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Models of Copyrights System

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***Abstract*—**The copyrights system is a combination of different elements. The number, content and the correlation of these elements are different for different legal orders. The models of copyrights systems display this system in terms of the interaction of economic and author's moral rights. Monistic and dualistic models are the most popular ones. The article deals with different points of view on the monism and dualism in copyright system. A specific model of the copyright in Switzerland in the XXth century is analyzed. The evolution of a French dualistic model of copyright is shown. The author believes that one should talk not about one, but rather about a number of dualism forms of copyright system.

***Keywords*—**Copyright, exclusive copyright, economic rights, author's moral rights, rights of personality, monistic model, dualistic model.

I. Introduction

THE copyright law has quite recently appeared: it is a result of the Modern Age. Its history differs a lot from the history of other law institutes, e.g. right of property, family, succession rights, which have been developed for many centuries. Theories and views of the lawyers, politicians, philosophers and writers had a great influence on the development of the copyright. We can say that the copyright is one of the most theoretically filled institute of the civil rights. Understanding of numerous copyright law theories and concepts is both essential for successful organization of the scientific research and a guarantee for the right laws introduction in the sphere of the intellectual property and their consistent implementation.

An issue of the copyright system design is one of the points, where the copyright theory and the law-making practice correlate. A three hundred history of the copyright law is an example of constant complications of this system both in the number, the diversity of the author's powers and the content of the latter. This evolution has led to the situation, when no single theoretical and legislative approach to the number and the structure of the copyright system has been developed. Monistic and dualistic models of the copyright system, represented in the legislative systems of Germany and France correspondingly, are the most widely known models. We believe that the analysis of these models and other alternative ways of copyright system design in law has not been paid adequate attention to.

The modelling and conceptualization play a very important role in law. A. Naschitz points out that one cannot think of and express the legal norms and institutes without the conceptualization techniques [1]. First of all, the concepts are the law phenomena, which can be found in public life. Secondly, they fulfill the function of the classification principle in studying different law situation and the rights manifestations in the society's life. Thirdly, they help to give reasoning in defining the rights norms and in solving controversial cases. Overall, P. Sandevoir feels that the concepts are the simplification factors, which are of great demand considering all the diversity and the complexity of the law reality [2]. The concepts, belonging to the sphere of law metaphysics, as J.–L. Bergel puts it [3], are expressed in the rights manifestations, which are laws and many other legal acts.

At the same time the law models and concepts, as any other speculative generalization, in this or that way put forward a particular systemization or relative reality deformation. Any law expert must be warned over the over systemization and over deformation of reality in dealing with the concepts.

The purpose of this article is the analysis of the models of copyrights system design, identification of the specific features of dualistic and monistic models, identification of other models of this system.

Categorization of the copyright into the economic rights, which are typically named "exclusive rights", and author's moral rights is the main principle of the copyrights system building. With this principle in mind we may divide the models of copyrights system design into those that include the economic rights only and those that include both economic and moral rights. The third type of the model of copyrights system with the moral rights only can be logically inferred from this. However, there is no such copyright in the history.

The description of the copyrights system in the science of law is not based on single terminology that brings some additional difficulties in the discussions in this area of knowledge. Outstanding widely known experts in copyright, such as D. Lipszyc [4], J. A. L. Sterlin [5], A. Lucas [6], see monism and dualism in the framework quite familiar to the Russian science. In terms of monistic approach the economic and author's moral rights are subject to and interpreted as different manifestations of one right that is unitary. In contrast, in terms of dualistic approach the specified types of rights have different background and are clearly divided. Thus, both analyzed models concern the situations, when the author's economic and moral rights are protected by the copyright law means.

Cerill P. Rigamonti has another point of view on monism and dualism in copyright. He identifies three types of copyright system models [7]. The first model known as patchwork theory describes the traditional Anglo-American

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copyright law with no institute of moral rights and the personal author's interests protected by the discrete means exterior to copyright law. For a dualistic model Cyrill P. Rigamonti takes the copyright of pre-1993 Switzerland, for instance, which was characterized by the lack of the moral rights and the protection of the non-proprietary author's rights by the common civil institute of personal rights. Finally, a Swiss scientist believes the continental copyright law with the economic and author's moral rights to be monistic. Thus, Cyrill P. Rigamonti looks at monism in terms of the integration of moral and economic rights in copyright law.

Finally, we may specify the standing of E. Ulmer, the most outstanding advocate of a monistic copyright theory, who considers the Germany copyright to be monistic and the copyright with the personal and economic rights strictly divided to be dualistic. At the same time the method of personal author's interests' protection (whether it is the institute of moral rights or common institute of personality rights) is of no important to identify dualism [8].

