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Intellectual Property and Intellectual Rights: Issues of Correlation

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The article examines the legal nature of intellectual property and intellectual rights according to international, Russian and Kazakhstani intellectual property law and establishes the differences between them. The former one as a set of intangible objects (literary, artistic and scientific works, performances, phonograms, broadcasts, inventions, etc.) reflects their abstract (non-material) matter. They are just created, but not able to be granted, held, divided, restricted, transferred, terminated, etc. It is noted that not all of them are protected, but those which are end-listed in national law of a particular country in accordance with the rules of international law. Depending on the types of intellectual rights to be granted (moral or/and economic rights), objects of intellectual property can be divided into two groups: the results of intellectual activities and equated to them means of individualization of legal entities, goods, work, services and enterprises. Unlike intellectual property, intellectual rights (copyright and related rights, patent rights, etc.) are legal rights, which in virtue of law provide for a lot of legal possibilities and can be shared among different individuals and legal entities, enjoyed by them, transferred to third parties and thus applied in transactions. Especially it concerns an exclusive (economic) right, which is granted over any object of intellectual property, and it includes two main legal possibilities for its holder: to use the object in any legitimate manner and to dispose of this right.

Keywords: Intellectual property law, Intellectual property, intellectual rights, moral and exclusive rights, Berne Convention, Civil Code of Russian Federation, Civil Code of Kazakhstan

Intellectual property and intellectual rights are key categories of both international and national intellectual property law. They are often equally and simultaneously used so that they may be considered synonymous. Especially it seems to be true after addressing to Article 2(viii) of the Convention Establishing the World Intellectual Property Organization 1967, which clearly defines that intellectual property shall include the rights relating to: literary, artistic and scientific works, performances of performing artists, phonograms, and broadcasts, and all other rights resulting from intellectual activities in the industrial, scientific, literary or artistic fields.[1] That is probably why that the issue of correlation of such terms has not been paid with due attention in the legal literature.[2] However, as it will be argued *infra*, they must be distinguished that allows highlighting the specifics of the legal regulation of implementation and enforcement of intellectual legal rights granted upon objects of intellectual property.

Intellectual Property in International Intellectual Property Law

The modern international intellectual property law has no unified understanding of the legal matter of intellectual property yet. For example, from the one hand, the Convention Establishing the World Intellectual Property Organization 1967, as it was shown *supra*, defines intellectual property throughout rights resulting from intellectual activities in the industrial, scientific, literary or artistic fields. Such approach is found in many books on international intellectual property law, in which the authors usually invoke that provision of the Convention.[3] On the other hand, Article 1(2) of the Paris Convention for the Protection of Industrial Property 1883 refers to the objects of protection of industrial property, such as patents, utility models, industrial designs, trademarks, service marks, trade names, indications of source or appellations of origin, and the repression of unfair competition.[4] They are usually mentioned for the protection, but not duly defined yet. Article 5 *quinquies* of the Paris Convention is a good example for that. It contains just one sentence: "Industrial designs shall be protected in all the countries of the Union".[4] As a result it is presumed that the appropriate protection be guaranteed on the national level.

If we look at conventions for the protection of particular objects of intellectual property, we can find some legal definitions and provisions for them as well

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as intellectual rights upon them. They are usually described in separate articles indicating the different nature of intellectual objects and rights. For example, Berne Convention for the Protection of Literary and Artistic Works 1886 applies the expression "literary and artistic works", which include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatic or dramatico-musical works; choreographic works and entertainments in dumb show; musical compositions with or without words; cinematographic works to which are assimilated works expressed by a process analogous to cinematography; works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works to which are assimilated works expressed by a process analogous to photography; works of applied art; illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science.[5] A lot of other articles are devoted to the description of different legal rights granted upon such works to authors by the Berne Convention. In particular, according to Article 8 of the Convention, authors of literary and artistic works protected by this Convention shall enjoy the exclusive right of making and of authorizing the translation of their works throughout the term of protection of their rights in the original works.[5] Thus it may be concluded that the Berne Convention makes a difference between a work and a lot of rights granted by the Convention. Such an approach is deemed to be more accurate and to be applied in intellectual property law.

In addition it should be noted that the present international intellectual property law expressed in the form of a lot of treaties on intellectual property does not stipulate the full clear system of all the objects of intellectual property nor their possible classification. The reason is probably related to the most important role of national, rather than international, intellectual property law at present. It is the one, which determines the list of protected objects of intellectual property in a particular country and provides the necessary mechanism of the legal regulation of implementation and enforcement of intellectual rights.

