PRIVATE COPYING IN THE SYSTEM OF COPYRIGHT RESTRICTIONS UNDER THE LAW OF UKRAINE „ON COPYRIGHT AND RELATED RIGHTS“ – GENERAL TRAIT

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Abstract. The article presumes the existence of certain shortcomings at the level of the legal norm on the regulation of issues related to the carrying out of private copying as a copyright restriction. As is known, copyright should provide the author with a legal basis for supervising the type and scope of his work and making them dependent on the payment of remuneration. According to this principle of copyright, the formalization of exclusive right of an author is exhaustive, which means that any use of his work is under his control. Such a wide aspiration of the Law of Ukraine "On Copyright and Related Rights" to ensure the protection of the rights of the author is, moreover, in the fact that for repeated use, which follows one after another, not only the so-called primary use is taken into account, but every subsequent use of the work - the so-called secondary use (Article 20 of the Law of Ukraine "On Copyright and Related Rights"). This aspiration to protect the rights of the author is opposed by copyright restrictions as regulated by Articles 21 – 25 of the Law of Ukraine *On Copyright and Related Rights*. Definition of restrictions is based on the fact that copyright law, as well as any absolute right, is related to the social sphere and thus subject to certain restrictions in favor of society. The purpose of copyright restrictions is to serve the interests of society. At certain points, they cancel the author's exclusive right and thus serve to precisely delineate the outlines of rights that remain with the author within the scope of use defined by the concept of the work and the rules applying to the content of the rights. As for the shortcomings, then, firstly, it remains uncertain neither at the legislative level nor in practice, what exactly refers to the "personal purpose" of free reproduction of works. Secondly, only works which are presented in book (paper) form it is possible copying without payment of remuneration. Thirdly, the legislation of Ukraine regarding regulation of questions of the collection of payments by the manufacturers and the importers of the equipment and tangible mediums has certain disadvantages. Fourthly, the provisions of Ukrainian legislation with regard to technical means of protection do not take into account the copyright restrictions, especially regarding the free reproduction of works for personal purposes – the Article 25 of the Law of Ukraine *On Copyright and Related Rights*.
Key words*: copyright restriction, private copying, free reproduction for personal purposes, copyright, author's remuneration.*

Introduction

As it is known, the goal of the legislature is preservation of fair balance between effective protection of interests of right holders with respect to the use of their works and interests of society on access to such works. There is no objection to the fact that the most effective method of achieving equality of the parties (balance) is the establishment of legal restrictions. And copyright is no exception. One of such restriction is the user's right to freely reproduce works for personal purpose. This right is also called *private copying*. It should be mentioned that there is no the same approach to understanding the limits of this restriction in the world. At the same time, the quest to unify the policy of solving problems in this sphere arising in law is dictated primarily by copyright philosophy, which is a transnational (international) character. Therefore, the analysis of the actions of private copying as a restriction of the right, at the level of the legal norm, will allow supplementing the system (world) thinks about specified copyright restriction. In addition, since there are currently no scientific works devoted to the analysis of private copying in the system of copyright restrictions in Ukraine, the present research may claim to be a local scientific novelty.

The purpose of this article is to determine the general characteristic of private copying in the system of copyright restrictions in the context of the rules of Law of Ukraine *On Copyright and Related Rights* through the study of the content of the relevant rules of this Law. At the same time, with the recognition of copyright, it was concluded that such an exclusive right, as well as ownership of a thing, should be somewhat immanent to the interests of society, which can only be achieved by restriction of the relevant right. After all, despite the fact that ownership is an absolute right, this does not mean that no one can ever restrict it. Concerning the right of intellectual property, G.F. Shershenevich in 1909 wrote: *"... and material, and literary works of arts, industrial rights are classified as exceptional and occupy a place in the department of absolute rights, along with rights in rem, of the system of civil law."* (2003, p. 266]. The history of the development of civil law shows that at different periods and for different owners the state established greater or lesser legislative restrictions in the interests of individual social groups and society as a whole (Pushkin, 1996, p. 266). Therefore, by analogy with the property law, even Riezler in 1909 pointed out that *"such restrictions of intangible rights are comparable with statutory restrictions of ownership right in proprietary law"* (1909). In order to achieve the above-mentioned well-meaning - compliance with interests of society - the only possible option that could have been was the establishment of copyright restrictions. In this case, the restrictions *"should not be foreseen, but specifically required by law".* One of such restrictions is the right for user's to free reproduction of works for personal purpose, enshrined in Article 25, or, as this right is called, private copying.

