Protection of the phonogram producer as a factor in sustainable development

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Abstract. The purpose of this paper is to define the essence of the phonogram producer in the context of sustainable development. The paper uses methods of analysis and the comparative legal method. It has been argued that the phonogram producer has the right to conclude a licensing agreement and not to transfer the physical medium containing the phonogram. However, the medium itself is analogous to the "tradicio" known in Roman law. Thus, it is justified that, under this approach, intellectual property in the form of phonograms would circulate faster and a higher volume of transactions may have a positive impact on economic growth, which is one of the goals of sustainable development.

1 Introduction

The sustainable development of the law and the economy predetermines the need to use the latest technology.

One of the main goals of sustainable development is economic growth. It is impossible to imagine economic growth without the introduction of innovation. The literature reasonably points out that innovation is largely dependent on both domestic and international intellectual property [1].

As noted by the World Intellectual Property Organisation, innovation has evolved over the past 100 years due to a wide variety of technologies [2]. Thus, new technologies make a significant contribution to the development of innovation.

The legal regulation of intellectual property objects is of great importance for the development of technology. Without intellectual property protection, the creation of innovation would be unprofitable and potentially useless. Intellectual property law protects intellectual property from copying, theft, illegal use, and other unlawful dissemination of the results of someone else's intellectual work.

Intellectual property law, or IP law, as it is currently understood, began to emerge much later than other areas of civil law. Intellectual property law itself emerged as a result of technological advances. Its first part, copyright, translated into legal form one of the main human needs - the need for creativity.

Later on, a new area of intellectual property law emerged: the rights akin to copyright.

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The institute of neighbouring rights (neighbouring rights, related rights) has appeared comparatively recently, only in the XX century, in connection with the development of the international legal regulation, namely with the adoption of the Convention for the Protection of Performers, Producers of Phonograms, and Broadcasting Organisations of 1961. [3].

Neighbouring rights in the (objective sense) is a civil law institute which governs the legal relations pertaining to neighbouring rights objects expressly named and characterized as such in the law. Neighbouring rights (subjective sense) are intellectual rights, on objects of related rights, which are expressly named and characterized in the law as such [4].

Despite the relative "youth" of neighbouring rights, their list differs from one country to another, which is a characteristic feature of this institution. However, as a rule, all States of the Romano-Germanic family of law recognise phonograms as objects of neighbouring rights.

Some terminological differences exist in common law countries where the term "phonogram" has been replaced by "sound recording" (5).

The phonogram is a striking example of an object of rights, the protection of which is established in order to support the efforts of the so-called "producers" who have contributed organisationally and economically to its creation.

In the Russian Federation, in accordance with the provisions of article 1308 of the Russian Civil Code, the phonogram's producer has the right to grant another person the right to use the phonogram under a licensing agreement. Often, when the exclusive rights of such a licensee are infringed, procedural opponents refer to the lack of proof of the status of the rights holder. As a result, jurisprudence faces the problem of identifying the producer of the phonogram, the rights holder and the analysis of the licensing agreement.

Most often, neighbouring rights to a phonogram are designed to protect commercial investments. N.V. Buzova fairly writes that "related rights protect not the personal, creative contribution (exceptions include performances) to the creation of the result of intellectual activity, but the contribution which is of organizational, technical and economic nature" [6]. Indeed, the professional participants translate the results of their activities into the field of intellectual law largely in order to protect the funds invested in the creation of the phonogram.

The International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (1961), the first international instrument regulating rights in phonograms, has adopted the approach that the criterion of primacy of the recording should be taken into account to recognize a person as a phonogram producer. A phonogram producer is defined as a citizen or a legal entity who first records the sounds of a performance or other sounds.

A development of this approach may be found in the 1996 WIPO Performances and Phonograms Treaty [7], whose Article 2 defines a phonogram producer as a natural or legal person who takes the initiative and bears the responsibility for the first recording of sounds of a performance or other sounds, or representations of sounds.

In the context of international regulation, it should be noted that parallel to the acts of the World Intellectual Property Organization (WIPO), Trade-Related Aspects of Intellectual Property (TRIP) is developing in parallel and other acts have been adopted. However, in spite of the fact that the TRIP acts are becoming more and more significant, including in the context of the status of the phonogram producers, the WIPO acts remain the leading ones [8].

The chronology of the international regulation of the status of phonogram producers thus begins in 1961 (Figure 1).
Fig. 1. Chronology of the international regulation of the producer status of phonograms. Main stages.

