DOI: https://doi.org/10.14505/jarle.v7.5(19).20

Difficulties of Differentiating between Intellectual Property Rights and Human Rights on the Basis of the Case-Law Research Report 'Internet: Case-Law of the European Court of Human Rights'

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Suggested Citation:

Rozhkova, Marina Alexandrovna (2016). Difficulties of Differentiating between Intellectual Property Rights and Human Rights on the Basis of the Case-Law Research Report 'Internet: Case-Law of the European Court of Human Rights', *Journal of Advanced Research in Law and Economics*, (Volume VII, Fall), 5(19): 1136 – 1141, DOI: 10.14505/jarle.v7.5(19).20. Available from: http://www.asers.eu/journals/jarle/jarle-issues.

Article's History:

Received August, 2015; *Revised* September, 2016; *Accepted* September, 2016.

Acknowledgements

The work was carried out with funding from the Ministry of Education and Science of the Russian Federation as part of the state R&D project No. 1865.

Abstract

The article analyzes the problem of non-obvious difference between Human Rights and Intellectual Property Rights which often hinders their proper enforcement and protection. Methodological tools for the study are represented by a set of interrelated methods, techniques and methodologies. Elaboration depth of the posed scientific problem is provided, in particular, by such method of cognition as diachronic and synchronic comparison. The main idea of this article states that it is necessary to identify the demarcation line to distinguish between the abovementioned rights, which would enable proper implementation and protection of the rights of the parties concerned. Considering their high economic value and relation to the property issues, Intellectual Property Rights (as a part of economic rights) can be classified as 'Property', according to Art. 1 of Protocol No. 1 to the Convention on Human Rights and Fundamental Freedoms. However, moral rights, dealing with the realization of the creative potential and the personality of the Intellectual Property creator, are not recognized as 'Property' and are not protected by Art. 1 of Protocol No. 1 to the Convention on Human Rights and Fundamental Freedoms. In some cases, they can obtain protection under other provisions of the Convention (e.g. Article 10).

Keywords: intellectual property rights, economic rights, moral rights, property, human rights.

JEL Classification: K10, K11, K33.

Introduction

The category of Intellectual Rights emerged at the end of the XIX century. But experience shows the concepts of Intellectual Property Rights and Human Rights are not always clearly distinguished. This sometimes makes it difficult for the interested parties to protect these rights fully and effectively. Due to the above it is necessary to identify the grounds for the distinction between Intellectual Property Rights and Human Rights, paying attention to the relationship between

the human rights system and intellectual property regimes. Careful study of the nuances and implications of the intersection of human rights and intellectual property rights provides the basis for determining the direction of further development of the national intellectual property rights, and for identifying institutions in need of reform. The studies of the scientific problem of interrelations and differences of human rights and intellectual property regimes, taking into account interdisciplinary nature of the research, contribute to the formation of holistic scientific knowledge in the chosen subject. In addition, they enrich the existing system of knowledge about human rights (the science of public international law), on the international intellectual property system (the science of private international law), on the national intellectual property law (civil law).

1. Concept headings

In 1879, Belgian lawyer E. Picard singled out a separate group of intellectual property rights (*jura in re intellectuali*) that lay beyond the classical division into proprietary, liability and personal rights. E. Picard proceeded from the fact that intellectual property rights are quite different from others, primarily due to the fact that they are comprised of two elements – *moral* (related to the authorship, non-proprietary) and *economic* (proprietary) (Lipszyc 2002).

This approach was applied, for example, in Art. 27 (2) of The Universal Declaration of Human Rights (UDHR), which states that: 'Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author'.

This division is still used: *Intellectual Property Rights* are traditionally divided into *moral rights* and *economic rights*. Therefore, The World Intellectual Property Organization (WIPO) generally considers *moral rights* as existing 'exclusive rights of an economic character' (WIPO Intellectual Property Handbook: Policy, Law and Use 2008).

Unfortunately, Russian legal experts could not give an accurate description of which rights should be classified as *moral rights*, and which – as *economic rights*. This resulted in a situation when the Civil Code of the Russian Federation considers not two, but three groups of *Intellectual Property Rights*, which is implied in Art. 1226 of the Civil Code that reads as follows: 'For the results of intellectual activities and the means of individualization qualifying as such (the results of intellectual activities and means of individualization) intellectual rights are recognized as including an exclusive right deemed a property right, and also in the cases specified by the present Code, personal non-property rights and other rights (artists resale right, right of access and others)'. The explanation of this situation, perilous for law enforcement practices, was considered in the earlier papers (Rozhkova 2016).