Intellectual Property in National Intellectual Property Law: Russia and Kazakhstan

It is no doubt that the national legal regulation of intellectual property is different, even among legal systems belonging to the same legal family (civil or common law). The article does not aim to make a deep comparative legal research of intellectual property law in different countries, but to show some examples of understanding intellectual property and intellectual rights in Russia and other countries of the former Soviet Union.

In particular, in Russia significant changes in the legal regulation of intellectual property have recently occurred. On 1 January 2008 Part IV "Rights to the Results of Intellectual Activities and Means of Individualization" of the Civil Code of the Russian Federation[6] entered into force. It brought together a variety of previous Russian laws on different types of objects of intellectual property. After their codification Part IV of the Civil Code of the Russian Federation stipulated 9 chapters with more than 300 articles.

In the beginning of Part IV of the Code there are two important articles, which contain new provisions and highlight the difference between intellectual property and intellectual rights. In particular, Article 1225 defines intellectual property as the results of intellectual activities and the means of individualization of legal entities, goods, works, services, and enterprises, which enjoy legal protection.[6] It also enumerates such objects: scientific, literary and artistic works; programmes for computers (computer programmes); databases; performances; sound records; the broadcasting and cable radio and television programmes (the transmission of broadcasting or cable organizations); inventions; utility models; industrial designs; breeding achievements; integrated circuit layout-designs (topography); know-how; company names; trademarks and service marks; the appellation of the origin of goods; commercial names.

The next Article 1226 of the Code deals with intellectual rights. It states that intellectual rights are recognized for the results of intellectual activities and the means of individualization, and they include 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).[6] Thus, it should be concluded that intellectual property (the results of intellectual activities and the means of individualization) and intellectual rights are different legal categories in Russian law.

The reason is seen in the nature of literary, artistic and scientific works, performances, inventions and other objects of intellectual property. As they are a set

of intangible products or non-material objects of creative activities,[7] they can be created once and then be simultaneously used by unlimited group of people in different places. As the whole system of abstract categories they cannot be granted, held, divided, restricted, transferred, terminated, etc. The opposite can be said concerning legal rights and obligations over these objects. Such rights are called intellectual rights. There may be a lot of rights, or legal possibilities, granted in virtue of law to different persons to use the same object of intellectual property. The scope of such rights is determined by the law so that they can be granted, held, divided, restricted, transferred, terminated, etc. In other words, the turnover with its huge number of transactions should be addressed to intellectual property rights rather than intellectual property itself. Some analogy can be made with property law. As it is well known, it distinguishes an object of property (money in cash, documentary securities, buildings, constructions, plots of land, etc.) and property rights over them, which provide legal opportunities, mainly, to possess, use and dispose of appropriate objects.[6,8]

The necessity to distinguish intellectual property and intellectual rights was confirmed by the Supreme Court of the Russian Federation and the Supreme Arbitration Court of the Russian Federation in 2009. They held that in accordance with the provisions of Part IV of the Civil Code of the Russian Federation the term "intellectual property" covers only the results of intellectual activities and equated to them means of individualization of legal entities, goods, works, services and businesses, but not rights over them (Article 1225 of the Code). By virtue of Article 1226 of the Civil Code intellectual property rights upon those objects are recognized and they include the exclusive right, and in the cases provided by the Code, also personal non-property rights and other rights.[9]

In Kazakhstan, another country of the former Soviet Union, the Civil Code of Kazakhstan[10] consists of two parts, general and special, each of them contains provisions on intellectual property. In particular, Article 125 of the general part of the Code is called "Intellectual Property". It stipulates that an exclusive right of a citizen, or a legal entity shall be recognized with regard to the results of intellectual creative activities and to the means of individualization of a legal entity, the production of a physical person or a legal entity, work performed by it or services rendered, which are equated thereto (commercial name, trade mark, service mark, etc.).[9] Objects of intellectual property (results of intellectual creative activities and the means of individualization equated to them) are listed in Article 961 of the Civil Code of Kazakhstan. It is also stated in Article 963 that the authors of intellectual creativity are entitled to personal non-property and property rights which are related to these results, where as the holders of the right to the means of individualization have only property rights, related with these means.[10] Hence it should be concluded that intellectual property and personal non-property and property rights related to intellectual creativity and means of individualization are understood different in Kazakhstan.

Thus, intellectual property is deemed to be defined as a set of intangible objects of creative activities, where as intellectual rights are to be legal rights granted to their authors and other subjects of law in relation to the objects of intellectual property concerned.