Restriction of copyright in the system of Law of Ukraine *Copyright and Related Rights*

According to preamble of the Law of Ukraine *On Copyright and Related Rights*, copyright law grants the author an absolute subjective right to protect his personal non-property and property interests in relation to the work he has created. Under the same Law the author has the exclusive competence to use the work created by him and to prohibit such use to any other persons (Part 1, Article 15). The copyright law defines the power of the authors through the following three blocks, it alternates the object, the content and the restrictions of copyright. The object of protection in copyright law is the relation of the author to the work created by him. The Law does not provide the definition of *work*. However, as already noted above, proceeding from the provisions of the Law of Ukraine *On Copyright and Related Rights*, it appears that a work is a personal intellectual creation in the domain of science, literature and art, which meets the criteria of originality. The concept of the work is concretized by means of giving examples of certain types of works in Article 8, the list of which is not exhaustive. Such a definition of the work and only an approximate list of certain type of works deliberately leave the clear space for the flexible manipulation of the definition of the work in relation to technical and cultural improvements. Thus, the copyright law takes into account the new forms of expressing a personal intellectual creative result, which does not force the legislator to constantly make changes to the law. The content of copyright is regulated within the framework of the second cluster – Articles 14 – 20. Copyright as a range of rights has the following components:

- personal non-proprietary rights of the author (Article 14);
- proprietary rights as the right to use (Article 15) and other rights (Articles 16 – 20).

The right to use has the special significance for restrictions among the above-mentioned elements of the content of copyright. The copyright law grants the author the general, broad and absolute right to use (Dozortsev, p. 112). At the same time, the Law of Ukraine *On Copyright and Related Rights* clearly stipulates that the author can authorize and prohibit the use of his work within the framework of exclusive right (§ 1, Article 15). By the way, the legislator of the Russian Federation treats the exclusive right to perform the work as the right to "carry out and permit" the appropriate action. The key forms of use are specified in §3, Article 15 and their content is partially specified in the following articles of the Law. As above mentioned, such a list provided as an example, is not exhaustive.

Expressing the general postulates about the right to use, giving only their approximate specification, similar to the definition of the concept of a work, the legislator wanted to avoid that the final list of individual use authorizations would become irrelevant as a result of the development of usage technologies (Erhard, 1963). Consequently, the Law guarantees to extend the right to use into new forms, including those related to the technical possibilities of using newly opened ones, which could not be foreseen at the time of the legislative process. The facts related to the object and the content of protection which are provided in the form of general reservations and consciously wide-ranging formulations, are the main idea of the Law of Ukraine *On Copyright and Related Rights*, which consists in the desire to provide the greatest possible protection to the author. In this sense, as a justification for the adoption of that Law it is possible to state the following: an exclusive right shall entitle the author to prohibit (not permit) the use of the work by any third person who has not previously obtained permission from the author to use the work and has not paid the relevant remuneration.