In addition to that, one should note the following. Having analyzed the relationships between *Human Rights* and *Intellectual Property*, experts arrived at different conclusions that could be classified into three groups (Helfer and Laurence 2011). The researchers of the first group focus on the historical roots of two systems – *Human Rights* system and *Intellectual Property* system, trying to relieve tensions generated by the intersection of these systems (Torremans 2004, Yu 2007, Shaver and Sganga 2009). The second group of scholars aims to balance *Intellectual Property* and *Human Rights* in order to revise the imperfect mechanisms of intellectual property used in national legislations that aim to protect the rights of persons who are not rights holders – customers, potential rights holders and public in general (Srowel and Tulkens 2005; Hugenholtz and Okediji 2008). The third group of legal experts claims it is necessary to use the system of *Human Rights* for the maximum protection of *Intellectual Property*, and they refer to the fundamental rights and freedoms as a trump card in the protection of *Intellectual Property Rights* (Geiger 2006, Raustiala 2007).

In this article we will analyze the issue of non-obvious difference between *Human Rights* and *Intellectual Property Rights* which often hinders the proper enforcement and protection of these rights.

2. Discussion

The Convention on Human Rights and Fundamental Freedoms (hereinafter – the Convention) establishes quite an extensive range of fundamental rights. At the same time, in the context of evolutive (dynamic) interpretation of the Convention given by The European Court of Human Rights (hereinafter – ECtHR), these rights acquire new content, and the sphere of their effect is extended.

There is an obvious similarity between *Human Rights* (here we can mention, for example, *Right to respect for private and family life (Article 8), Freedom of thought, conscience and religion (Article 9), Freedom of expression (Article 10)*) and *moral rights*. Their common features are the following:

(1) the lack of any economic (proprietary) content, and they are not evaluated in monetary terms;

(2) they are directly linked with the personality of the right holder, so they cannot be transferred or alienated in any other way, or rejected (terminated);

(3) they are abridged by one condition which states that the exercise of these rights by one person should not violate the rights of another person.

At the same time the abovementioned rights are fundamentally different at least in one important aspect – the moment of the accrual of these rights. A person has *Human Rights* from birth, whereas *moral rights* occur at the moment of intellectual property creation and are a kind of subjective civil rights of non-proprietary nature.

Economic rights (as opposed to *moral rights*) fall within the scope of the Convention, since due to their proprietary nature they are included into the '*property*' category whose boundaries were significantly extended by ECtHR when interpreting the provisions of Art. 1 of Protocol No. 1 to the Convention (Mincke 1997).

With reference to the above mentioned, it should be noted that the basic provision, which subsequently formed the basis of all case law in relation to 'property' was formulated by the ECtHR back in 1995 in the case of *Gasus Dosier - und Fördertechnik GmbH v. the Netherlands*. The judgment in the case indicated that the concept '*possessions*' used in Art. 1 of Protocol No. 1 to the Convention has a specific meaning which is certainly not limited to the ownership of tangible objects. The concept of '*property*' used in Art. 1 of Protocol No. 1 to the Convention, according to the ECtHR, denoted not only things in their traditional sense, but also some other rights and interests constituting '*assets*' which can be regarded as '*property rights*' and, therefore, as '*property*' (Rozhkova and Afanasiev 2015).

For example, the case of *Smith Kline and French Laboratories Ltd. v. the Netherlands* contained a reference to the fact that the concept of '*property*', as stated in Art. 1 of Protocol No. 1 to the Convention, applies to patents (which confirm the exclusive rights of the patent holder to an invention, utility model, etc.). Another example of the ECtHR broad interpretation of the concept of '*property*' was the case of *SC Editura Orizanturi SRL v. Romania*, where the ECtHR found that Art. 1 of Protocol No. 1 to the Convention covered the right of publication – the right that not all national legislations recognize as the '*property right*'.

In this research we analyzed Section IV 'Internet and Intellectual Property' of the case-law research report 'Internet: case-law of the European Court of Human Rights', prepared by the ECtHR Research Division (hereinafter – Section IV of the Report).

Intellectual Property Rights are listed in Part (A) of Section IV with reference to the Convention Establishing the World Intellectual Property Organization. It states that the authors obtain, firstly, *moral rights*, and, secondly, *economic rights*, which allows them to benefit from the result of their intellectual activity.

However, in the same Part (A) of Section IV of the Report *moral rights* of the author are defined as the right to communicate the work and to grant the permission to use and reproduce it.

This seems a very disputable interpretation as *moral rights* are generally understood primarily as the author's right to demand recognition of his authorship and to prevent any distortion or non-approved changes in the work that could affect the honor and reputation of the author.

In turn, the rights to use the work as well as the rights to the work (including the license to use and reproduce it, etc.) are classified as *economic rights*. It is these rights that allow authors to benefit from the results of their creative work, which is justly pointed out in the beginning of Part (A), and which, in fact, enables to differentiate between moral and economic rights.

