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Original article

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ANONYMITY AS THE INHERENT NATURE OF CYBERSPACE

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Abstract. This article aims to explore the legal nature of the concept «anonymity» of the subjects of relations that occur in information-telecommunication networks. Anonymity will be considered in two aspects: as the inherent nature of cyberspace and as one of the most important subjective rights in the structure of studied relationships. Also an interdisciplinary approach will be applied to this concept.

The article also analyzes the first results of amendments to the information legislation in terms of identification of users of cyberspace, adopted in 2017, as well as new legislative initiatives in this area, currently being considered in the State Duma of the Federal Assembly of the Russian Federation.

Keywords: legal theory; information law; anonymity; privacy; cyberspace; Internet; deanonymization; national security.

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PROBLEM STATEMENT

The concept of anonymity, which does not leave from news feeds in recent years, can be called one of the symbols of the modern cyberspace. Within a few years, this concept has passed from the vocabulary of secret services and coders into everyday speech. This is largely due to the activities of the regulators to “bringing order” on the Internet. Despite the fact that anonymity is often perceived by the legal community as a phenomenon that does not need to be explained, in many ways it remains to be *terra incognita*.

The format of the article, unfortunately, does not allow us to analyze all the features of the phenomenon of anonymity in cyberspace that is why we review the key technical and legal aspects of this phenomenon. We have repeatedly drawn attention to the fact that cyberspace has become a fundamentally new sphere of law, and anonymity, in turn, is its organic property, along with cross-border and interactivity¹. This feature of cyberspace, coupled with the development of wireless public access networks and technologies for changing (masking) IP-addresses, has been worried Russian lawmakers

¹ See for example, *Deineko A.G. (2017). Avtorskoe pravo v kiberprostranstve: monografiya [Copyright in cyberspace: monography]* Moscow: Yurlitinform. P. 15. (in Russ.).

for many years. In 2016, German Klimenko, adviser to the President of Russian Federation on Internet issues, called anonymity the most serious problem of the Internet and de facto recognized that it was impossible to solve it quickly². Some attempts have already taken place in Russian practice in terms of introducing mandatory identification of users of public Wi-Fi networks³, and they can hardly be called effective. In recent years the legislator has made a number of steps, which, however, have not led to a full solution to this problem⁴.

July 29, 2017 Russian President Vladimir Putin has signed two laws directly related to the issue of cyberspace anonymity: Federal law No. 241-FZ⁵ and Federal law No. 276-FZ⁶. Many experts note that the draft laws related to the regulation of cyberspace tend to have ultra-short (from two weeks to one month) terms of discussion in the lower house of Parliament⁷.

Law 241-FZ, also known as the “Messengers Law”, amended Federal law of July 27, 2006 No. 149-FZ “On information, information technologies and information protection” (hereinafter — “Information Law”), fixing a new concept for the Russian law system: “organizer of an instant messaging service”. The definition is formulated so vaguely that it includes not only well-known messengers — WhatsApp, Viber, Telegram, etc., but also, for

example, social networks. For such organizers, the Messengers Law establishes the obligation to identify users of services using the mobile operator’s subscriber number “in accordance with the procedure established by the Government of the Russian Federation”, which came into force in May 2019⁸, as well as the obligation to ensure the confidentiality of transmitted electronic messages. In other words, messenger users will be identified through the SIM cards that they use to access the Internet, but in return they will receive a guarantee of confidentiality of the transmitted data. There is no answer to the question of what to do with users who purchased a SIM card without entering a passport data (which is absolutely legal today) or use a SIM card issued to another person.

Law No. 276-FZ, also known as the “Anonymizers Law” amended the Information Law by prohibiting the use of software that allows users to change (mask) their IP-addresses, reducing the possibility of their identification to zero. To legally define anonymizers, the legislator used a very cumbersome construction: “information-telecommunication networks and information resources, through which access to information resources and information-telecommunication networks is provided, access to which is restricted on the territory of the Russian Federation”⁹. At the same time, «*information resources*» mean a website on the Internet and (or) a website page on the Internet, an information system, or a computer program. The authors of the 276-FZ paved a shaky bridge between information and copyright law, given that information has not been the object of civil rights for many years¹⁰, but computer programs are¹¹. Thus, new concept «*information resources*» combines two different groups of objects: site, site page, information system (information law) and computer programs (copyright law). Thus, the existing discussion in the Russian jurisprudence about the legal nature of information and related concepts is even more complicated.

It should be noted that the 276-FZ does not establish a total ban on the use of anonymizers, it is only prohib-

² Interview with G. Klimenko (2016) [online]. Izvestia [News]. Available at: <https://iz.ru/news/608118> [Accessed November 1, 2019].

³ Art. 1 Decree of the Government of the Russian Federation of August 12, 2014 No. 801 «On amendments to certain acts of the Government of the Russian Federation» // Svod zakonov Rossijskoj Federacii [Russian Code of Laws], August 25, 2014. No.34. Art. 4662.

⁴ See for example, Naumov V.B. (2018). Problemy razvitiya zakonodatel'stva ob identifikacii sub"ektov informacionnyh otnoshenij v usloviyah cifrovoj ekonomiki [Problems of development of legislation on identification of subjects of information relations in the digital economy] // Trudy Instituta gosudarstva i prava RAN [Proceedings of the Institute of State and Law of the RAS]. 13 (4). P. 131.

