast, by the contract on creation by request and using intellectual property

¹⁶ Закон України “Про авторське право і суміжні права” від 23 грудня 1993 р. в редакції закону від 11 липня 2001 р. // Відомості Верховної Ради України. – 2001. – № 43. – Ст. 214.

object, a creator (writer, painter etc) undertakes an obligation to create the object. Thus, at the moment of conclusion of this contract, the object does not exist yet, so intellectual property rights do not exist either. Therefore, a person at the age between 14 and 18 years can conclude the contract on creation by request and using intellectual property object only upon the consent of their statutory representatives (Article 32 (2) C.C.U.).

The rule enshrined in Article 32 (1) C.C.U. does not apply to the contracts on collective management of the copyrights and related rights (Article 48 U.C.R.R.A.). Such contracts have a legal character of a mandate contract¹⁷. Thus, a conclusion of a contract on collective management of the copyrights and related rights does not refer to exercising of these rights. So, in accordance with Article 32 C.C.U., a person aged between 14 and 18 years can exceptionally enter into a contract on collective management upon a consent of their legal representative.

Furthermore, the discussed category of legal persons between cannot dispose of the intellectual property rights by will. The capacity of testation is vested in persons with full civil capacity and the right to make the will is to be exercised personally (Article 1234 C.C.U.). Therefore, unlike the two previous situations, a person aged 14 to 18 years cannot dispose of the intellectual property rights by a will even upon a consent of concord their statutory representatives.

The view has been expressed in the civil law literature that there is a need to differentiate between rights of persons aged between 14 to 18 years to exercise the rights to the results of intellectual, creative activity on the one hand, and the right to dispose of income that they receive as a result of exercising of intellectual property rights, on the other¹⁸. Such differentiation is plausible, because a right to dispose of a salary, stipend or other income is positioned as a separate element of the limited civil capacity (Article 32 C.C.U). The royalty is a kind of income and persons between 14–18 years enjoy a right to dispose it on their own. On the other hand, Article 32 (5) C.C.U. provides that a court can restrict a right of such person to dispose of their income or deprive the of this right. The quoted norm undoubtedly applies to the royalty received by a minor.

In connection with provisions of Article 31 and 32 C.C.U the question arises of what results of intellectual, creative activity of the minor are meant there. Do

¹⁷ Якубівський І.С. Про юридичну природу договорів між організаціями колективного управління і суб'єктами авторського права та суміжних прав // Теорія і практика інтелектуальної власності. – 2013. – № 5. – С. 25–31.

¹⁸ Харитонов О.І. Правовідносини інтелектуальної власності, що виникають внаслідок створення результатів творчої діяльності (концептуальні засади): монографія. – Одеса: Фенікс, 2011. – 346 с. – С. 179; Харитонов О.І. Деякі проблеми визначення творчоздатності фізичної особи у віці до 18 років // Актуальні проблеми цивільного, сімейного та міжнародного приватного права (Матвєєвські цивілістичні читання). Матеріали міжн. наук.-практ. конференції, Київ, 10 листопада 2011 р. – К.: Алерта, 2012. – 432 с. – С. 79.

these provisions refer only to output created by a minor in question or do they extend to any other rights (including the rights acquired on derivative grounds – by a contract, inheritance etc)? Some writers are of the opinion that minors do not have a right to exercise all intellectual property rights for the objects, created by other persons without the consent of their statutory representatives¹⁹.

One has to take into account that that Articles 31 and art.32 C.C.U. do not contain a provision according to which the minors' right to exercise the intellectual property rights refer solely to objects created by themselves. However, we are of the opinion that in this case the verbal interpretation of these provisions is not sufficient.

