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HARMONIZING EU LEGISLATION ON COPYRIGHT AND RELATED RIGHTS: PRINCIPAL ISSUES

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Summary

The present article deals with peculiarities of harmonisation of EU secondary legislation on copyright and related rights, particularly of transposition measures taken by the Member States to incorporate EU directives in this field into the national legislations. Special attention is paid to the importance of the European Commission in the evaluating the effects of directives and harmonisation processes in general. Different approaches are analyzed as to the evaluation of the results of copyright harmonisation by the European institutions and the scholars.

Key words: harmonisation, implementation, EU copyright and related rights, EU directive, European Commission.

Аннотация

Статья посвящена исследованию особенностей гармонизации актов вторичного права Европейского Союза об авторском праве и смежных правах, в частности имплементации директив Европейского парламента и Совета в этой отрасли в национальные законодательства государств-членов. Отдельно проанализирована роль Европейской комиссии в контроле над эффективностью применения директив, исполнением государствами-членами ЕС обязательств по их имплементации, а также процессами гармонизации в целом. В заключение рассматриваются различные подходы к оценке результатов гармонизации авторского права и смежных прав со стороны европейских институтов и представителей научных кругов.

Ключевые слова: гармонизация, имплементация, авторское право и смежные права ЕС, директива, Европейская комиссия.

Formulation of a problem. The intellectual property is the backbone of a competitive European economy, creating jobs and bringing innovative products and services to consumers and companies. Taking into account the priority of Ukraine's course toward integration into the European Union the quick and effective adaptation of the Ukrainian legislation in the field of the intellectual property and particularly copyright to the EU laws becomes highly important in the context of fulfillment of international obligations by Ukraine according to the Partnership and Cooperation Agreement between EU and Ukraine, the EU-Ukraine Association Agreement and the Law of Ukraine "On the national program on adaptation of the legislation of Ukraine to the legislation of the European Union".

Recent researches and publications. Several aspects of the EU legislation on copyright and related rights were researched by foreign scholars, namely J. Bornkamm, C. Caron, M. Fiscor, F. Holtzen, B. Hugenholtz, A. Kerever, A. Lucas, G.Tritton, D. Vaver and others. The Ukrainian researches, particularly H. Androshchuk, V. Drobyazko, R. Ennan, Yu. Kapitsa, L Komziuk, V. Murayov, S. Stupak and others also displayed interest in investigating this field. However, complex legal researches are lacking in the legal science of Ukraine of the processes of harmonisation of EU legislation on copyright and related rights and especially their transposition into the national legislations of Member States.

Purpose of the article. The aim of this article is to consider the peculiarities of the harmonisation of EU legislation on copyright and related rights and specifically the transposition measures taken by the Member States to incorporate EU directives in this field into the national legislations. A special attention is paid to the increasing role of the European Commission in securing an accurate and timely implementation, evaluating the effects of directives and harmonisation process in general.

Basic material. The study "Intellectual Property Rights intensive industries: contribution to economic performance and employment in Europe"

published in September 2013 which was carried out jointly by the European Patent Office (EPO) and the Office for Harmonisation in the Internal Market (OHIM) measures the importance of Intellectual Property (IP) rights in the EU economy. Key findings of the study are that about 39% of total economic activity in the EU (worth some € 4,7 trillion annually) is generated by IPR-intensive industries, and approximately 26% of all employment in the EU (56 million jobs) is provided directly by these industries [1].

The copyright industries as a part of IP industries that protect the creative output of the mind are critically important to the European Union because they involve media, cultural and knowledge industries. Development in these industries is indicative of performance in post-industrial society especially where related to the information society.

In contrast to the industrial property the legal protection of copyright and related rights is being performed by way of harmonisation, in other words by adopting directives aiming to eliminate most significant differences between national laws affecting the functioning of the internal market and to reduce barriers to trade. According to the art. 288 of the TFEU (ex art. 249 of TEC) "a directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods" [2].