⁵ Federal law of July 29, 2017 No. 241-FZ «On amendments to articles 10-1 and 15-4 of the Federal law “On information, information technologies and information protection”» (hereinafter — 241-FZ). Available at: Ofitsialniy Internet-portal pravovoi informatsii [Official Internet-portal of law information] URL: <https://pravo.gov.ru>, ID: 0001201707300031. [Accessed November 1, 2019].

⁶ Federal law of July 29, 2017 No. 276-FZ «On amendments to the Federal law “On information, information technologies and information protection”» (hereinafter — 276-FZ). Available at: Ofitsialniy Internet-portal pravovoi informatsii [Official Internet-portal of law information] URL: <https://pravo.gov.ru>, ID: 0001201707300002. [Accessed November 1, 2019].

⁷ Interview with head of NGO «Roscomsvoboda» A.Kozluk (2017) [online]. «Afisha.Daily». Available at: <https://daily.afisha.ru/technology/5885-v-rossii-blokiruyut-vpn-i-tor-svobodnomu-internetu-konec> [Accessed November 1, 2019].

⁸ Decree of the Government of the Russian Federation of October 27, 2018 No. 1279 «On approval the Rules for identifying users of the Internet by the organizer of the instant messaging service» (came into force May 5, 2019) // Svod zakonov Rossijskoj Federacii [Russian Code of Laws], November 12, 2018. No. 46. Art. 7043.

⁹ Art. 15.8 of Information Law.

¹⁰ Art. 128 of the Civil Code of the Russian Federation (Part 1) of November, 30, 1994 No. 51-FZ // Svod zakonov Rossijskoj Federacii [Russian Code of Laws], December, 5, 1994. No. 32. Art. 3301.

¹¹ P. 1 art. 1259 of the Civil Code of the Russian Federation (Part 4) of December, 18, 2006, No. 230-FZ // Svod zakonov Rossijskoj Federacii [Russian Code of Laws], December, 25, 2006. No. 52 (Part 1), art. 5496.

ited to use them to overcome Roskomnadzor's blocking. Owners of information-telecommunication networks and information resources that are used to overcome blocking, are required to "ensure compliance with the ban" on access to blocked Internet sites, but the law does not explain how they should do this. At the same time, for non-compliance, is provided a responsibility in the form of restricting access to the owner's software and hardware, regardless of the owner's national jurisdiction. It is obvious that foreign owners of anonymizers, having received a Roskomnadzor's notification, will not eagerly comply with it, but rather will create a "mirror" of a potentially blocked site.

In general, this legal construction looks like a matryoshka doll — it is possible that the Roskomnadzor registry will be supplemented with sites that were blocked for providing tools to access blocked sites, etc. Users of cyberspace, in turn, will create information resources to overcome the blocking of information resources intended to bypass the blocking of Internet sites. It should be noted that in the explanatory note to the federal law draft No. 195446-7¹², which was the prototype of 276-FZ, is noted that the practice of blocking web sites, which has developed since 2012, revealed the insufficient effectiveness of the blocking mechanism.

NEW BEGINNINGS

Despite the noted width of the thesaurus of 241-FZ, 2019 was marked by another resonant initiative related to the deanonymization and addressed to e-mail users. Apparently, legal practice has revealed the incorrect application of the Messenger Law to e-mail users, which prompted senators A. Klshas, L. Bokova, A. Bashkin, A. Karlin to introduce a draft law that extends the obligation to identify e-mail users. Moreover, we are talking about two draft laws with identical names: the first one was introduced on July 23, 2019 under the No. 760029-7¹³ and is currently cancelled, the second draft law was introduced by the same senators on October 8, 2019 under the No. 808655-7¹⁴ and, most likely, it will be the basis for future amendments to the Information Law.

¹² Federal law draft No. 195446-7 «On amendments to the Federal law "On information, information technologies and information protection" (in terms of clarifying the procedure for restricting access to information resources)» // Available at: <https://sozd.duma.gov.ru/bill/195446-7> [Accessed November 1, 2019].

¹³ Federal law draft No. 760029-7 «On amendments to the article 10-1 of Federal law "On information, information technologies and information protection" (in terms of establish email service organizer's responsibilities)» // Available at: <https://sozd.duma.gov.ru/bill/760029-7> [Accessed November 1, 2019].

¹⁴ Federal law draft No. 808655-7 «On amendments to the article 10-1 of Federal law "On information, information technologies

In the explanatory notes to both draft laws it was noted that the changes made in 2017 to the Information Law, according to the developers, "had a positive impact on the security of the Russian Federation." The necessity of the identification of e-mail users is due to the growth of false messages about the threat of terrorist acts. Federal law draft No. 760029-7 regulated in detail actions of the organizers of e-mail services in relation to users of such services and messages transmitted by them, while the Federal law draft No. 808655-7 has only obligate them to «restrict users abilities». Also, a draft law No. 808655-7 proposes to remove the term "instant" from all legal constructions with the "instant messaging service", thereby extending the effect of the Messenger Law to e-mail services. Such novelties are unlikely to be working themselves until the relevant amendments are made to the Decree of the Government of the Russian Federation of October 27, 2018, No. 1279, which is still action in pilot mode¹⁵. In addition, it may be necessary to adopt a special legal act, established the procedure (method) for filtering messages containing prohibited information by e-mail services, as well as by a regulator that is not yet known.