Copyright should provide the author with a legal basis for supervise the type and scope of use his work and making them dependent on the payment of remuneration. According to this principle of copyright, the authoring of exclusive author's powers shall be as thorough exhaustive, as any use of his work shall be under his control. Such a wide aspiration of the Law of Ukraine *On Copyright and Related Rights* to ensure the protection of rights of the author is, moreover, in terms of multiple use, which follows one after another, not only the so-called primary use is taken into account, but in principle every subsequent use of the work - the so-called secondary use (Article 20). This aspiration to protect the rights of the author is opposed by copyright restrictions as regulated by Articles 21 – 25. Definition of restrictions is based on the fact that copyright law, as well as any absolute right, is related to the social sphere and thus subject to certain restrictions in favor of society. The purpose of copyright restrictions is to serve the *interests of society*. At certain points, they cancel the author's exclusive right and thus serve to precisely delineate the outlines of rights that remain with the author within the scope of use defined by the concept of the work and by the rules operating in relation to the content of rights. As for technical regulatory the copyright restrictions concern only right to use, defined, first of all, by the Article 15, pointing that the use of works does not include certain actions. At the same time, copyright restrictions do not affect the author's personal non-property rights specified in Article 14. In contrast to the concept of the work and the right to use, Tle Law does not specify the copyright restrictions through examples. Moreover, Articles 21 – 25 cover all special personal interests and provide privileges only for the listed and clearly described cases of

use. Thus, The Law regulates the justified interests of the public in a different way, than the object of protection and the content of protection – exhaustively and in detail. Such a technique of listing of certain facts in The Law gives the advantage to certainty and legal clarity, but causes only a slight flexibility in the restrictions area. The existence of a system of copyright restrictions in the normative structure is a source to understand: the copyright restrictions provide the balance of different interests covered by copyright within the scope, as defined by the notion of the work and the content of the right to use.

The distinction between what shall be assigned to the author and what remains to the public is carried out in both previous regulatory units. Already in determining whether a personal intellectual creation takes place for the purposes should be a clear distinguish one from another those elements of work, the right to which is recognized only for the author, and those elements that shall be remained with the public. In other words, the provisions of Articles 21 – 25 are intended to *"proper delineation of the author's rights and justifiable interests of the public, is common"* (Macciacchinni, 2000, p. 42).

It is important to understand correlation between provisions of the Article 25 and Article 42. First, it should be noted that all copyright restrictions without exceptions are correlated with the so-called three-stage test, which is set out in the provisions of Part 2 of Article 9 of the Berne Convention: *"It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author".* This means that each of the statutory restrictions, in turn, is possible for use only if it *"does not conflict with a normal exploitation of the work"* and *"does not unreasonably prejudice the legitimate interests of the author"*. And the restrictions on free reproduction of works for personal purposes are no exception.

In general, provisions of Article 25 are presented rather succinctly, especially in comparison with Article 53 of the German Copyright Law, dealing with the same issues. But the Article 25 follows the same structure as Article 1273, part 4 of the Civil Code of the Russian Federation. Strategically, the provisions of the relevant articles of laws and Ukraine, and Germany, the Russian Federation, on the issue of free reproduction of works for personal use, start the same way: *"It shall be permissible without the consent of the author (or other copyright holder)...",* and then cases of the permission of reproduction with the exemptions are specified.

The purpose and the meaning of the rule

Surely, subject to the provisions of Article 43, which will be considered later, the provisions of Article 25 are called upon to harmonize the interests of the society with the interests of the authors (and other copyright holders) by means of a limited use of works protected by copyright law. As is known, the commercial (property) interests of each of the authors are guaranteed by the fact that the author has the exclusive right to reproduce and distribute the work created by him, and the granting of the right to use the third parties is carried out for an adequate remuneration. However, the exclusive rights of authors have certain limitations because of the social impact of the works created by them, since nothing new appears from nowhere: each author creates something on the basis of the cultural layer built by previous

authors', every new work is based on what was created before it. That is why, in the interests of society to which the authors themselves belong, some limitations of copyright have been made because of the possibility to perform certain actions for the use of works free of charge. Such legal norms are a kind of accent on the part of the legislator that the state really contributes to cultural development (e.g. Article 11 of the Constitution of Ukraine).