Unlike regulations, the directives do not aim to put in place uniform rules in all Member States, but to bring different national laws into line with each other, and are particularly common in matters that affect the operation of the single market. The directive is a two-tier legal act and the law-making process passes two stages. On the first stage, the directive is adopted at the European level by the European Parliament and the Council in accordance with prescribed procedures, so, the European institutions impose obligations on the Member States to pass the necessary laws, regulations or administrative acts in order the directive is duly transposed within the prescribed period; during the second stage the Member States are implementing the directive into the national legal systems by way of adopting national legal acts. According to L. Entin, during the second stage the main role is conferred to the national (domestic) implementation mechanism which insures that directives are duly transposed into the national legal orders [3, p. 192]. S. Kashkin, in his turn, shares this position and specifically mentions that "depending to the subject of the directive and peculiarities of the legal system of a Member State the directives are implemented into the national laws by amending or cancelling current national laws or regulations" [4, p. 126].

In general, ten directives have been adopted in the European Union in the field of copyright and related rights, namely: Council Directive 91/250/EEC of 14 May 1991 *on the legal protection of computer programs* (repealed and replaced by Directive 2009/24/EC of 23 April 2009); Council Directive 92/100/EEC of 19 November 1992 *on rental right and lending right and on certain rights related to copyright in the field of intellectual property* (repealed and replaced by Directive 2006/115/EC of 12 December 2006); Council Directive 93/83/EEC of 27 September 1993 *on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission* ; Council Directive 93/98/EEC of 29 October 1993 harmonizing *the term of protection of copyright and certain related rights* (repealed and replaced by Directive 2006/116/EC of 12 December 2006 and further amended by the Directive 2011/77/EU of 27 September 2011); Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 *on the legal protection of databases*; Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 *on the harmonisation of certain aspects of copyright and related rights in the information society*; Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 *on the resale right for the benefit of the author of an original work of art*; Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 *on the enforcement of intellectual property rights*; Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 *on certain permitted uses of orphan works*; Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 *on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market.*

Each directive contains a deadline by which Member States must adopt national transposition measures – which incorporate the obligations of the directive into national law. The deadline or the date by which Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with a directive is specified in the text of the directive itself usually in the chapter "final provisions" or in the specific article "implementation/transposition". The deadline indicates the date on which Member States are responsible for incorporation of the obligations of the directive into the national law what further allows to determine whether the implementation measures were timely or not. As a rule, the Member States are given a period from eighteen months to two years to implement directives on copyright and related rights, however in cases of very significant disparities with regard to the existence of a specific right and its application by Member States the term of implementation may be increased. Thereby, according to art. 12 of the Directive 2001/84/EC of 27 September 2001 on the resale right for the benefit of the author of an original work of art the Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive before 1 January 2006, in other words the Member States were given more than four years to adopt implementation measures.

When Member States adopt these measures, they shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such a reference shall be laid down by the Member States. Furthermore, the Member States shall communicate to the Commission the provisions of national law which they adopt in the field covered by this Directive. These requirements are stipulates in the texts of the directives normally in the final provisions.

We propose a brief list of the national implementation measures taken by some of the Member States, particularly France, Italy, Belgium and Netherlands to incorporate EU directives on copyright and related rights into national laws.

In France the following laws were adopted introducing amendments into the IP Code to have the directives 91/250/EC on the legal protection of computer programs and 96/9/EC on the legal protection of Databases duly transposed into the French legislation, namely Law № 94-361 of May 10, 1994 implementing the Directive (EEC) № 91-250 of the European Communities Council dated May 14, 1991 on the legal protection of computer programs and amending the IP Code; and Law № 98-536 of July 1, 1998 transposing into the code of the intellectual property of Directive 96/9/EC of the European Parliament and Council of March 11, 1996 on the legal protection of Databases.