Thus, we can state the legislative "trend" of recent years — the desire of the legislator to "deanonymize" cyberspace by any ways. This trend is likely to lead to an "exodus" of users to foreign service providers, who are unlikely to obey with Russian law requirements. A significant number of legal entities and public authorities that provide their employees (officials) corporate email addresses fall under the scope of the proposed laws. The question of identifying email addresses belonging to legal entities, state and local government bodies, as well as their various divisions (departments, services, etc.) remains unanswered.

As for the Russian owners of information-telecommunications networks and information resources that qualified as anonymous technologies, since none of them is able to control how they are used by end users (especially if we are talking about computer programs), the most reasonable action for them in terms of risks minimizing is to delete such a network or information resource.

Supporters of access to the Internet "by passport" often call anonymity as a clear threat to national security, arguing that it helps to commit crimes — from

and information protection"» // Available at: <https://sozd.duma.gov.ru/bill/808655-7> [Accessed November 1, 2019].

¹⁵ This is confirmed by numerous journalists experiments, proved that after the entry into force of this Decree, any one can still purchase a SIM card without presenting an ID, installing any messengers, adding funds to the account balance and without any risk of being identified — AA.

hacking social networks accounts to large-scale hacker attacks. However, the Doctrine of information security, approved by the President of Russia in December 2016, does not call anonymity as one of the threats to our country's information security¹⁶.

This is because anonymity, like any other technological tool, cannot be used solely for the purpose of causing harm. For example, anonymous technologies are successfully used for the state protection of victims, witnesses and other participants of criminal proceedings, by journalists in “hotspots”, as well as in the practice of transnational corporations for the safe transfer of information. The authors of the draft law (Federal law No. 195446-7) in an explanatory note to it also pointed to “a wide range of possibilities for their legal application”. In this regard, one of the key disadvantages of 276-FZ, in our opinion, is the lack of differentiation between the legal and illegal use of anonymous technologies. SMS and other mobile communications are often used when committing crimes (and even terrorist attacks), but this does not mean that these technologies should be also banned.

The most common technologies for providing anonymity in cyberspace can be divided into three groups. The first group includes so-called VPN services¹⁷, which now have formed a large market with paid access to these services. It seems that 276-FZ is directed against Internet sites that offer to “buy a VPN”. However, blocking a site that offers a paid access to VPN, will not affect the performance of the VPN service itself, and users who previously paid for access will be able to continue using it. It should be noted that, according to our estimates, the number of advertising offers for the purchase of VPN services over the past two years has not changed significantly.

The second group of technologies includes various add-ons for Internet browsers (Google Chrome, Opera, Mozilla Firefox, etc.) that allow users to change their own IP-address by one click. These applications are usually free of charge and are most convenient for users. It seems that such add-ons were what the legislator meant when he used the term “computer programs”. In this case, we can expect bans of using of software-add-ons, and in the worst case, the entire Internet browser. Finally, the third

group includes TOR-technologies¹⁸, the perspective of blocking which is most doubtful.

We can agree with the forecast of analysts of the Internet media “Medusa” that law enforcement bodies will focus their efforts primarily on the first two groups, since they are the most popular and easiest to use¹⁹. The Chinese experience of fighting with TOR, where the state has spent huge technological and financial resources to block the output nodes of TOR networks, is disappointing for supporters of blocking. The developers “taught” the system to “build bridges” through hidden repeaters, and as a result, TOR networks became more perfect, and huge state resources were wasted. In fact, the China state has invested significant resources in improving the technology that was going to be banned.

Certain doubts arise when referring to the question of the time limits of the legislative novels. As we know, *lex prospicit, non respicit*, but in this case we can talk about an example of the hidden retroactive force of the law. At the time of creating special add-ons for Internet browsers or sites that offer VPN services, such actions of developers and users were absolutely legal. 276-FZ does not contain any reservations that it does not apply to information resources created before its adoption, which means that it may be quite real that developers will be responsible for the technology or program that they created 5 or 10 years ago. At the same time, users who paid for a VPN service or installed software before the 276-FZ entry into force, theoretically, should not be responsible for the use of anonymous technologies.

THE CONSTITUTIONAL DIMENSION OF ANONYMITY

For a more complete analysis of the legal nature of anonymity in cyberspace, it necessary to consider it not only from the standpoint of information law, but also in conjunction with the right to privacy, established by part 2 of article 23 of the Constitution of the Russian Federation. The Constitution of the Russian Federation, as we know, establishes an open list of possible means of communication, through which personal correspondence can be carried out, and also speaks about the only possible way for restricting the right to privacy — a court decision. In

¹⁶ The doctrine of information security of the Russian Federation, approved by Decree of the President of the Russian Federation of December 5, 2016 No. 646 // Svod zakonov Rossijskoj Federacii [Russian Code of Laws], 12.12.2016. No. 50. Art. 7074.

¹⁷ VPN (Virtual Private Network) — generic name for technologies, provide one or more network connections (a logical network) on top of another network (for example, the Internet). It should be noted that VPNs can be used not only for anonymous data transfer, but also for other purposes, including access to the Internet. For more information, see URL: <https://ru.wikipedia.org/wiki/VPN> [Accessed November 1, 2019].

¹⁸ TOR (*The Onion Router*) — software (as well a proxy system) that allows to establish a secure anonymous network connection. Like a VPN, it can be used for “peaceful purposes”. For more information, see URL: <https://ru.wikipedia.org/wiki/Tor> [Accessed November 1, 2019].