Description of the norm

Article 25 consists of two parts:

1. It shall be permissible to reproduce exclusively for personal purposes or for members of a family, without the consent of the author (or other copyright holder) and without payment of the author's remuneration, works previously promulgated in a lawful way, except for the following:
   a) works of architecture in the form of buildings and facilities;
   b) computer software, except in the cases stipulated in Article 24;
   c) to reprographically reproduce books, sheet music and original works of fine art, except in the cases stipulated in Articles 22 and 23;
   d) works, performances of which have been fixed on phonograms or videograms, and specimens thereof.
2. It shall be permissible to reproduce works and performances fixed on phonograms, videograms and specimens thereof, in home conditions and exclusively for personal purposes or for a regular family members and close acquaintances of this family, without the consent of the author(s), performers, manufacturers of the phonograms, or manufacturers of the videograms, by paying remuneration. The specifics of the payment of the remuneration in this case are stipulated in Article 42 of this Law.

As noted above, this rule contains cases of such use, which are referred to as *"instances of free reproduction"*. According to E.P. Gavrilov etc., the term *free* means that the exclusive right in this case does not work (2008, p. 180). Similarly, concerning the term *without payment of remuneration* it can be concluded that the author's remuneration should not be paid for free reproduction.

According to Article 25 the term *author (or other copyright holder)* is correlated with the rule of Article 7 of the same Law and thus means any person who is a subject of copyright by that. It should be noted that such a wording embodied an error. As can be seen from the provision of the Article 25 of the Law, free reproduction is permitted only with the appropriate purpose - solely for personal purposes or for a regular family members. Article 7 is about subjects of copyright and it does not exclude that, in keeping with Article 1 of the Law, as regards the definition of the term "person", such a person also may be individuals as well as legal entities. It is quite logical that a legal entity cannot have personal purpose or purpose *for a regular family members*. However, Article 25 does not specify that. The Russian Federation's experience is interesting in this regard, where a corresponding caution was made in Article 1273 of the Civil Code of the Russian Federation: *"reproduction by a citizen is may be without the consent of the author or other right holder and without payment of royalties...",* which excludes the possibility of manipulating this rule by legal entities. In our opinion such a reservation will not be superfluous in Ukrainian legislation.

As noted above, free reproduction of works is possible only *for personal purpose* or *for a regular family members* as for the *personal purpose*, neither at the legislative level, nor in practice it is determined what could be interpreted as referring to such purpose. One can only be assumed that for *personal purpose* it is possible, e.g. to play records, record a television program or a movie that is broadcast on television, a copy of an audio cassette or CD, etc., that is, actions aimed at meeting personal needs.

As for the term *for a regular family members*, the range of persons within the family circle is determined by the Family Code of Ukraine (hereinafter – the Family Code of Ukraine). According to Part 2 of Article 3, the family consists of persons who live together, are connected by common life, have mutual rights and obligations. In any case, reproduction for personal purposes and in the family circle is without any commercial purpose, direct or indirectly, that is, it should be free from the connection between reproduction and commercial use.

Here it should be emphasized that the question of which can be considered primarily as indirect commercial goal, the Ukrainian legislator assigned responsibility to case-law. This approach is applied in many European countries. E.g. the Supreme Court of Germany - OLG Hamm (the capital of the North Rhine - Westphalia) had spelled out that the creation of copies by lawyers, teachers of schools and higher educational institutions for the performance of their professional duties is considered as an indirect commercial purpose as well (Schricker, 2006, p. 1079). Unfortunately, the Ukrainian judicial practice are not very enlightening on this matter.