Traditionally, in Italy so called legislative decrees are adopted for transposing the European Parliament and the Council directives into national law. A number of such legislative decrees were adopted in the field of copyright and related rights, namely: Legislative Decree № 685 of November 16, 1994, implementing the Council Directive 92/100/EEC of November 19, 1992, on rental right and lending right and on certain rights related to copyright in the field of intellectual property; Legislative Decree № 154 of May 26, 1997, on the implementation of the Directive № 93/98/EC of harmonizing the term of protection of copyright and certain related rights; Legislative Decree № 140 of March 16, 2006, implementing Directive 2004/48/EC of the European Parliament and of the Council of April 29, 2004, on the enforcement of intellectual property rights.

In Belgium special transposing laws are adopted for the purposes on implementing EU directives into the national legislation. We would like to mention some of them: Law of June 30, 1994 transposing to Belgian Law the European Directive of May 14, 1991 on the legal protection of computer programs (updated July 17, 2007); Law of August 31, 1998 transposing into Belgian Law the European Directive № 96/9/EC of March 11, 1996 on the legal protection of databases; Law of May 22, 2005 transposing into Belgian Law the European Directive 2001/29/EC of May 22, 2001 on the harmonization of certain aspects of copyright and neighboring rights in the information society (updated May 19, 2009).

One of the peculiarities of the legal system in Netherland is that the national legislation governing copyright dates from 1912. So, the implementation measures consist of adopting special acts amending Copyright Act 1912 and the Related Rights Act 1993, for instance two Acts dated December 21, 1995 amending the Copyright Act 1912 and the Related Rights Act in accordance with the Council Directive 92/100/EEC on rental rights and lending rights and on certain related rights in the field of intellectual property and with the Council Directive 93/98/EEC harmonizing the term of protection of copyright and certain related rights; Act of June 20, 1996 amending the Copyright Act 1912 and the Related Rights Act in accordance with the Council Directive № 93/83/EC on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission. Meanwhile, new laws are adopted relating to the new objects protected by copyright: Law of July 8, 1999 on Adaptation of the Dutch legislation to the Directive 96/9/EC of the European Parliament and the Council of 11 March 1996 on the legal protection of databases.

It should be mentioned that the European Commission plays an increasing role in the processes of harmonisation of national legislations on copyright and related rights. Obviously, apart from preparing proposals for directives, regulations, communications and Green Papers, consultations and coordination efforts, the European Commission is watching on due implementation and is evaluating the effects of directives. Thus, on April 10, 2000 the Commission published the Report to the Council, the European Parliament and the Economic and Social Committee on the implementation and effects of Directive 91/250/EEC on the legal protection of computer programs and stated, particularly that Member States' implementation is overall satisfactory and the effects of implementation actually achieved are beneficial [5].

The similar reports were prepared by the European Commission to the Council, the European Parliament and the Economic and Social Committee concerning the transposition of other directives on copyright and related rights:

– Report on the implementation of the Directive on the rental and lending right and certain related rights (92/100/EEC) adopted on 12 September, 2002. The Commission concluded that only partial harmonisation has been achieved in this field and the legislative measures applied by Member States still vary to a large extent [6];

– First evaluation of Directive 96/6/EC on the Legal Protection of Databases published on 12 December, 2005. The evaluation was conducted on the basis of two information sources: first, an online survey addressed to the European database industry carried out by the Commission in August and September 2005; and second, the Gale Directory of Databases ("the GDD"), which is the largest existing database directory and contains statistics indicating the growth of the global database industry since the 1970s. The Evaluation found that the economic impact of the *sui generis* right on database production is unproven [7];

– Report on the application of the Directive on the harmonisation of certain aspects of copyright and related rights in the information society (2001/29/EC) published on 30 November, 2007. The report specifically assesses how Articles 5 (exceptions and limitations), 6 (the obligation to protect against the circumvention of technological measure) and 8 (sanctions and remedies in respect of infringements of the rights and obligations) of the Directive have been transposed by the Member States and applied by the national courts [8];

– Report on the application of Directive 2004/48/EC on the enforcement of intellectual property rights mandated by Article 18(1) of Directive adopted on 22 December, 2010. The Report was accompanied by a Commission Staff Working Paper containing an article-by-article analysis of the application of the Directive in the Member States [9];