Protected Objects of Intellectual Property and their Results

It is obvious that not all results of intellectual activities in the industrial, scientific, literary or artistic fields are protected by law. The protected objects of intellectual property is determined by national law, but in accordance with international law. The matter is that the list of such objects is not the same in different countries. Moreover, there may be results of intellectual activities, which are protected in national law, but with no appropriate rules of international law (in the form of a particular treaty). They are, for example, breeding achievements, topologies of integrated circuits, secrets of production (know-how) regulated by the Chapters 73-74 of the Civil Code of the Russian Federation.[6]

It is also necessary to distinguish objects of intellectual property stipulated by the national law of a particular country and other results of intellectual activities.[11] The latter may be so diverse and multiple, especially thanks to the technical progress. For example, they are a scientific discovery, improvement suggestion, innovation, domain name, etc.[12], which are not protected by the Russian law. As the Supreme Court of the Russian Federation held, the present list of objects of intellectual property is exhaustive in the Civil Code of the Russian Federation.[9] It means that no other results of intellectual activities and means of individualization to be protected in Russia.

In this regard the issue of qualification of a result of intellectual activities as an object of intellectual

property arises. At present most of protected objects of intellectual property are clearly defined in the Civil Code of the Russian Federation. The Code stipulates the requirements for the legal protection as well. For example, according to Article 1350(1) of the Civil Code of the Russian Federation, a technical solution in any area is protected as an invention if it relates to a product (including a device, substance, strain of microorganisms, plant or animal cell culture) or a method (the process of carrying out actions in respect of a material object by material means). An invention is provided with legal protection if it is novel, has an inventive step and is industrially exploitable.[6]

The only exception is a scientific, literary or artistic work. In spite of its common understanding there is no explicit legal definition of this result of intellectual activities in the Civil Code of the Russian Federation as well as in international law. It is usually considered as a result or production in the literary, scientific and artistic spheres. The law just enumerates their possible types (literary works; dramatic and dramatic-musical works, script works; choreographic works and mime shows; musical works with or without a text; audiovisual works; painting, sculpture, graphic, design, graphic stories, comics and other works of art; artistic craftsmanship and scenographic works; works of architecture, city planning and landscaping, including designs, drawings, images and models; photographic works and works produced by methods similar to photography; geographic, geological and other maps, layouts, sketches and plastic works that have to do with geography, topography and other sciences; other works. (Article 1259(1) of the Civil Code of the Russian Federation).[6] Meanwhile some concepts were proposed in Soviet and then Russian civil jurisprudence, which help to understand such an important category of intellectual property law. In particular, a work may be defined as: "a complex of ideas and images that have objective expression in the finished work"[13]; or "a set of ideas, thoughts and images, which are considered as a result of the creative activities of an author and expressed in a particular form easily understood with human feelings and allowing the ability to play"[14]; or "an individual and unique creative reflection of objective reality"[15]; or "a result of spiritual creativity of an author expressed in a certain form"[16], etc. In other words, a work is deemed to be a system of scientific, literary and artistic abstract categories (ideas, concepts, thoughts, images, etc.), expressed by language, visual, audio, media and other objective (material) means.

Explicit definitions of particular objects of intellectual property are of importance for both theory and practice. The key problem here is that the same result, for example, particular information, can be considered as a work, a scientific discovery, know-how, invention or another object and accordingly protected with the application of different legal institutions or not protected at all. This is especially true for names, which can be registered as a firm name, trade or service mark, commercial name, etc. The intellectual rights concerning such objects are stated independent and may belong to different physical and legal persons simultaneously.

It can be clearly shown on the example of a domain name. Initially, under making the first law draft, but before its adoption by the State Duma of the Federal Assembly of the Russian Federation, it was considered as a separate object of intellectual property and defined as a symbolic name designed to identify the information resources and to address queries in Internet and registered in the register of domain names in accordance with the generally accepted procedures and practices.[17] Subsequently such provisions were excluded so that the present Civil Code of the Russian Federation does not refer domain names to the results of intellectual activities nor the means of individualization. As a result a domain name is not subject to legal protection. Meanwhile the present judicial practice tends to admit it as a way to use a particular protected means of individualization (a company name, trademark or service mark, the indication of the origin of goods, commercial name) in the Internet. Such a statement is based, in particular, on Article 1484(2) of the Civil Code of the Russian Federation. It stipulates that the exclusive right to a trademark may be exercised to individualize the goods, works or services for which the trademark has been registered, for instance by placing the trademark … on the Internet, including in a domain name or in other address methods.[6]