¹⁹ «Meduza», July, 3, 2017 // Available at: <http://meduza.io/feature/2017/07/03/vlasti-sobirayutsya-zablokirovat-vpn-i-anonimayzerya-eto-voobsche-vozmozno> [Accessed November 1, 2019].

this regard, anonymity should be considered as the most important technological tool aimed performing the constitutional right of everyone to privacy. A person who uses anonymous technologies to visit unbanned Internet sites is reasonably based on the legality of their actions. Thus, a complete ban on the anonymous technologies in cyberspace is impossible due to its obvious unconstitutionality.

Anonymous technologies are on a par with encryption technologies that allow you to secure payments and correspondence in cyberspace, but at the same time are not identical them. In this regard, soon it will become possible to establish the right to secure Internet access in the constitutions of modern countries and international legal acts. At the same time, today we can name possible components of the right to anonymity. Experts of the «Russian center for digital rights protection» identify the following components of this right:

- the right to anonymous web surfing (searching for information on the web) and anonymous sending of personal messages (including via messengers);
- the right to anonymous posting (publication of information in the network);
- the right to anonymous payments (including the use of cryptocurrencies);
- the right to create and distribute works anonymously²⁰.

We can generally agree with the proposed classification, if we take into account that these rights can also be implemented using encryption technologies, i.e. encrypted data transmission, rather than anonymous. In support of the position on the need to establishing these rights, the «Russian center for digital rights protection» experts refer to the practice of higher courts in foreign legal systems (in particular, the Supreme Court of the US²¹ and the ECHR²²), and to the positions of international organizations (the UN Human rights Council²³, the Council of Europe, etc.).

Analyzing these examples, we can draw two conclusions from the legal positions of these bodies. First, courts and international organizations require states to

respect the desire of citizens to access the Internet anonymously and not to obstruct it. Secondly, these bodies assume that the right to anonymity cannot be absolute and may be subject to reasonable, justified and lawful restrictions, as well as other constitutional rights. After all, even in those developed legal systems where the death penalty is prohibited, the most important constitutional right — the right to life — is still a subject to certain restrictions — for example, through the necessary self-defense or (less often) legalizing euthanasia. In addition, in some cases, identification of a person may be obligated for the realization of other constitutional rights — for example, when a citizen applies for state and municipal services in electronic form. In these conditions, it is not necessary to talk about the right to anonymity, since the law on personal data protection comes into play. It should be noted that Russian legal experts draw attention to the conceptual and terminological discrepancy between the legislation on identification and on personal data protection [1].

There is hardly find any convincing arguments that anonymous payments to charitable foundations (even from foreign sources) pose any threat to national security. However, such threat may arise in the case of anonymous funding of political organizations, which means that the right to anonymous payments should still be subject to constitutional restrictions. The question of whether to restrict the right to publish information anonymously in cyberspace deserves a separate discussion and is beyond the scope of this article. The problem of the limits to the realization of the right of everyone to privacy is relevant for western legal systems. The debatable issue is the limits of restricting this right by the state when it is necessary for fight against terrorism and extremism. In this case, we are talking about the state interference in the personal life of law-abiding citizens, not the terrorists (extremists). In cases where the object of interference is the personal life of a potential criminal, the law on operational search activity enters into the case, allowing in such cases to obtain a court sanction. A clear illustration of this trend is the USA Patriot Act²⁴ adopted in the United States after the September 11, 2001 attacks, which expanded the powers of law enforcement agencies to monitor citizens, including in cyberspace. Adopted as a temporary measure, this law was in effect for 14 years, until its provisions were significantly relaxed in 2015. One of the pushes to soften the provisions of the

²⁰ Available at: <https://habrahabr.ru/company/digitalrightscen-ter/blog/329050> [Accessed November 1, 2019].

²¹ A selection of decisions of the Supreme Court of US in cases related to anonymity and freedom of speech on the Internet // "Electronic Frontier Foundation". Available at: <https://www.eff.org/updates?type=case> [Accessed November 1, 2019].

²² See for example, ECHR cases K.U. vs. Finland, № 2872/02, December 2, 2008, Delfi vs. Estonia, № 64569/09, October, 10, 2013, etc..

²³ UN Human rights Council resolution No. A/HRC/32/L.20 «The promotion, protection and enjoyment of human rights on the Internet». June 27, 2016 // Available at: <https://undocs.org/A/HRC/32/L.20> [Accessed November 1, 2019].

²⁴ Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act, October, 26, 2001, № 107-56. // Available at: <https://congress.gov/107/plaws/publ56/PLAW-107publ56.pdf> [Accessed November 1, 2019].

USA Patriot Act was the report of the US Department of justice on the ineffectiveness of this law.

Unfortunately, the Russian legislator did not take into account the experience of overseas colleagues and in 2016 Russia adopted the infamous “Yarovaya package”²⁵, which established the obligation for all information mediators to decrypt messages transmitted by users (text, voice, video, photo and other messages) and store them for 6 months. The “Yarovaya package” is related to the USA Patriot Act with a common goal (fighting against terrorism) and a large resonance that both of these acts caused in the Internet community. It is still too early to assess the effectiveness of these laws, but even today we can see a serious burden on telecom operators and information mediators in the costs of purchasing and operating special equipment. This has already led to increase in the cost of communication services provided on the territory of Russia. In addition, with regard to the “Yarovaya package”, the doubts remain about its compliance with the articles 23, 24 of the Constitution of the Russian Federation (in part on the necessity of a court decision to restrict the right to privacy and the need for a person’s consent to collect, store and use information about his private life).