Article 31 C.C.U. endows a person under the age of 14 the possibility to exercise the personal non-property rights to the results of intellectual, creative activity, protected by law. In accordance with Article 423 C.C.U., personal non-property intellectual rights are vested in a creator (author), unless any other rule is specified by law. Civil legislation of Ukraine regulates the circumstances, when other persons, beside the author, can protect some personal non-property rights after his death (Article 439 (2) C.C.U., Article 29 (2) U.C.R.R.A.). These exceptions, however, are not applicable to the persons under the age of 14 years. This category of persons has therefore a right to exercise the personal non-property rights for the results of their own intellectual activity.

The same interpretation should be employed with regard to the provisions of Article 32 C.C.U. regulating the possibility of a person aged between 14 to 18 years to exercise the rights to the results of their intellectual, creative activity, protected by law. The rules stipulated in Articles 31 and 32 C.C.U. are based on the fact that persons younger than 18 years of age can exercise creative activity and acquire a status of an author with respect to the output of such activity. Therefore, the purpose of these legislative provisions is to confer to minors a possibility of exercising relevant intellectual property rights to the results of their own creative activity. The same regulation is contained in another provision of Article 32 C.C.U., which give to a person aged 14 to 18 years the right "to dispose of his own salary".

Taking into consideration the above remarks, we propose the following amendments to Article 31 and 32 C.C.U.:

– Article 31 paragraph 4 of part 1 could be formulated as follows:

“2) to exercise the personal non-property rights to the results of intellectual, including creative, activity, protected by law, and to use such results by oneself.”;

– Article 32 paragraph 3 of part 1 could be formulated as follows:

“2) to dispose of the intellectual property rights to the results of intellectual, including creative, activity, protected by law, by oneself”.

¹⁹ Гареев Є.Ш. Правова охорона винаходів: автореф. дис. ... канд. юрид. наук: 12.00.03; Одеська нац. юрид. академія. – Одеса, 2007. – 20 с. – С. 12.

As far as natural persons whose civil capacity has been limited by court are concerned, one has to take into account the following provisions :

- 1) Such person can make the small domestic deals only (Article 37 (2) C.C.U.);
- 2) The deals concerning the disposition of assets and legal transactions outside of the scope of small domestic ones can be made by such persons upon the consent of their statutory representative (Article 37 (3) C.C.U.).

Basing on the definition of a “small domestic deal” (Article 31 C.C.U.), we assume that the contracts on disposition of intellectual property rights are not covered by this concept. First of all, these contracts do not aim at satisfying the domestic needs of the person at issue. In addition, their subject – the intellectual property rights – ar by no means of a low value. Therefore, a natural person who has a limited civil capacity cannot make any transaction on disposition of intellectual property rights without obtaining the consent of their statutory representative.

In this respect, E.Kharitonova has concluded that a natural person whose civil capacity is limited, has a degree of “author’s ability”, that is to be regarded as an “intermediate” ability situated between the ability of a person under the age of 14 years and the ability of a person aged between 14 and 18 years. This person can exercise the moral rights for the results of intellectual, creative, activity, protected by law; besides, such person can make the deals upon the consent of his representative, receive income deriving from the exercising of intellectual property rights and dispose of such income upon the written consent of their representative²⁰.

In general, when agreeing with this opinion, we would like to note that a natural person whose civil capacity is limited enjoys also a right to use the object of intellectual property. For example, a singer, who has a limited civil capacity, can perform the songs created by themselves at concerts, music festivals or contests without the representative’s consent.

The incapacitated persons do not have a right to make any legal transactions. Their legal representative is empowered to perform all that deals on behalf of them (Article 41 C.C.U.). Therefore, such a person cannot conclude contracts or make other deals on disposition of intellectual property rights. At the same time, E.Kharitonova emphasised that Article 41 C.C.U. is not applicable to cases of the complete deprivation of civil capacity, but incapacitated person lose transaction ability and delictual ability. Since the exercising of intellectual property rights not always entails a conclusion of a contract and making other deals. the incapacitated persons possesses some volume of author’s ability²¹.

²⁰ Харитонова О.І. Правовідносини інтелектуальної власності, що виникають внаслідок створення результатів творчої діяльності (концептуальні засади): монографія. – Одеса: Фенікс, 2011. – 346 с. – С. 182.