Similar understanding of the substance of a domain name was earlier confirmed by the Supreme Arbitration Court of the Russian Federation in *Eastman Kodak Company* v *A. Grundul* in 2001. It held that a domain name in Internet is deemed to be the only association of computers connected to each other by phone or other means of communication. The primary function of a domain name in this case is to convert IP addresses (Internet protocol), expressed in the form of specific numbers in the domain name in

order to facilitate the search and identification of the owner of information resources. Modern commercial practice has shown that when choosing for Internet domain names owners of information resources select the most simple and logical names (a word, a group of letters, etc.), which are usually associated by consumers directly with a specific participant of economic turnover or its activities. Domain names are actually transformed into a means of performing the function of a trade mark, which allows distinguishing goods and services of one natural or legal persons from the goods and services of others.[18]

Classification of Objects of Intellectual Property in Russia

The classification of objects of intellectual property is usually based on their types (a work, performance, phonogram, invention, trade name, trademark, etc.). It is also a main criterion for division of the system of intellectual property law into several legal institutions: law on copyright and related rights, patent law, law on firm names, trademarks, indications of the origin of goods, etc.[19,20] However, it is thought that there may be more generally formulated yardstick for separation of objects of intellectual property. For example, Article 1225(1) of the Civil Code of the Russian Federation provides two groups of all the protected by law objects of intellectual property:

(i) The results of intellectual activities: scientific, literary and artistic works; programmes for computers (computer programmes); databases; performances; sound records; the broadcasting and cable radio and television programmes (the transmission of broadcasting or cable organizations); inventions; utility models; industrial designs; breeding achievements; integrated circuit layout-designs (topography); know-how;

(ii) The means of individualization of legal entities, goods, works, services, and enterprises, which are equated to the results of intellectual activities: company names; trademarks and service marks; the appellation of the origin of goods; commercial names.[6]

Such a classification is deemed to have both theoretical and practical value. The matter is that the means of individualization can hardly be estimated as the result of intellectual activities. They are usually a sign (one or several letters or words), which rarely reflects creativity. They may be proposed by not only a human, but also machine intelligence. Moreover, they sometimes have no an author at all. A good example for that is the appellation of origin of goods, which contain "a contemporary or historical, official or unofficial, full or abbreviated name of the country, urban or rural inhabited settlement, locality or another geographical object"[6] (Article 1516(1) of the Civil Code of the Russian Federation). The main function of the means of individualization is thought not to make new concepts, ideas, images, forms, decisions and other results reflecting objective reality, but to identify manufacturers, their goods, works, services, enterprises and eventually to promote them on the market.

Differentiating the results of intellectual activities and the means of individualization is resulted in the difference of intellectual rights upon such objects. The content of legal rights to the means of individualization is much narrower and is only presented with the exclusive (property) right. Moral rights of authors are absent. Moreover, there can be also limited and restricted for their dual implementation and enforcement. For example, according to Article 1474(2) of the Civil Code of the Russian Federation, the disposal of an exclusive right to a company name (for instance by means of the alienation or grant to another person of a right to use the company name) is prohibited.[6]

Intellectual Rights and Their Types

There is no precise definition of intellectual rights in national and international law. They are usually referred to legal rights for the results of intellectual activities. As any legal right, an intellectual right may be described as a legally enforceable measure of the possible behavior of the authorized participant: to act at their own discretion and to demand from the obliged person to perform their legal duties.[21]

Unlike the objects of intellectual property, intellectual rights are granted by law. They determine the limits of use of objects of intellectual property and provide simultaneously a lot of legal possibilities to an author and other physical and legal persons. That is why they can be, in particular, held to different individuals and legal entities, divided among them and then transferred to third parties. Intellectual rights are diverse and they are usually qualified depending on the type of intellectual property (patent for inventions, copyright for literary and artistic works and associated products, and trade marks and names for the goodwill attaching to marketing symbols).[3]

Moreover they can belong to the same object of intellectual property. Especially it is true for protected works.

In particular, according to Article V(1) of Universal Copyright Convention 1952 copyright shall include the exclusive right of the author to make, publish, and authorize the making and publication of translations of works protected under this Convention.[22] Berne Convention for the Protection of Literary and Artistic Works 1886 also provides for a lot of intellectual rights to the author. They are called moral rights (to claim authorship; to object to certain modifications and other derogatory actions) (Article 6*bis*(1)) and economic rights (right of translation (Article 8); right of reproduction (Article 9); certain rights in dramatic and musical works (Article 11); broadcasting and related rights (Article 11*bis*); certain rights in literary works (Article 11*ter*); right of adaptation, arrangement and other alteration (Article 12), etc.).[5] The latter ones confer mainly two legal possibilities: to use a work in any manner by the author and to authorize doing it to third persons. For example, authors of literary and artistic works protected by this Convention shall enjoy the exclusive right of making and of authorizing the translation of their works throughout the term of protection of their rights in the original works (Article 8).[5]