Every approach mentioned appears to have some advantages and drawbacks. Cyrill P. Rigamonti's classification [7], for example, does not allow to fix the difference between the French and German copyright systems. Consequently, additional terminology should be introduced to describe the difference between these systems in the framework of monism. On the other hand, Cyrill P. Rigamonti's approach [7] may be of help in analysing the Anglo-American and traditional Swiss (up to 1993) copyright systems. On the contrary, the understanding of D. Lipszyc [4] does not take into account the Swiss model, but at the same time it clearly highlights the difference between the French and German copyright. E. Ulmer's point of view [8] is quite attractive in reasoning the monistic theory, but it does not pay special attention to the varieties of dualism in copyright. At the same time the difference in the method of author's personal interests protection significantly affects the copyright system, consequently, it should be taken into account in system's design and description.

Thus, in any case the traditional Anglo-American copyright is outside the monism and dualism. Up till the end of the XXth century in the countries of the common copyright the author's moral rights are not written in laws. Only Canada may be an exception where these rights were legally proclaimed for the first time in 1931. On the whole, neither statute law, nor common law mentioned the moral rights institute: while the academic jurisprudence thought this situation to be quite acceptable. The fact that both in England and in the USA the author's interests in the sphere of attribution and his work's integrity were not secured by the copyright legislation does not mean that these interests were not protected at all. For instance, the work integrity fell under the law of obligations or defamation protection and the author's name citation or non-citation were considered in terms of unfair business practice. These mechanisms are much more flexible than the inherent absolute moral rights. For example, the means of the competition law preventing unfamiliar product under the name of a person not participating in its creation to enter the market are limited by a number of conditions characterized for the named institute. We must agree with I. A. Bliznets, who writes that both in the USA and in England the purpose of the copyright laws was recognized to be the protection of the economic publishers' rights in first place, who bought the rights either from the author, or from his assignees [9].

The understanding of the dualistic copyright model is the most controversial. As it was mentioned earlier, Cyrill P. Rigamonti [7] uses this concept to describe the traditional Swiss copyright, which is an interesting example of author's personal interests' protection with the means exterior to the copyright law. Here we are talking about the period from 1913, when the Civil Code of 1907 came into effect, till 1993, when the Swiss copyright law dated 9 October, 1992, went into operation [10]. At that time the author's moral rights were protected by the Swiss courts as an element of personality's rights, which was recognized in the Article 28 of Swiss Civil Code. The author's moral rights were not recognized in Swiss copyright law of 1992, which became invalid in 1993. Such an approach looks rather interesting, taking into account a huge influence of German and French civil law on Swiss law and also the fact that this country was a permanent participant of Bern Convention acts for the Protection of Literary and Artistic Works [11], where the author's moral rights had been fixed since 1928.

The protection of the author's personal interests of the common institute of personality rights was far from being perfect and was severely criticized among academicians as this mechanism did not guarantee the protection of the author's personal rights after his death. The point is that the Swiss courts understood the personality's rights as inheretent rights, thus resulting in the situation, when after the author's death these rights are not valid any longer [12]. This shortcoming was eliminated with the Law on copyright dated 09 October, 1992. Together with this law the Swiss law system obtained fully valid institute of author's moral rights. It shouldn't be understood that the decision to choose the copyright model was an easy one for a Swiss law-maker. Originally the draft law was planned to recognize the German monistic model with its essential feature of copyright transfer proscription. However, later they decided to avoid this proscription [13]. The Article 16 Copyright Law states that the economic copyright may be transferred. At the same time the law is characterized by a monism's feature as one validity period for economic and author's moral rights, which follows from the Article 29.

At the end of our considerations about the traditional Swiss copyright, which Cyrill P. Rigamonti names "dualistc" [7], one should compare it with the dualistic (in D. Lipszyc's interpretation [4]) copyright of France. In France, just like in other countries, the copyright appeared as an economic right. However, at the beginning of the XIXth century the French lawyers and artists drew public attention to the fact, that the works usage was both profitable and connected with the author's name and reputation. Gradually it became clear for the society that the author's concession of his economic rights on the work did not give a buyer the right to change, distort,

remake the work voluntarily and publish it without the author's name or with another name. For example, in the first half of the XIXth century the court decisions provided the protection of the non-economic interests of some particular authors.

In the second half of the XIXth - the beginning of the XXth century a category of droit moral and author's powers within it were developed in French theory. However, at this stage one can't talk about developed dualistic copyright model in France. A. Morillot - the founder of the droit moral theory - did not consider droit moral as a component of copyright. He pointed out that the author's droit moral and the exclusive right were absolutely different. The first one was developed from the natural law, while the latter - from the positive law. One of these rights may be violated, while the second one can't [14]. A. Morillot feels that the object of the droit moral is the work as it is, and the object of the exclusive right is the work's copies. Here it should be noted that when reasoning the author's droit moral a French lawyer stood up for the idea that a work was interpreted as the continuation, expansion of the author's personality, which must be protected. A. Morillot came to the conclusion that the true copyright was the exclusive right, from this followed that the droit moral should be regulated by the common principles, for instance, it may be inferred from the Article 1382 Code of Napoleon, concerning compensation for the damage caused.