It should be noted that Russian law in this regard is largely related to international instruments, as the definition of the producer of a phonogram is based on the primacy of the recording. In accordance with Article 1322 of the Civil Code of the Russian Federation, the phonogram producer is the person who took the initiative and responsibility for the first recording of the sounds of a performance or other sounds or representations of those sounds. That is, the definition of the producer of a phonogram is effectively the same as in the WIPO Performances and Phonograms Treaty (1996).

It is noted in the foreign literature that such an approach is typical and that in most States, the definition of a phonogram producer differs in form but not in substance. Common in the definition of the producer of a phonogram in various legislations is the fact that it is understood as a natural or legal person who first fixes the sound of a performance or other sounds [9]. Therefore, the main feature of the producer of a phonogram should be understood to be precisely the fact that he was the first to record the sound in question.

As the status of the phonogram producer is in relation to the first recording of the sound, it is important how the relation of the person to the first recording of the phonogram is proved. In Russian law, there is a presumption of authorship of the phonogram's producer. By virtue of article 1322 of the Civil Code of the Russian Federation, in the absence of evidence to the contrary, the rule applies, according to which the producer of a phonogram is the person whose name or title is indicated in the usual manner on a copy of the phonogram and/or its packaging, or in some other manner.

This presumption is sometimes referred to as being similar to the presumption of authorship since, in accordance with Article 1257 of the Civil Code of the Russian Federation, the presumption of the author of a work applies to the person identified as the
author on the original or a copy of the work or otherwise in accordance with Article 1300, paragraph 1 of the Civil Code of the Russian Federation.

In practice, a number of non-trivial problems arise. In particular, is it necessary, when concluding a licencing agreement, to transfer also a physical medium, which will reflect the name of the phonogram's producer? If the licence agreement does not include the relevant physical medium as an annex, will such a transaction be valid?

Obviously, plaintiffs often have to prove their status as the owner of the phonogram, where the phonogram producer or his heirs do not prevent such use of the object of related rights. Sometimes, case law does not recognise a person as possessor of rights when an agreement has been concluded between him or her and the producer of the phonogram without transferring a copy of the phonogram. Such a high standard of proof negatively affects the ability to protect the rights of a bona fide owner, while the wrongdoer is unjustifiably afforded additional protection. The importance of protecting the rights of phonogram rightsholders lies in the role they play in all traffic.

Science and practice agree that "in phonogram rights cases, the plaintiff must prove that he or she owns the neighbouring rights" [10], to prove the status of the right holder. In this connection, special attention should be paid to the ways in which a person can prove the existence of exclusive rights to a phonogram, what the standard of proving the relevant status is.

The actual judicial practise on the matter is quite diverse. Moreover, a peculiarity of such disputes is evident in the competence of the courts which hear them. Without dwelling in detail on the issue of courts' competence, it should be noted that this problem has been studied in detail by D.A. Lepeshin [11].

2 Materials and methods

The Civil Code of the Russian Federation expresses the position on the essential terms of the contract in Article 421 of the Civil Code of the Russian Federation. According to Article 421 (1) of the Civil Code, a contract is deemed to have been concluded if the parties have agreed on all the essential terms of the contract in the form required by law.

Substantial are conditions on the subject matter of the contract, conditions that are named in the law or other legal acts as essential or necessary for contracts of this type, as well as all those conditions on which an agreement must be reached at the request of one of the parties.

It appears that the condition in the licencing agreement concerning the transfer of the tangible medium containing the object of related rights cannot be regarded as essential, without which the agreement is not concluded, unless either party has stated so.

The Civil Code of the Russian Federation describes the content of the licencing agreement in detail. Article 1235 of the Civil Code of the Russian Federation lists the essential conditions of the contract. Moreover, Chapter 71 of the Civil Code of the Russian Federation contains a special norm on the licencing agreement on granting the right to use the object of related rights.

None of these regulations refers to the need to transfer the tangible medium of the object of related rights. The systematic interpretation of Part 4 of the Civil Code of the Russian Federation does not allow to conclude that the condition of the transfer of a tangible medium is mandatory (essential).

Consequently, a licence agreement on the transfer of exclusive rights to a phonogram cannot be regarded as unconcluded on the grounds that the parties did not agree on the need to transfer the tangible medium with the phonogram.
3 Results

As such, the transfer of a medium containing the object of related rights can be viewed through the prism of the "Tradicio", a method of transfer known in Roman law.

According to this concept, a person transferred a certain symbolic object confirming the transfer of rights to this or that property. For example, if the keys to the warehouse were given to the recipient, this act constituted sufficient action to make the recipient the owner of the contents of the building or the owner of the building and the contents, depending on the intention of the parties (12). Thereby a symbolic object confirmed that a person who had a certain amount of rights transferred a part of those rights to another person together with a symbol of that transfer.