– Report on the implementation and effect of the Directive 2001/84/EC on the resale right for the benefit of the author of an original work of art, as provided for by Article 11 of that Directive. The Commission proposes to establish a Stakeholder Dialogue, tasked with making recommendations for the improvement of the system of resale right collection and distribution in the EU. As a result of this proposal representatives

of collecting management organizations, authors and art market professionals (art dealers, galleries, auctioneers) signed up to "Key Principles and Recommendations on the management of the Author Resale Right" on 17 February, 2014 [10].

Normally, deadline by which the European Commission shall submit to the Council, the European Parliament and the Economic and Social Committee a report on the implementation and the effect of the directive is determined in the directive itself. Quite often the directive may require not only one recapitulative report, but periodic reports on its actual application on a three-four yearly basis, what happened in the case of the Directives 96/9/EC on the legal protection of databases; 2001/29/ЄС on the harmonisation of certain aspects of copyright and related rights in the information society and 2001/84/EC on the resale right for the benefit of the author of an original work of art.

The European Commission may also open the infringement procedure provided for by art. 258 TFEU (ex art. 226 TEC) and bring action before the Court of Justice of the European Union (CJEU) in the event a Member State has failed to transpose the directive within the period prescribed or transposed it incompletely or incorrectly. Relying on appropriate provisions of the directive as well as under art. 258 TFEU (ex art. 226 TEC) the Commission has to prove to the CJEU that a Member State failed to comply with obligations and time-limits laid down by a directive and the directive was not fully or correctly transposed within the deadlines set. Thus, the Commission brought actions in 2004–2005 against Belgium, Sweden, Finland, Great Britain, France, Spain, Czech Republic for failure to transpose the Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society. In 2006–1007 the similar actions were brought against Ireland, Italy, Luxemburg, Spain, Portugal, Belgium for failure to fulfill obligations on implementation of the Directive 92/100/EEC on rental right and lending right and on certain rights related to copyright in the field of intellectual property (repealed and replaced by Directive 2006/115/EC). Furthermore, a number of actions were initiated by the European Commission early 2007 against Spain, Greece, Belgium, France and Sweden for failure to transpose the Directive 2001/84/EC on the resale right for the benefit of the author of an original work of art, judgments on these actions were rendered in 2008.

The analysis of the reports on the implementation and effects of the directives on copyright and related rights allows to conclude that the European Commission gives general positive evaluation on harmonization processes in this field. Firstly, the Commission emphasizes that the provisions of the EU directives in most cases establish higher copyright protection standards comparing to Bern and Rome Conventions as well as current national laws of Member States. Second positive factor is introduction of new objects protected by copyright: computer programs, databases as well as increase of legal protections in the existing field, namely extension of the terms of protection and expanding the scope of rights. The harmonization resulted in adoption of a great number of legal acts relating to the proprietary rights, terms, exceptions and limitations. Obviously, these results demonstrate positive changes and progress in copyrights and related rights protection which led to the real approximation of national laws affecting the functioning of the internal market, legal certainty and predictability [11, p. 115].

Traditionally, the scholars are more critical in evaluating the results of copyright harmonization. Prof. Dr. P. Hugenholtz from the University of Amsterdam stated in his review "Future EU Copyright Law and Global Copyright Reform" recently published in Geneva that it is difficult to distil from the "acquis" a clear policy perspective on copyright owing to the lack of constitutional guidance, combined with EU law's traditional focus on economic issues. Traditionally, preambles to the directives typically refer to 'disparities' in national law that justify harmonization. Additionally, the need to provide for a high level of protection of intellectual property in the EU is often quoted. However, the scholar summarizes that it remains unclear from which general policy aim this need would arise. We should agree that this is a serious challenge for copyright in the European Union.

