



CONCERNING DEALS AIMED AT ACCRUAL, ALTERATION AND TERMINATION OF PERSONAL NON-PROPERTY GOODS

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Summary

The relevance of research of deals with intangible goods is caused by debatability of issues, notably by that points of view that deals are regulator of contractual legal relationship are traditional in civil law. Accordingly contractual legal relations are relations of property circulation, and it allows claiming that deal dogmatically is considered to be regulator only of property relations in civil law. Also possibility of effecting deals with objects of intellectual property, information and personal non-property rights is supported in article. The special attention is paid to that personal non-property rights remain inalienable, but they are separable both during lifetime, and after death of owner.

Key words: deal, subject, intangible goods, results of intellectual, creative activity, information, personal non-property goods.

Аннотация

Актуальность исследования сделок с нематериальными благами обусловлена дискуссионностью вопросов, а именно тем, что в цивилистике традиционным является точка зрения, что сделки являются регулятором обязательственных правоотношений. Соответственно обязательственные правоотношения являются отношениями имущественного оборота, и это позволяет утверждать, что в гражданском праве сделка догматически считается регулятором только имущественных отношений. Также указывается возможность совершения сделок с объектами интеллектуальной собственности, информации и личных неимущественных прав. Особое внимание обращается на то, что личные неимущественные права остаются неотчуждаемыми, но отъемными, как при жизни, так и после смерти своего владельца.

Ключевые слова: сделка, возникновение, изменение, прекращение, нематериальные блага, результаты интеллектуальной деятельности, личные неимущественные блага.

Statement of problem. In present realities of time during development of society and public relations new types of civil relations originate and demand corresponding legal regulation. A lot of transactions with such personal non-property right as right on name are being closed in sphere of real but mechanism of regulation of such transactions is not defined. In order to define it need of research of possibility of conclusion of such transactions appeared.

Relevance of subject-matter of research is confirmed by degree of subject-matter explication – at present time there is almost no fundamental work devoted to possibility of conclusion of transactions with personal non-property right.

Status of research. The issues of deals as juridical category have special importance for civil law. In spite of fact that a number of studies devoted to this legal phenomenon was carried out in civil law science, a basis for research are works of such legal scholars as: M.M. Aharkov, Ch.N. Azimov, M.I. Brahinskyi, S.I. Vilnianskyi, D.M. Henkin, O.V. Dzera, O.S. Yoffe, O.V. Kokhanovska, O.O. Krasavchykov, N.S. Kuznetsova, S.N. Landkof, V.V. Luts, I.B. Novitskyi, S.O. Slipchenko, N.V. Rabinovych, Z.V. Romovska, Yu.K. Tolstoi, V.P. Shakhmatov, etc.

Objective and task of article is research of possibility of conclusion of transactions with personal non-property right on name and studies on this problem. Novelty of research consists in that in this work attempt to study both positive and negative sides of conclusion of transactions with personal non-property right.

Statement of main material. There is traditional point of view that deal is regulator of contractual legal relationship in civil law. Accordingly contractual legal relationship are relations of property circulation and it allows asserting that deal is considered to be regulator only of property relations in civil law. The analysis of scientific researches testifies that one of problems, which requires special attention of civilians, is identification of possibility of effecting deals with intangible goods. Just its description (statement) also is aim of this article.

The continuous increasing of attention of society and state to issue of regulation of author's relations was being taken place in process of historical development. Several centuries ago protection of property and personal non-property rights concerning results of creative, intellectual activity seemed strange, and today relevant legislative regulations make up basis of each legal system. The continuous increase of demand for objects

of intellectual property causes necessity of introduction of effective mechanisms of interaction of authors (their assignees) with users of such objects.

The form of civil circulation is legal succession, inheritance etc., that is all that mediates movement of goods from one subject to another through movement of rights to them. In other words, transfer of rights is carried out by succession, inheritance or otherwise [1, p. 95]. B.B. Cherepakhin asserts that legal succession is a transfer of subjective right (in a broad sense – also legal duty) from one person (right giver) to another (assignee) in order of derivative (secondary) right acquisition (in appropriate cases – derivative acquisition of legal duty) [2, p. 311].