It was only in 1957, when the Law "On protection of literature and fiction property" was adopted, that the author's droit moral was legally recognized in France and the French dualistic copyright was completely developed. The droit moral was recognized to be one of two components of copyright. Nevertheless, the opposition of these rights to the economic rights remains and the possibility of the complete concession of the letter remains as well. The validity period of the droit moral after the author's death in French legislative system is unlimited. Thus, from the second half of the XIXth century up to the middle of the XXth century French copyright developed from one form of dualism to another one. The first of these dualism forms is close to Swiss traditional copyright model. The difference is in the fact that the Civil Code of Switzerland recognized the personality's rights, which were the basis for the courts to protect the author's personal interests, while in France in the period of droit moral theory development there was not institute of personality's rights in the civil law. This form of dualism can't be called a dualistic copyright model in its actual meaning, as there is not recognition of the droit moral in the framework of the copyright, and here we are talking not about the copyright system, but rather about the system of author's interests protection, which is a bit different.

The second dualism form may be considered in the formal and conceptual aspects. Formally one may talk about the copyright in dualism, when there is an institute of moral rights in the copyright law. It goes without saying that the clear distinction between moral and economic rights should remain. Conceptually the dualism appears, when the regime of the author's moral rights becomes separated from the regime of personality's rights. Indeed, the first rights can be clearly separated from the second ones by such parameters as object, basis for being developed, validity period, protection method. And here dualism is conceptually close to monisic theory. This may be the reason, why Cyrill P. Rigamonti looks at these two models as monistic ones [7].

The words of E. Ulmer with his copyright comparison with a tree are the most popular metaphoric foundation of the monistic theory in its true understanding [15]. "Correlation between the interests' protection and the copyright form and the powers following from the copyright may be presented in the form of a picture. Both group of interests, - a scientist wrote, - as in the case of a tree, are the roots of the copyright, which in turn is one trunk. And author's powers may be compared with the branches, which grow from the trunk. They get the power either from both roots, or mainly from one of them" [15]. E. Ulmer's idea is that the copyright, if considered as one institute, cannot be put in a law system, which is familiar with only economic and moral rights [15]. It is much more probable that along with the rights, which belong to one of groups by their type, there are other rights, which comprise the features of both groups. A German law expert saw the disadvantage of the dualistic theory in the provision, that after the author's death the fate of moral and economic rights may be different [15]. The first one is transferred to the author's relatives, while the second ones may be transferred to any third parties. This situation is quite impossible in Germany and in Austria, which is, as E. Ulmer believes, right [15].

Comparing monistic and dualistic models we may put the question on whether the first one is more advanced than the second one. The answer is yes, to some extent. Logically monistic model is the next step of the development of the dualistic model. The recognition of the moral rights of an integral part of the copyright must result in serious influence of these rights on the economic rights. Such an influence may be expressed in the economic rights concession proscription and in the establishment of one regime of both rights groups after the author's death. However, historically monism did not become the next step of the copyright development. This concept is very difficult and quite unpopular in the national legislation systems. In case of France, where the author's droit moral is highly protected, it is shown that to achieve such a protection level one needn't stick to monistic theory. An opportunity of economic rights transfer is an unquestioned advantage of the French copyright model.

II. Conclusion

Monism and dualism are the main models of copyrights systems. However, these widely recognized notions are given different organization methods and relations of copyrights by the scientists. So many interpretations, to some extent, create difficulty in search of the universal typology of copyrights systems models.

The interpretation of the dualistic model is the most controversial notion among the experts. It is clear that dualism presupposes clear division between the author's economic and moral rights. The research shows that such a clear division may exist in two principally different forms. The first of these

forms of dualism is connected with the protection of author's moral interests in the terms of common personality's rights institute. This form cannot be called a dualistic copyright model yet, which is understood in its direct meaning, as moral rights have not been recognized yet in the framework of the copyright. The copyright of Switzerland in the XXth century is an example of this dualism.

The second dualism form may be considered in the formal and conceptual aspects. Formally one may talk about the copyright in dualism, when there is an institute of moral rights in the copyright law. Conceptually the dualism appears, when the regime of the author's moral rights becomes separated from the regime of personality's rights. The copyright of France in XIX-XX centuries may be an example of gradual transformation of the first form of dualism into the second form of dualism.

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