THE LAW SHOULD BE ECONOMICAL

Questions about the feasibility of restricting the right to use anonymous technologies have not only a legal, but also an economic dimension. In this regard, it seems necessary to apply a law-economical analysis, to estimate the costs and benefits of making the legislative decisions.

First of all, anonymity itself can be considered as an economic category. It is the opposite of individualization, which has value for the product, including for the Internet user, if he himself acts as a product, exploiting its popularity. This does not mean that anonymity has no economic value or has a negative value. If the user does not make money on their own identity (for example, by blogging), anonymity is an economically valuable benefit for them, the loss of which they will perceive as a damage. Anonymity has an even greater economic value when transferring confidential information between commercial companies, as pointed above.

²⁵ The «Yarovaya package» includes two laws, but in this case we are talking about Federal law No. 374-FZ of July 6, 2016 “On amendments to the Federal law “On countering terrorism” and certain legislative acts of the Russian Federation regarding the establishment of additional measures to counter terrorism and ensure public safety” // Available at: [Ofitsialniy Internet-portal pravovoi informatsii](https://pravo.gov.ru) [Official Internet-portal of law information] URL: <https://pravo.gov.ru>. ID: 0001201607070016 [Accessed November 1, 2019].

Thus, the state, depriving individuals and legal entities from economic benefits (anonymity), or to be more precise, limiting their ability to use such benefits, is forced to bear organizational, technical and financial costs. The costs should also include the risks of incorrect enforcement, since the mentioned laws and draft laws are not perfect in terminology.

Richard Posner, a professor at the University of Chicago School of law, provides the following formula for an economic and legal analysis of the problem of limits and restrictions on freedom of speech in the United States:

$$pH / (1 + d)^n + O \geq B - A$$

where H means the harm that public statements are likely to cause with probability p , O — the offensiveness caused by such statements, B — the benefits of allowing dubious statements by the state, A — the costs of imposing bans, and $(1 + d)^n$ are the discount rate for future costs or profits compared to the present. In other words, the state should prohibit questionable statements if and only if the expected harm from the statements, discounted based on their probability and time of occurrence, exceeds the amount of benefits from them and the costs of prohibiting them [2].

If we extrapolate this formula (without indicator O) to the anonymity problem, we will conclude that the actions of the state to deanonymize the Internet will be effective only when the expected benefit from these restrictions exceeds all possible costs incurred by the state and society. With regard to the “fight against VPN”, it should be considered, that the costs incurred by Russian IT companies will be higher than at foreign competitors, since the risks of them to suffer from the actions of Roskomnadzor should be assessed lower. This may create an economically paradoxical picture, when the state actually imposes additional burdens on domestic IT companies instead of helping them to improve their competitiveness in the world market.

If, as a result of restrictions on the use of VPN in the Runet, the technological chain of transmitting confidential information of any business entity is disrupted, this will be a danger signal for the entire market. These costs are directly related to the concept of the “digital economics”²⁶, the need to build which speak Russian leaders, and at the same time, they are the most difficult to calculate.

²⁶ Passport of the National project “Digital economics of the Russian Federation” (approved by the Presidium of the Council to the President of the Russian Federation for strategic development and national projects, protocol No. 7 of June 4, 2019) // Available at: https://digital.gov.ru/uploaded/files/natsionalnaya-programma-tsifrovaya-ekonomika-rossijskoj-federatsii_NcN2nOO.pdf [Accessed November 1, 2019].

If we look to the left side of the above formula, we will see that prof. Posner's allows us to abstract from unnecessary moral and ethical aspects of the anonymity problem. If the "Yarovaya package" calls the fight against terrorism among its main goals, then based on a purely moral assessments, it will not be difficult to conclude that even one prevented terrorist attack will equal billions costs to decrypt and store the correspondence of users of cyberspace. From the point of view of law-economic analysis, we will be talking about a very high potential harm (**H**), which can occur with a relatively small probability **p**, which in turn will allow us to raise the question of other, possibly more effective options for allocating financial costs for the fight against terrorism.

Summing up the attempt at law-economics analysis of the phenomenon under consideration, it should be notes the high potential value of this method, which in the future could be used for the preparation of financial and economic justifications for draft of legal acts, including mentioned in this article.

SOME CONCLUSIONS

Anonymity, as one of the organic properties of cyberspace, cannot be called an absolutely harmful phenomenon. In some cases, the use of anonymous technologies benefits both individuals and society as a whole by increasing the security of data transfer in cyberspace. However, it is necessary to distinguish between the anonymous and cryptographic technologies, since in the first case, the devices that transmit information are depersonalized, and in the second case, the transmitted information itself is encrypted.

Anonymity should be considered as one of the key mechanisms for implementing the constitutional right to privacy. This right is not absolute, so its recognition by states does not exclude the possibility of minor restrictions on the use of anonymous technologies (for example, in terms of anonymous payments to prevent the financing of terrorist or extremist organizations). At the same time, anonymous communication in cyberspace should not be prohibited to users, for whom government bodies do not have reliable information about their involvement in socially dangerous acts.

Russian legislator, having adopted new laws requiring messenger operators to identify all users and prohibiting the use of VPN, continued the trend to deanonymization of cyberspace. The Internet community perceives anonymity as a benefit that it does not want to lose, and in response to each legislative novel develops new technologies to circumvent new prohibitions.