The legislation admits copyright as well for author of production, and also for his assignees. It is accepted to name author's right for production primary in legal literature as it arises owing to fact of creation of production by author, in turn, assignee's right for production is derivative as it originates from transfer of rights which belong to author [3, p. 38].

The content is most important aspect of any right. V. I. Serebrovskyi defines content of author's right as set of rights (authorities) that are necessary for guard of interests which arise in connection



with creation of production and its use in society [4, p. 94–95]. The content of derivative subject's right directly depends on content of rights of primary subject, but volume of rights of specified subjects isn't equal [5, p. 112].

V.I. Serebrowskyi considers that it is because of that fact that not all authorities and not on all means of their use transfer to assignees of author, there is a sense to use such notions as primary and derivative copyright [4, p. 88].

The double nature of copyright (close connection with personality of author is observed, at same production encloses signs of property and non-property goods) led to that division of copyright into two groups became traditional not only in Ukraine but also in foreign countries. The division of rights into property and non-property depends on what interests are bases for authorities: property or moral. As practically any copyright includes both moral and material interests, such division is very conditional.

The author's personal non-property rights, as well as property rights, arise from moment of creation of production and granting an objective form to it irrespective of its appropriation, size, genre, purpose, irrespective of that whether it is published, completed; it is reflected in Article 1 of effecting law of Ukraine «On copyright and allied rights».

Defining a range of personal non-property rights we should specify that in Article 438 of Civil Code of Ukraine their following list is fixed:

- 1) to demand indication of name in connection with use of production if it is possible in a practical way;
- 2) to forbid indication of name in connection with use of production;
- 3) to choose a pseudonym in connection with use of production;
- 4) of integrity of production.

The same author's rights are fixed also in Article 14 of the Law of Ukraine «On copyright and allied rights» but something is formulated differently:

- 1) to demand definition of authorship by indication in proper way author's name on production and its copies and in case of any public use of production if it is possible in a practical way;
- 2) to forbid mention of author's name if author during public use of production wishes to remain anonymous;

3) to choose a pseudonym, to note and demand indication of a pseudonym instead of a real name of author on production and its copies and during any public use;

4) to demand reservation of integrity of production and to counteract any other encroachment on production which can do harm to honor and reputation of author [6, p. 64].

There is a current opinion that personal non-property rights of creators are inalienable. On this matter O. A. Pidoprygora notes that subjects of copyright – not authors – can't have rights which authors of productions have, and personal non-property rights of author are inherent from him [7, p. 549]. Y.O. Pokrovskyi at beginning of XX century wrote: «If any subjective right provides personality from an arbitrary, idea of «inherent rights» is aimed against state per se. The self-affirmation of personality heads out here in legal relation» [8, p. 309]. He predicted that new development of legal awareness will move in direction of recognition of rights of natural person, even of specific human personality, and law will be obliged to take all infringed non-material interests under its protection [8, p. 138–139]. The issue of inalienability of personal non-property rights of intellectual property nevertheless remains debatable in law science. We will shortly note distinctive features of inalienability and inherence of personal non-property rights. In result of alienation good becomes somebody else's for primary owner and acquirer's own. Such process can be followed by transfer of good. The transfer of good isn't key in this way of circulation, but that good becomes somebody else's for alienator and own for secondary acquirer [9, p. 7]. The inherence is such indissoluble connection of good with its bearer which creates physical impossibility to separate it from particular person [7, p. 231]. The connection is so inseparable that extinction of subject entails cessation or disappearance of object [10, p. 233]. So, for example, if after death of author his artwork continues to exist independently, i. e. separates from it, autonomy of these intangible goods creates possibility of third parties to get access to them, and also possibility to use them in a separation from author [10, p. 234]. It is possible to notice that author's personal non-property rights remain inalienable but inherent

both during lifetime and after death of owner.