Obviously, this legal mechanism was designed primarily for the transfer of rights in an object, whereas rights in a phonogram are of an intangible nature. In Roman law there could not have been such a mechanism for the transfer of intellectual rights, since there was no intellectual property right in the present sense of the word. Nevertheless, it seems that the legal construction of "Tradicio" itself can be adapted to the relevant legal relationship.

A tangible carrier with a phonogram is not identical to a phonogram. Moreover, a tangible medium does not indicate any rights in the phonogram. Put simply, the tangible carrier merely attests ownership of that very tangible carrier and not the existence of any exclusive right. Consequently, the object may be used as a symbol of the existence of rights in a phonogram.

It would seem that, since neighbouring rights, being intellectual rights, are of an intangible nature, the transfer of the relevant tangible object associated with the object of the neighbouring right is the transfer of a symbol of the relevant exclusive right. Which, in fact, does not exclude the possibility of transferring rights on the basis of a licensing agreement without the transfer of a tangible medium containing the information.

It should be noted that the name of the producer of a phonogram may be indicated not only on a tangible medium, but also expressed in digital form.

The possibility of recording the name of the producer of a phonogram reflects the public demand for protection of rights in the context of digitalization. The rapid development of digital technology has been of concern to phonogram rightsholders since the end of the last century. Producers of phonograms, for example, have demanded that collecting societies in Europe adapt their rights to the rapid development of digital distribution [13].

The importance of protecting the rights of phonogram rightsholders lies in the role they play in the whole traffic. Their role in the production of music seems to be vital for the consumption and enjoyment of music by the public at large.

It seems possible and legitimate to transfer a tangible medium containing objects of neighbouring rights in a way other than that set out in the licensing agreement.

Civil law is based, inter alia, on the recognition of equality of participants in the relations regulated by it and freedom of contract. Citizens (natural persons) and legal entities acquire and exercise their civil rights of their own free will and in their own interests. They are free to establish their rights and obligations.

This shows that, insofar as the procedure for the transfer of the material medium is not strictly regulated by law, the parties are free to determine any procedure for performance under the contract. If the parties have agreed on one method of performance, e.g. by sending the phonogram to an e-mail address, and the phonogram is transferred to a hard disk during performance, the contract shall be deemed to have been duly performed if the contracting party consents to the change in the method of performance and accepts such performance without complaint.

If, however, the parties have agreed on a particular way of transferring the material medium of the object of related rights and in the process of performance the licensor transfers the material medium in a different way in the absence of the consent of the counterparty,
there is a clear violation of the principle pacta sunt servanda as a necessary condition of any social society [14].

In other words, a change in the manner in which the contract is performed is permissible if the parties to the contract agree. To do otherwise would be contrary to basic principles of civil law.

Thus, it seems reasonable that there is no need to transfer a tangible medium containing a phonogram in the case of a contract for the transfer of rights to it. Moreover, such an approach would accelerate civil circulation and reduce its regulation.

It has been proven in the literature that less regulation of the intellectual property market leads to increased economic performance [15], thus achieving economic growth as a factor of sustainable development.

This conclusion is based, among other things, on the fact that the value of intellectual property is manifested in the creation of intellectual property by a variety of economic and legal actors [16]. Thus, the simpler the rules on the circulation of intellectual property, the better the economic effect will be produced.

4 Conclusions

In proposing a solution to the problem in question, the following significant conclusions can be drawn:

1. First of all, the name or title of the producer of a phonogram may be indicated not only on a tangible medium but also in digital form. The relevant conclusion is based on a literal interpretation of the law and is the State's response to the general development of digitalisation. Such an indication may include, for example, mentioning the name or title of the phonogram producer in the metadata of an electronic file.

2. It seems possible and lawful to transfer a tangible medium containing objects of neighbouring rights in a manner other than that set out in the licence agreement, provided that both parties have expressed their will to do so. Where the will to perform an obligation in a manner different from that in the licence agreement emanates only from one of the parties, such performance cannot be regarded as proper.

3. It seems that the condition in the licensing agreement to transfer the tangible medium with the object of related rights cannot be regarded as essential, without which the agreement is not concluded.

4. The transfer of a tangible medium under a licence agreement granting the right to use a phonogram is a modern analogue of the Roman "Tradicio". By transferring a tangible medium containing a phonogram, a person expresses his or her will to transfer the relevant rights to the intangible object.

An appropriate approach would allow the transfer of intellectual property rights in phonograms to proceed significantly faster and to achieve economic growth, which is one of the goals of sustainable development.

References

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