Looking at the anonymity problem from the point of view of the theory of benefits and costs allows us to make

a conclusion that it is necessary to analyze law-economic aspects of legislative initiatives related to the regulation of cyberspace. Legislation in this area should be based not only on the legislator's ideas about "reasonable, good, eternal", but also on the laws of the market, and achievements of economic science. The ratio of costs and benefits, that the state and society are ready to incur from the adoption of a new law, should become as integral element of the legislative process as the legal examination of draft laws.

However, we cannot rule out a scenario where the further development of technology will seriously change the concept of anonymity. If one person uses a single mobile device to access the Internet at home, at work, and anywhere in the world by simply connecting to public networks, then this device (through the contract concluded with the seller of the device) will be the legal basis for identifying the user. If we recall the forecasts of futurists predicting the appearance of microchips integrated into the human body and connected to the Internet, it becomes obvious that with each round of technological progress, the legislator will face more and more complex tasks.

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FALSE INFORMATION ABOUT COVID IN AMERICAN SOCIAL NETWORKS

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Abstract. The existence of a great amount of Covid-related false information on social networks has created serious problems in the fight against the disease. Because of Constitutional limits on its powers, the government is unable to police this information. After a long period of inaction, social networks began to take serious steps to remove this false information. However, there is a political split in the country over the amount of content control that should be exercised by semi-monopolistic organizations such as Facebook and Twitter.

Keywords: Social networks, covid, censorship, defamation, free speech.

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- **E**xtensive false information about Covid in the social media has been leading to the spread of the disease and has been discouraging vaccination. Under the United States Constitution, as interpreted by the Supreme Court, the government may not prevent the posting of such information, force the removal of the information, or cause the removal of user accounts or discussion groups spreading the information. In contrast the main social media companies, such as Facebook and Twitter, are free to remove individual posts, cancel user accounts, and remove discussion groups.
- The Constitutional limits on the power of the government to limit free speech are set by the Supreme Court in *Brandenburg v. Ohio* [1], in which the Court held.
- Accordingly, we are here confronted with a statute which, by its own words and as applied, purports to punish mere advocacy and to forbid, on pain of criminal punishment, assembly with others merely to advocate the described type of action. Such a statute falls within the condemnation of the First and Fourteenth Amendments.
- Thus the government cannot punish or prevent mere advocacy against wearing masks or receiving vaccination.
- Likewise the government cannot punish those making false statements concerning Covid. In the United States the highest award of the armed forces is the “Medal of Honor.” Even a general must salute a private wearing this medal. In 2005 Congress adopted the Stolen Valor Act, which defined the crime of falsely claiming to have received orders or medals and which provided stricter punishment if the false claim was about the medal of honor. In the case of *United States v. Alvarez* [2], the accused admitted that he had falsely claimed to have received the Medal of Honor, but appealed his conviction on the ground that the Stolen Valor Act of 2005 was unconstitutional. The Supreme Court found this law unconstitutional as violating the First Amendment to the

Constitution, which guarantees freedom of speech. The effect of this decision of the Supreme Court was to establish the right to lie. This right is very important now when there are many false posts about Covid-19 in US-based social networks.

However, social media networks, such as Facebook and Twitter may censor posts, may remove users, and may delete discussion groups. Traditionally, print publishers, such as newspapers and magazines, have exercised editorial control over the publication of letters to the editors, reader opinions, and paid advertisements. However, this control has come with major risks under the laws on defamation. A newspaper that exerts editorial control, even if only some of its content, is considered a “publisher” and as such is subject to liability for defamation if it publishes harmful false information about an individual or organization. Section 230 of the Communications Decency Act provides in relevant part [3]:

... No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider ...

Since the “provider or user of an interactive computer system” may not be treated as a “publisher speaker,” neither a provider nor user may be responsible under the law of defamation for information provided by another, even if this provider or users engages in some editorial control. Thus Facebook and Twitter are not responsible for posts and tweets even though if they were newspapers (rather than interactive computer services, they would be responsible for all posts and tweets with defamatory conduct if they edit any of them. Further someone who retweets is not responsible for the content of tweets since the information retweeted was provided by “another”.

At the time of American elections in the fall of 2020, it became clear that many members of one political party were against wearing masks, while most members of the other party were for masks [4]. The most popular person on Twitter in 2020, with around 80 million followers, was the President, who constantly retweeted various negative opinions about masks [5]. The chief White House medical advisor tweeted in October 2020 that masks are unnecessary and actually cause heart problems, but Twitter removed the tweet [6].

A number of antimasker groups were on Facebook, but were removed by Facebook. For instance Facebook removed the “Unmasking America” group, which had over 9000 members [7].

Unlike masks, vaccination has not become a political issue. The Trump administration made hugely successful efforts to support the development of Covid vaccines and the Biden administration has run a major vaccination campaign. For many years “antivaxxer” groups were

popular on Facebook. However, more recently Facebook has steadily increased its efforts to remove posts and groups peddling false information about the safety of vaccines [8].

Luckily for the researcher, one can find many deleted Internet pages on the very helpful site “archive.org.” This site regularly makes “snapshots” of the whole Internet and saves. This site is very useful, not only for historians, but also for lawyers, who may find information that opposing parties in lawsuits have deleted from their website. For instance one can find since removed antivaxxer pages by searching in “archive.org” for <https://facebook.com/StopMandatoryVaccinationNow>.

But even after expulsion from Facebook, this organization has continued to maintain its own website with the same kind of false information at <https://www.stop-mandatoryvaccination.com/>. Facebook can do nothing about it.