The similar division of intellectual rights is stipulated in Russian law. For example, according to Article 1226 of the Civil Code of the Russian Federation, intellectual rights include 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).[6] In regard of a work, Article 1255(2) of the Civil Code of the Russian Federation stipulates that the author of a work has the following rights: an exclusive right to the work; the right of attribution; the right to one's own name; a right to integrity of the work; a right to publish the work[6]. In other words, all of them except for an exclusive right to the work are deemed to be moral, whereas the exclusive right to the work is of property matter.

As an intellectual right is a legal category, it can include elements to be determined by law. They are the contents, effective period, territory of action, the order of occurrence, implementation and enforcement, etc., which may be different depending on a type of an intellectual right. For example, according to Article 1265(1) of the Civil Code of the Russian Federation, the right of attribution, i.e. the right of being recognized as the author of a work, and the right to one's own name, i.e. the right of using or permitting the use of a work under the author's name, a pseudonym or without an indication of a name, i.e. anonymously, are unalienable and unassignable, for instance, when the exclusive right to the work is assigned to another person or transferred to another person, and when the right of using the work is granted to another person. The waiver of these rights is deemed null and void.[6] In addition Article 1267(1) of the Code states that the authorship, the name of the author and the integrity of a work shall be protected indefinitely.[6]

Quite different provisions are stipulated for the exclusive right for a work. In particular, the exclusive right to use a work shall be effective for the whole life of the author plus seventy years, counting from January 1 of the year following the year of death of the author (Article 1281(1) of the Civil Code of the Russian Federation). It also passes by inheritance (Article 1283(1) of the Civil Code of the Russian Federation).[6]

Among all the intellectual rights, an exclusive right is the most important. It is granted over any object of intellectual property. It is absolute and it provides a monopoly (privilege) for an owner to use an appropriate result of intellectual activities or means of individualization. In this regard Article 1229(1) of the Civil Code of the Russian Federation states that other persons shall not use the relevant result of the intellectual activity or means of individualization without the right holder's consent, except for the cases envisaged by the present Code. If it takes place without the right holder's consent, the use of the result of an intellectual activity or means of individualization (including the use thereof by the methods envisaged by the present Code) is deemed illegal and it shall cause the liability established by the present Code and other laws, except for cases when the use of the result of an intellectual activity or means of individualization by persons other than the right holder without his consent is permitted by the present Code.[6]

According to Article 1229(1) of the Civil Code of the Russian Federation any exclusive right include two powers:[6]

(i) To use the result of intellectual activities or the means of individualization at his own discretion by any means that does not conflict with the law;

(ii) To dispose the exclusive right to the result of the intellectual activities or means of individualization, unless otherwise envisaged by the present Code. In particular, the right holder may at his own discretion permit other persons to use or prohibit them from using, the result of the intellectual activity or means of individualization. The lack of prohibition shall not be deemed consent (permission).

Thus, different intellectual rights (moral rights, exclusive right, etc.) can be granted to the author or another owner in relation to a particular object of intellectual property. They have specifics in their contents, effective period, territory of action, the order of occurrence, implementation and enforcement. Among them, an exclusive right is typical to any object of intellectual property. It includes legal possibilities to use an object in any legitimate manner and to dispose of such a right. Unlike an object of intellectual property itself, an exclusive right can be limited, restricted and transferred to third parties.

Conclusion

Intellectual property as a set of intangible objects (literary, artistic and scientific works, performances, phonograms, broadcasts, inventions, etc.) and intellectual rights (copyright and related rights, patent rights, etc.) are deemed to be different categories. The former ones reflect their abstract (non-material) matter. They are just created, but not able to be granted, held, divided, restricted, transferred, terminated, etc. Not all of them are protected, but those which are end-listed in national law of a particular country in accordance with the rules of international law. Depending on the types of intellectual rights to be granted (moral or/and economic rights), objects of intellectual property can be divided into two groups: the results of intellectual activities and equated to them means of individualization of legal entities, goods, work, services and enterprises.

Intellectual rights are legal rights, which in virtue of law provide a lot of legal possibilities and can be shared among different individuals and legal entities, enjoyed by them, transferred to third parties and thus be applied in transactions. Especially it concerns an exclusive (economic) right, which is granted over any object of intellectual property, and i**t** includes two main legal possibilities for its holder: to use the object in any legitimate manner and to dispose of this right.

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