Vague differentiation between *moral rights* and *economic rights*, found in Part (A) of Section IV of the Report led to the following error. When analyzing the case of *SC Editura Orizonturi SRL v. Romania,* the right to publish the novel translation, which is the right to use the work, *i.e.* an *economic right*, was incorrectly attributed to *moral rights* (see Part (B) of Section IV of the Report). The authors of the Report failed to notice the fact that The ECtHR itself in the resolution on the case admitted that the cancellation of the final court judgment that acknowledged the legality of publication of the novel translation led to violation of the applicant's property right, guaranteed by Art. 1 of Protocol No. 1 to the Convention.

Part (B) of Section IV of the Report (subsection 'Moral rights') announced consideration of these rights. However, all cases considered in this part, which, as it might seem, were to illustrate the legal positions on *moral rights* formed by the ECtHR do not actually consider these.

For example, the case of *A.D. v. the Netherlands* had another focus, not *moral rights*. The applicant in this case reported the interception of the correspondence addressed to a third party which violated the *Right to respect for private life* (Art. 8 of the Convention). The complaint regarded the violation of *Intellectual Property Rights* of the author of the letters. However, it was the question of violating not *moral rights*, but *economic rights* (Art. 1 of Protocol No. 1 to the Convention). It should be mentioned that at the end of the proceedings the complaint was rejected as manifestly ill-founded.

In the case of *Editions Plon v. France* the applicant company appealed to the ECtHR with a complaint against the domestic courts' ban on distribution of the book that contained information relating to the late head of state and which

was not to be disclosed on the basis of doctor-patient confidentiality. This, according to the applicant, violated *Freedom of expression* (Art. 10 of the Convention). One of the arguments was that the total ban on the distribution of the book stemmed from the fact that the removal of links that violated doctor-patient confidentiality would deteriorate the book's content, distorting it. However, the applicant pointed out that partial censorship under the *Code de la propriété intellectuelle* of France interferes with the author's right to the inviolability of the work. After reviewing the case, the ECtHR found that the respondent state violated *Freedom of expression*. However, since the reference to the violation of *moral rights* was used by the applicant company only as an argument and was not in itself the subject of the appeal, it is not possible to say the ECtHR formed its position on this case.

The case *Akdaş v. Turkey* contained an appeal against the criminal prosecution of the publisher who had published the Turkish translation of the novel by Guillaume Apollinaire 'Onze mille verges' (1907) that contained descriptions of scenes of sexual intercourse with elements of sadomasochism, necrophilia and pedophilia. As in the previous case, it concerned the violation of *Freedom of expression* (Art. 10 of the Convention). Pointing out that this work belongs to the European literary heritage, the ECtHR found a violation of the applicant's right to freedom of expression. In this case the question of the violation of *moral rights*, being part of *Intellectual Property Rights*, was not and could not be subject of examination, as most legal systems attribute *moral rights* to only the author of the work (the writer), but not to the person using the product (in this case, the publisher).

The next case, examined in Section IV of the Report, was the case of *Peck v. the United Kingdom*. In this case, the applicant appealed against granting films shot using street CCTV cameras to the media, which resulted in the publication and dissemination of his image with a knife in his hand. According to the applicant, it infringed his *right to respect for private life* (Art. 8 of the Convention). The issue of *moral rights* in the context of *Intellectual Property rights* was not raised in this case either.

At the end of Part (B) of Section IV of the Report there was a description of the ECtHR hearing the case of *K.U. v. Finland*, where the Court found a violation of *right to respect for private life* (Art. 8 of the Convention) since the Internet service provider did not supply the confidential information about the user of the Internet communication services, when it concerned the pursuit of a minor by pedophiles in the Net. Like in previous cases, the issue of *moral rights* was not raised.

Thus, the subsection 'Moral rights' Part (B) of Section IV of the Report lists cases, the subject of which was not *moral rights* themselves.

Another weak point of the report is the fact that it examined the cases considering not *Intellectual Property*, but the other '*property*'. For example, Part (B) of Section IV of the Report featured the case *Megadat.com SRL v. Moldova*, which focused on such 'property' as a license for the provision of ISP services. In its complaint to the ECtHR, the applicant company pointed out that it was unreasonably revoked a license for the provision of ISP services, which ultimately led to the closing up of the business (despite the fact that when the license was revoked the applicant company was the largest Internet Service Provider in Moldova). After the hearing of the case the ECtHR concluded that when revoking the license for the ISP services provision, the authorities of the respondent state did not apply fair and consistent policies, which led to the violation of the applicant's right to 'property', guaranteed by Art. 1 of Protocol No. 1 to the Convention. However, issues related to the violation of *Intellectual Property rights* were not considered in that case.