The rule of Article 25 indicates that only works previously promulgated in a lawful way can be freely reproduced. This means that the work that is copied must be legitimately put into civilian circulation. It should be borne in mind that there is no exhaustion of rights with respect to the made copy, and therefore it could not be distributed, which is also impossible in terms of the availability of a commercial purpose in such a distribution. Even E.P. Gavrilov had mentioned that *“the rule of law, which enshrined the possibility of making a copy of the work to meet personal needs’, proceeds from the fact that such a copy could not be put into civil circulation”* (1982, p. 5-11).

The considered Article 25 contains three cases where works previously promulgated in a lawful way could not be reproduced by a person, even if he meant to carry out it for personal purposes. It means that to use of such works the consent of the relevant subject of copyright is required. Thus, free reproduction shall not be applied to works as buildings and structures, computer software with the exception as envisaged in Article 24 as well as books, music texts and original works of fine art for the purpose of reprographic reproduction, taking into account the provisions of Articles 22 and 23.

Part two of the Article 25 provides the special conditions for free reproduction of works (and performances) fixed in phonograms, videograms, specimens thereof, as well as audiovisual works and their specimens. The peculiarity of free reproduction of such works is that it is possible only in home conditions and only by paying remuneration. It is remarkable the incomprehensibility of the presence of term *specimens* in this part. Taking into account that according to Article 1, the specimen of the work is considered to be a copy performed in any material form, the point of existence its here is not clear, since the reproduction for personal purposes in each case is made from specimen. As for home conditions, it means

that the free reproduction of such works should be made in the place where the person lives, as well as with the use of equipment belonging to him, intended for the use in home by an ordinary user. Considering of the imperative of part two of this Article in relation to payment of remuneration, we will analyze this rule for what works can be freely reproduced for personal purposes free of charge. Analysis of the provisions of the Law of Ukraine *On Copyright and Related Rights* helps to determine that it is possible copying without payment of remuneration only works in book (paper) form. Since almost all works (except for computer programs) which had listed in Article 8, can be distributed only in hard copy (e.g. books) or phonograms, or videograms, or audiovisual works, reprographic reproduction by private copying is impossible. That is taking into account the provisions of Article 42, the reproduction of work fixed on paper to extent justified by the intended purpose is the only free-of-charge action that met the characteristics of free reproduction for personal purposes. As for the remuneration, Part 2 of Article 25 taking into account the specifics of its payment, provides a reference to Article 42, which contains the rules about the remuneration for private copying.

According to Article 42, Part 2 *“it shall be permissible to reproduce the works and performances fixed on phonograms and videograms and their specimens in home conditions and exclusively for personal purposes without the consent of the author(s), performers and manufacturers of phonograms (videograms), but paying remuneration to them in the manner stipulated in part four of this Article”*.

Under Article 42, Part 4 the remuneration of manufacturers of phonograms and videograms and other persons holding copyright and (or) related rights with respect to the reproductions stipulated in part two of this Article shall be paid as deductions (interest) from (on) the value of equipment and (or) material media by the manufacturers and (or) importers of the equipment and material media, with the use of which it is possible to carry out the reproduction of works fixed on phonograms and videograms exclusively for personal purposes in home conditions, except for:

a) professional equipment and (or) material media not designed for use for recording in home conditions;
b) equipment and material media that are exported outside the customs territory of Ukraine;
c) equipment and material media that are imported by an individual into the customs territory of Ukraine exclusively for personal purposes and without a commercial purpose.

The aim and the meaning of the rule

The mentioned Article establishes the remuneration – the special deductions shall be paid by the manufacturers and (or) importers of the equipment and material media which individual could use for reproduction of phonograms and videograms exclusively for personal purposes only in home conditions. Inherently such remuneration has a compensatory character since it aims to compensate copyright holders concerning phonograms and videograms with the material losses they incur in connection with the actions of private copying, which each individual can perform freely in accordance with Art. 25 of the Law of Ukraine *On*

Copyright and Related Rights, because each copy actually means a non-sale of one specimens of the work.

Description of the Law

The second and fourth parts of Article 42 deals with the constructions contained in Article 25 terms home conditions, for personal purposes, and their conception should accordingly meets the above-mentioned.