So, there are links about that personality of author is defined by indication of name on book even if in fact it was written by another person in legal literature of Soviet period. It leads to conclusion that representatives of Soviet doctrine didn't consider immoral and unnatural practice of use of works of «hack writers» and thus allowed possibility of a concession of rights of authorship. The classical controversion whether copyright is property right in fact divided experts into two opposite camps: adherents of «proprietary» theory who insisted on full assimilation of these two rights (I.H. Tabashnikov, D.I. Meyer) and its opponents who considered copyright as special (sui generis) and, essentially, property right (A. Pylenko, G. Shershenevych, V. Spasovys, K. Annenkov and other).

The copyright by its nature is person's domination over production which can exist in presence both property and non-property rights. Besides, O.O. Morgunova, O.A. Ruzanova mentioned in their works that non-property rights as rights that connected with individuality of creator, have to be on important position, and their role has to increase with progress of society; not only property, but also non-property rights have exclusive character [11, p. 18]. The author's personal non-property rights are closely connected with property rights, there is a necessity of regulation of property relations together with personal non-property relations in certain cases, so, for example, when regulating relations connected with free use of production. Sometimes for correct understanding of content of non-property right it is necessary to find out content of property right. Close connection, interlacing of rights are resembling cucumber tops as stems can't be separated without having damaged any of them [11, p. 18].

Legal succession in copyright is possible as during lifetime of author – under contract according to which author transfer certain rights of use production to physical or what is more often in practice to juridical entity both within term established by law or contract and also in order of inheritance. Nevertheless, it is necessary to specify that secondary copyright of inheritors, in turn, also can



be transferred to another person under contract.

During lifetime of author of work of science, literature and art authorities, which author, as a rule, can't execute by himself, usually are transferred to assignees under contract that's why publishing houses, film studios, theaters etc. are assignees in first place [12]. Both Ukrainian and foreign natural persons and juridical entities can be assignees of Ukrainian authors.

In case of author's death or announcement him deceased heirs of author of production becomes owners of property copyright, which get mentioned rights according to law or testament. The heritors of author can also protect some non-property rights of author in case of their violation, according to Article 29 of the Law [6] heritors have right to protect authorship of production and to counteract a distortion, perversion or other change of production, and also any other encroachment on production, which can do harm to honor and reputation of author. There is a question: if person is granted such right to protect and he/she provides consent for purpose of counteraction, in order not to do harm to honor and reputation of author, is it legal succession of personal non-property rights of authors, isn't?

The idea of necessity to differentiate personal non-property rights, non-property and property rights of intellectual property is substantiated in doctrine [13, p. 23]. The authors come to a conclusion that such approach is reasonable in view of content and extent of these rights, ways and order of their realization, circle of subjects and special features of protection. Personal non-property intellectual property rights are inalienable, and non-property and property can be alienated. Both M.I. Nikitina and V. Kabatov share this thought, motivating such approach with that level of connection of author's rights with production is different: right of authorship and right on name are inalienable under no circumstances, and connection with other rights isn't so stable as they can be executed by other persons (right of integrity, right for publication) [14, p. 75; 15, p. 7].

Summing up results, we can specify that personal non-property rights of authors for literary, art and other works can transfer in order of legal succession, they are separated from creator, but not alienated.

Conclusions. The main peculiarity of objects with which main difficulty of their perception by civil law is connected, is that these objects are non-material.

But at present time in connection with establishment of civil law institute of personal non-property rights and increasing of social value of these rights in Ukraine, a lot of problematic issues concerning execution and protection of such rights arises in practice that are caused by limits of of regulation of personal non-property relations by current legislation. Therefore scientists and practitioners call into question a categoriality of theory of contractual regulation of exclusively property rights today. So advertizing agencies, television stations, medical organizations, production centers, etc., even more often conclude bargains which subject of regulation is not only property, but also personal non-property relations.

Thus, today scientists only in certain works directly or indirectly state possibility of conclusion of deals with intangible goods. Such variety of opinions which are as usual opposed one to another, point to existence of a problem. In spite of coverage of some aspects of conclusion of deals with intangible goods by certain scientists, lack of complete research conduces to indeterminateness of theoretical and methodical source, contradictory law enforcement practice concerning such deals. The drawn conclusion indicates necessity of not only further research of possibility of effecting deals with intangible goods, but also determination of a place of deals with intangible goods in system of highest level and systematization of such deals.

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