Facebook also removed the Instagram page of one of the most dangerous antivaxxers, a nephew of the late United States President John F. Kennedy. [Rishi Iyengar, “Robert F. Kennedy Jr. has been banned from Instagram,”

In answer to the censorship of posts by Facebook and Twitter, a relatively new social network, Parler, with a policy of freedom of speech, began to expand rapidly. I signed up for Parler and found there a very active discussion among anti-maskers, anti-lockdowners, and antivaxxers. However, because of the many dangerous posts on Parler, Amazon, one of the largest suppliers of “cloud computing” in the United States, refused to supply services to Parler, which was shut down and has a hard time finding a new company willing to support its services. A lawsuit by Parler against Amazon, failed [9].

President Trump’s personal account was removed by Twitter in January 2021. [“Permanent suspension of @realDonaldTrump,” https://blog.twitter.com/en_us/topics/company/2020/suspension.html] In late March 2021, an advisor to former President Trump announced that Trump was going to start his own social network [11].

A committee of the United States House of Representatives held a hearing in March 2021 on problems of Internet censorship by social networks and on the possibility of revising Section 230 of the Internet Decency Act. The hearing exposed a deep divide along party lines, with Democrats demanding more censorship of material they considered false and dangerous and Republicans demanding less censorship reflecting their belief that much of existing censorship reflected a left-wing bias [11].

Thus the proper role of social media companies in editorial control of social media remains a subject of active debate.

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MEDIA AND DEMOCRATISATION: CHALLENGES OF THE 1990s

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Abstract. The 1990s were an important time for experimentation and change in media policy in the emerging Russian Federation. Informed citizenry was a stated goal, but it coexisted with other strong currents, concerns about excessive and overly critical accounts functioning to endanger democratic prospects. Media law and policy was then also shaped to burnish electoral mandates or to help support particular visions of the post-Soviet society. Important experiments included the Presidential Judicial Chamber on Information Disputes and the Treaty of Public Accord.

Keywords: informed electorate, comparative media, electoral mandate, governance, Yeltsin era, stability

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- **T**he decade of the 1990s in the Soviet Union and then the Russian Federation was one of the most extraordinary periods in the history of media regulation. It would be a great loss were it to be forgotten. In the spirit of this conference marking 30 years of radical change and stubborn continuity, we should all want to revisit aspects of those these strange and difficult times. Many of those who lived through these dramatic years are, many of them, slipping away, and the legal artifacts of the time are increasingly ephemeral. For me, thinking about this subject led to a happy task, looking through a volume of essays, documents and decisions: **Russian Media Law and Policy in the Yeltsin Decade** [1], published two decades ago, edited by communication law scholars Andrei Richter, Peter Yu and me and heavily influenced by an environment in which Mikhail Fedotov and Yuri Baturin, who created the 1991 Russian Media Law, played such an important part. In that book, I wrote these words: “Looking at the development of mass media law in post-Soviet Russia is like examining the wrists of a recently freed prisoner where the marks of the chains are still present” [2, p. 31]. Those were strong words. They may continue to be applicable, but in so different a context that all implications must be revisited. Technologies have transformed; the geopolitics of information regulation have revolutionized. A period of dramatic uncertainty and weakness has been replaced with momentary projections of confidence. Altogether, the rather wild and unconventional 1990s, uncertain and often depressed, have given way to a far more controlled and stabilized Putin era. Several vital issues arise when looking back to the 1990s and forward to the next quarter-century: how to celebrate advances; how to discover new vocabularies of change; how does one understand the dramatic modifications in the strategic reshaping of media spaces in a digital age.

A few words about why the 1990s were such an important crucial time for reconceptualizing media law and policy. One reason this decade of the 1990s was so consequential was the cast of characters engaged in participating in the reshaping process. In the vortex created by the sudden end of the Soviet Union, in the time during Perestroika and after, the redefinition of freedom of expression fell to an unusual mixture of journalists, officials, lawyers, educators, entrepreneurs and thieves, some operating at enormous scale. It would be an important contribution to chronicle the cast of characters. I would single out Yassen Zassoursky, the legendary dean of the School of Journalism at the Moscow State University (MGU), who died in 2021 and whose cavernous office at MGU was a site of religious wonder: a global archive incorporating, not just the decade, but a century of consequential transformation. Zassoursky had witnessed transformations, drastic changes in ideology, in alliances and technology. His office was benevolent and simultaneously tragic, a monument to the elegance of persistent memory and the destructive impacts of shifting winds. Everyone passed through his office, from Scientologists to fervid graduate students, foreign broadcast moguls to fly-by night operatives, high flying diplomats, and ambitious scholars and entrepreneurs. As Andrei Richter wrote in a loving tribute, Zassoursky “managed to create an academic laboratory for free journalism while maintaining the facade of ‘forging ideological personnel’” [3]¹.