²¹ Харитонова О.І. Правовідносини інтелектуальної власності, що виникають внаслідок створення результатів творчої діяльності (концептуальні засади): монографія. – Одеса: Фенікс, 2011. – 346 с. – С. 182.

To sum up, it should be noted, that opportunities of the natural persons who have not full civil capacity in relation to the exercising of their intellectual property rights depend on the character of such exercising. In cases where exercising of intellectual property rights takes a form of factual actions (using an object), it is to be assumed that all of the mentioned categories of persons are equally entitled to their performance. In turn, when intellectual property rights are to be exercised by means of legal actions (authorising the use of an object by license contract and other forms of disposition of such rights), the corresponding entitlements differ depending on the degree of the capacity to undertake legal actions.. The natural persons whose civil capacity is limited, can dispose of their intellectual property rights upon the consent of their statutory representatives. The disposition of the intellectual property rights vested in persons under the age of 14 or in the incapacitated persons entirely remains within the ambit of powers of their representatives.

Wykonywanie majątkowych praw własności intelektualnej przez niektóre kategorie osób fizycznych

Streszczenie

W artykule poddano analizie problematykę regulacji wykonywania majątkowych praw własności intelektualnej, przysługujących osobom niepełnoletnim, osobom posiadającym ograniczoną zdolność do czynności prawnych, w tym osobom ubezwłasnowolnionym, w ustawodawstwie Ukrainy. W odniesieniu do sytuacji gdy wykonywanie majątkowych praw własności intelektualnej przybiera postać działań faktycznych (eksploatacja przedmiotu praw), należy przyjąć, że działania te mogą być podejmowane samodzielnie przez wszystkie wymienione kategorie osób fizycznych. Z kolei gdy chodzi o realizację majątkowych praw własności intelektualnej poprzez czynności prawne (wydanie zezwolenia na eksploatację przedmiotu twórczości intelektualnej oraz inne przypadki rozporządzania tego rodzaju prawami), wówczas zakres posiadanych uprawnień jest różny w zależności od rodzaju zdolności do czynności prawnych. Samodzielnie wykonywać czynności dotyczące majątkowych praw własności intelektualnej mogą wyłącznie osoby pełnoletnie. Osoby fizyczne z ograniczoną zdolnością do czynności prawnych mogą natomiast wykonywać czynności dotyczące majątkowych praw własności intelektualnej jedynie za zgodą ich ustawowych przedstawicieli. Kwestia rozporządzenia majątkowymi prawami własności intelektualnej, przysługującymi osobom poniżej czternastego roku życia oraz osobom ubezwłasnowolnionym, całkowicie pozostaje w sferze uprawnień przedstawicieli ustawowych.

Słowa kluczowe: wykonywanie majątkowych praw własności intelektualnej, osoba fizyczna, zdolność prawna, eksploatacja przedmiotu praw własności intelektualnej.

Exercising of intellectual property rights by some categories of natural persons

Summary

The article discusses the regulation of the problems related to the exercising of intellectual property rights vested in persons lacking of the capacity to perform legal actions, persons with a limited capacity to undertake legal actions and the incapacitated persons. In cases where exercising of intellectual property rights takes a form of factual actions (using an object), it is to be assumed that all of the mentioned categories of persons are equally entitled to their performance. In turn, when intellectual property rights are to be exercised by means of legal actions (authorising the use of an object by license contract and other forms of disposition of such rights), the corresponding entitlements differ depending on the degree of the capacity to undertake legal actions.. The natural persons whose civil capacity is limited, can dispose of their intellectual property rights upon the consent of their statutory representatives. The disposition of the intellectual property rights vested in persons under the age of 14 or in the incapacitated persons entirely remains within the ambit of powers of their representatives.

Key words: exercising the intellectual property rights, natural person, civil capacity, using of an object of intellectual property.