Conclusions. In contrast to the industrial property the legal protection of copyright is being performed by way of harmonisation aiming to eliminate most significant differences between national laws affecting the functioning of the internal market. Since 1991 ten directives have been adopted in the field of copyright and related rights. The European Commission is entrusted the task of drawing up periodic reports on the actual application of the directives in the Member States and on the impact on the European market, and where appropriate, of making proposals relating to the amendment. Members States are responsible for an accurate and timely transposition of the EU directives on copyright. In the event a Member State fails to incorporate EU directives into its national law the European Commission may open formal infringement proceedings and eventually refer the Member State to the European Court of Justice. In spite of the adverse criticism of some scholars the effects of copyright harmonisation are evidently positive: introduction of new objects protected by copyright (computer programs, databases), increase of legal protections, adoption of a more uniform legal framework relating to the proprietary rights, terms, exceptions and limitations.

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CONSTITUTIONAL AND LEGAL REGULATION OF LAND AND AGRARIAN RELATIONS IN UKRAINE AND IN FOREIGN STATES

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Summary

The article considers constitutional and legal regulation of land and agrarian relations in Ukraine and in other states. The study of constitutional norms of foreign states allows establishing the significance of the Constitution as a formation source for the principles of land system and agrarian policy of each state, as well as determining the most important issues in these areas, which the state seeks to resolve at the level of its Supreme Law. The completed study allows formulating the vector of further development of the land and agrarian legislation, which must be specified at the level of the Constitution of Ukraine.

Key words: constitutional and legal regulation of land and agrarian relations in Ukraine and in foreign states, Constitution as source of regulation of land and agrarian relations in Ukraine and in foreign states.

Аннотация

В статье рассматривается конституционно-правовое регулирование земельных и агарных отношений Украины и других стран. Исследование конституционных норм зарубежных государств позволяет определить значимость Конституции Украины как источника формирования основ земельного строя и агарной политики каждого государства, а также выделить наиболее важные вопросы в данных сферах, которые государство стремится решить на уровне своего Основного Закона. Проведенное исследование позволяет сформулировать вектор дальнейшего развития земельного и аграрного законодательств, который должен быть определён на уровне Конституции Украины.

Ключевые слова: конституционно-правовое регулирование земельных и агарных отношений Украины и зарубежных стран, Конституция как источник регулирования земельных и агарных отношений Украины и зарубежных стран.

Problem definition. In the minds of modern society the Constitution is considered as no other but the Fundamental Law i.e. an essential legal attribute of any state, the main objectives of which consist in the regulation of relations between citizens and the state through the lens of determining the rights and obligations, the system of public authorities of the state, entrenchment of the basic principles on which the state is to found its activity and by which the society is to be guided in the course of its life.

Based on the aforementioned one could not disagree that the place of the Constitution in the national legislation of each country is considered as no other but as the supreme law of the state governed by the rule of law, which has a constituent power and thus stands above the state itself, which constitute the legal basis for the formation and implementation of public authorities [1].

Recent researches and publications. This approach has been taken into consideration and reflected in the works of scientists who researched the mutually causal influence of the Constitution of Ukraine on the development of land and agrarian relations and the nature of land relations on the norm of the Constitution of Ukraine; among them V.I. Andreitsev, H.I. Baliuk, P.F. Kulynych, A.M. Myroshnychenko, I.I. Karakash, T.A. Kovalenko, V.V. Nosyk, A.A. Pohrebnoi, V.I. Semchyk, V.D. Sydor, N.I. Tytova, Yu.S. Sheshuchenko, M.V. Shulha, V.Z. Yanchuk etc.

In particular, the provisions of art. 13 of the Constitution of Ukraine which establishes the right of the Ukrainian people on the land, on whose behalf this right is implemented by state and local authorities, as well as art. 14 which provides for the possibility of acquiring such rights by the state, legal and natural persons [2], is mainly justified in the scientific literature by the uniqueness of the land as a natural resource, which is due to its natural properties and exceptional social value.

The aforementioned provisions of the Constitution of Ukraine, incurred as a result of the circumstances of our country's historical development, indicate the absence of randomness and declarative nature of