Regarding the order of payment and the amount of rates, as well as equipment and material media which should be subject to these fees, such charges are established by the Decree of the Cabinet of Ministers of Ukraine No. 992 *"On the amount of deductions by manufacturers and importers of equipment and material media, with the use of which it is possible to carry out the reproduction of works fixed on phonograms and (or) videograms exclusively for personal purposes in home conditions"* from 27.06.2003, where the tariffs for pure medium is based on the duration of record which can be fixed on this medium, and a fixed rate of interest are established for reproducing equipment. This Decree determined all the equipment and material media that are imported into the customs territory of Ukraine or manufactured in Ukraine, from which funds an interest rate should be charged depending from the product.

The procedure for the deductions was stipulated by the Order of the Ministry of Education and Science of Ukraine, the State Committee for Regulatory Policy and Entrepreneurship, the State Tax Administration *"On approval of the payment regulations by manufacturers and importers of equipment and material media, with the use of which it is possible to carry out the reproduction of works fixed on phonograms and videograms for personal purposes in home conditions"* from 24.11.2003 № 780/123/561. It should be noted that the legislation of Ukraine regarding the regulation of the collection of deductions by manufacturers and importers of equipment and material media has certain shortcomings. E.g., the procedure and timetable for payment by importers of deductions for the import of relevant products, as well as the responsibility for non-payment are not determined.

The technical means of protection

According to Article 1 technical means of protection are the technical devices and (or) technological means designed to create a technological obstacle to the infringement of copyright and (or) related rights during receipt and (or) duplication of protected (encoded) recordings in phonograms (videograms) and broadcast organization transmissions, or to control access to the use of objects of copyright and related rights. These technical means are primarily intended for use on the Internet. However, their application is not limited to this sphere, which, in principle, is also indicated in the definition itself. Thus, technical means of information also include the coding of television signals or coding of disks on which, e.g. a database has been recorded. The purpose of using technical protection means is to control access to the use of copyright and related rights to prevent copyright infringement. At the same time, technical means can limit access to both promulgated and non-promulgated works. Control of access to a work is carried out by granting the author or other person who has copyright the appropriate authorization to use the work. Taking into account the provisions of e) Article 50, any actions for the intentional circumvention of

technical means of protection of copyright and (or) related rights, in particular the production, distribution, importation for distribution and use of means of such circumvention are infringement of copyright and related rights.

As we can see, the wording of the legislation of Ukraine on copyright in respect of technical means of protection and any actions for the intentional circumvention of such means have significant drawbacks. Thus, the provisions of the legislation do not take into account the restrictions of copyright, especially regarding the free reproduction of works for personal purposes. The Russian Federation's experience is interesting in this regard, where in addition to distribution to the various remedies according to the criterion of *copyright* and *related rights*, under the Article 1299 *Technical means of copyright protection* in section 4 of the Civil Code of the Russian Federation States, the technical protection measures cannot and should not be applied in order to control, prohibit or limit the use of works in cases for which the law provides for a regime of free use (Part 3 of Article 1299 of the Civil Code). Usually, in our opinion, the probability of practical application such a reservation is rather low due to the lack of appropriate control. However, the fact of having such a warning in the law means a lot.

Some of the key findings emerging from the above analysis are as follows: First, it remains unclear either at the legislative level or in practice, what may constitute the *personal purposes* of the free reproduction of works. Secondly, the only reproduction of work fixed on book (paper) is permissible without payment of remuneration. Thirdly, the legislation of Ukraine to regulate of paying deductions (interest) by the manufacturers and (or) importers of the equipment and material media has certain shortcomings. Fourthly, the provisions of the legislation of Ukraine regarding the technical means of protection of copyright and (or) related rights do not take into account the restrictions of copyright, especially regarding the free reproduction of works for personal purposes.

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