Conclusion

Summing up, we can say that despite the undeniable positive impact of the research reports prepared by the Research Division, inaccurate or even wrong interpretations of legal positions set out in the case-law of the ECtHR obviously do not promote the understanding of the profound conclusions that can be found in the Courts judgments. When translating the report into another language, this inaccurate interpretation may even worsen.

This, in turn, can have a serious negative impact not just on understanding of the Convention provisions, but also on the application of the ECtHR legal positions for the development of national legislation. This is particularly important in case of intellectual property law, whose evolution is associated with a number of difficulties.

Therefore, we believe, a more balanced approach should be applied when presenting relevant legal practices formed by the ECtHR.

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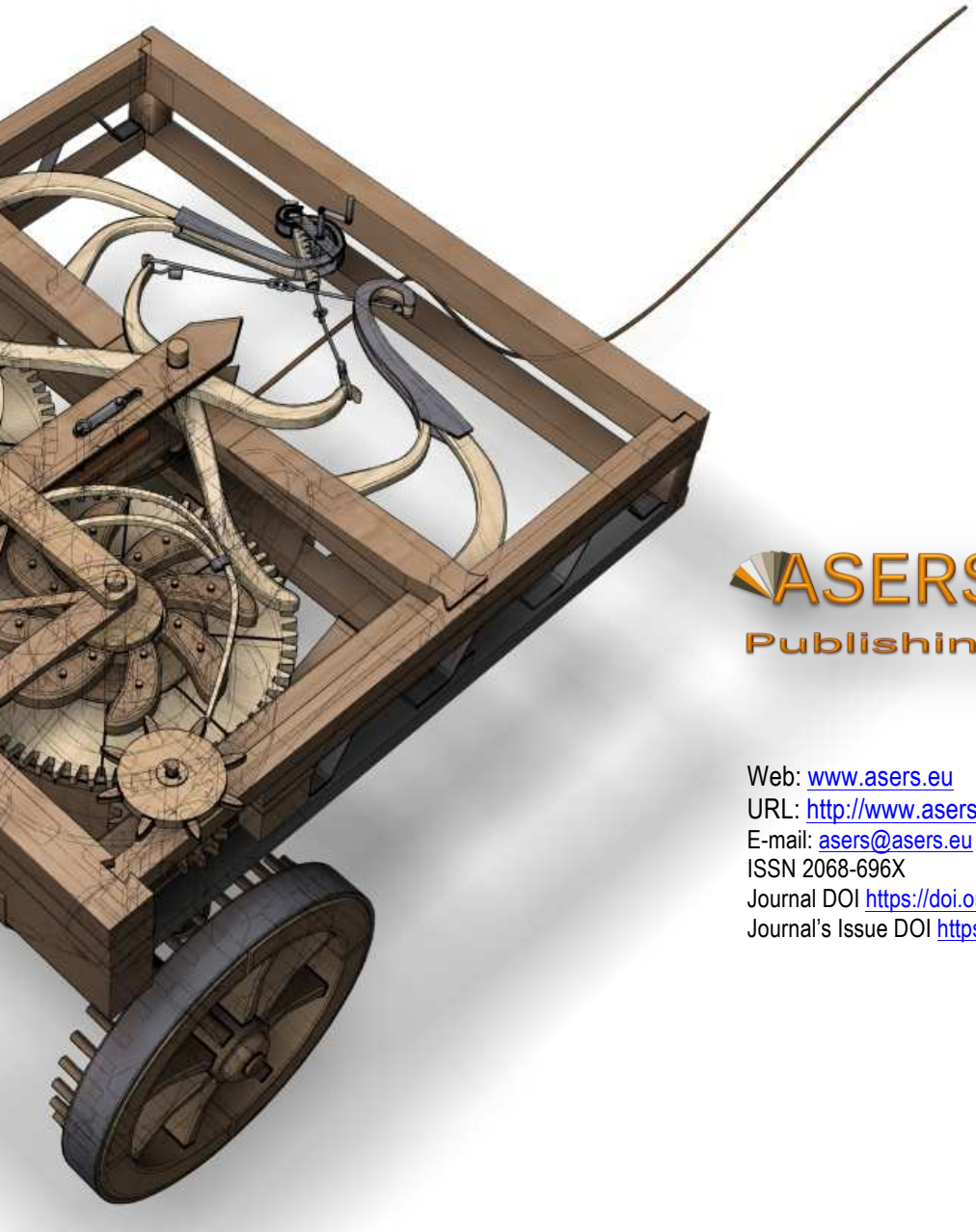

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