The spirit of Zassoursky was an example of why the period of the 1990s was so yeasty. There were many forces at play. To have functioned and contributed in that decade required some magical combination of idealism, realism, fatalism and cynicism, some willingness to pretend positive change was possible, while recognizing depressing limitations. It was a period of individual and collective striving for human rights and freedom of expression, and at the same time of massive privatization and alteration of institutions. Brilliant minds that had seen few opportunities to have their ideas discussed and realized now could command attention. The unconventional became the currency of the moment. I remember a conversation with Igor Malashenko, the one of the founders of NTV, about programming possibilities. In 1990s, NTV was a key national independent privately owned TV broadcaster. Experts were urging Malashenko to have more public interest programming. Spanish and Turkish soap operas were gaining popularity. It was his view, however, that the Russian audience needed

programs, rather, like “Miami Vice” that would, in his view, awaken the sleeping mass and increase the thirst for cutthroat competition. That way lay the future. Moscow’s hotel lobbies were filled with idea entrepreneurs, agents of charities, representatives of big brands (like McDonald’s), producers, famous academics and others. Internews, an international media support nonprofit organization, now a collection of hundreds and more of implementers around the worldwide pressing for democracy-augmenting media, was then just a struggling pioneer, defining its purpose, seeking a formula for engagement [4]. In the wake of the great institutional collapse, this was a time for the fashioning or refashioning of norms. It was a great jurisprudential void. Of course, it was hardly a total emptiness. This was a society in which almost 75 years of Soviet governance and Leninist ideologies of the function of the media was deep in the collective identity. And, as mentioned, the surrounding world, academics, businesses and those engaged in communications governance and development, were pervasively seeking to influence Russian efforts at reform. All this made the 1990s special. And this combination of forces created a heightened consciousness of alternative ways of thinking about the role of information in society, about media and democracy, about the very purpose of information flows.

Fully to capture the discourse and transformation of this period is far beyond the capacity of this short essay. Certainly, among the monuments to this time are the legislative constructs of Fedotov and Baturin. There were many steps, large and small. The new media law was certainly a major effort. But the impact of the times was larger and more pervasive. The abandonment of old models meant there was almost a *tabula rasa*, from an institutional perspective. How media should be structured in the Russian Federation became a matter of global debate. There were small cultural steps as well, including: a “school” of media law and policy informally named after Baturin and formed at the MSU School of Journalism. The school held weekly classes to recruit and train young law and journalism students who would become more familiar with international standards and approaches to media law, still novel in for the Russian Federation. These young law and media professionals could and did staff the new institutions created as tangible instruments of change.

More pervasive perhaps, were theoretical innovations. I draw heavily on the work of Professor Frances Foster, who chronicled four distinct approaches to the functions of information explored by Russia after the dissolution of the Soviet Union. These four — a foundation for thinking through theoretical perspectives were, in Foster’s telling, the informed citizenry theory, the defense of democracy theory, the popular mandate theory, and the parental theory [5, p. 95–118].

¹ For me, other influences include Aleksei Simonov and his Glasnost Defense Foundation, Andrei Richter’s Moscow Center for Media Law and Policy and the Carter Commission on Radio and Television Policy.

INFORMED CITIZEN THEORY

A root approach — one that perceived the emerging society as stemming from its citizenry — saw a need for a very broadly functioning media, one that could yield a citizenry capable of performing the functions assigned to it in a democratic post-Soviet world. A citizenry worthy of the term should be informed (or have the means to be informed), and it could be the task of the media institutions to ensure the fulfillment of this task. This would be particularly important as the new citizen of the Russian Federation was formed. One can see the thousands of implications for media immediately. Of course, the theory was a powerful argument for official affirmative action to protect the media from economic and political extinction. Foster found in the debates of the time the emphasis on media's role in informing Russian society as grounds for careful exemption from free market principles for specific preferences such as state subsidies, tariff reductions, and tax concessions [6, p. 97]. There is a policy implication to assure the existence of a media system that can inform the citizenry. One should also note that the informed citizenry theory was deployed to justify journalistic advocacy of media coverage of the negative as well as positive aspects of post-Soviet Russia. This included a defense for harsh and persistent media criticism and ridicule of Russian leaders, institutions, and processes. The informed citizenry theory undergirds access to information and openness of data (as the doctrine develops). Foster tied the theory to efforts to resist or protest official attempts to monitor, censor, and mandate expression. It has also been a frequent defense against government criminal, civil, and extralegal actions against individual media organs.

DEFENSE OF DEMOCRACY THEORY

Foster contrasted the informed citizen theory with the “defense of democracy theory”, which became more prominent as the decade advanced. She read the post-Soviet debates as shifting towards this “defense of democracy” emphasis, and the distinction is significant. Much of the political class, especially then president of Russia Boris Yeltsin, came to see “full” information, as described by an “informed citizen” lens, as a potential threat to the democratic system. “Too much” information or the wrong kind could have a destabilizing effect. Certain flows can alienate citizenry from government. Carpeted emphasis on official corruption and other frailties are seen (and were seen in mid-1990s Russia) to weaken government institutions already in a weakened state. There was an overarching point: constant delegitimization encourages popular distrust, apathy, and nonparticipation in the political process. “Irresponsible”

dissemination of information can also exacerbate political and ethnic divisions. Incessant reports of even the most inconsequential disagreements between branches of power fuel political tensions and inhibit compromise [7, p. 99].

The defense of democracy theory thus came to regard the mass media, at times, as a dangerous adversary. Foster expanded this argument:

“[...] the media exalt abstract constitutional rights above the concrete interests of state and citizenry. In so doing, they jeopardize the evolving democratic process and cause serious harm to society. Under the protective banner of freedom of press, expression, and information, the media bombard the populace with a barrage of false, distorted, offensive, and negative news. They unleash “psychological war”, discredit organs of power, “torpedo” reforms, inflame an already tense atmosphere, and contribute to public dissatisfaction and despair. Under the defense of democracy theory, the notion of an independent Fourth Estate is anathema. It views the proper role of the media instead as conduit between government and citizenry. Like the informed citizenry theory, the defense of democracy theory recognizes the value of an “informing” media for democracy. Its understanding of this function is fundamentally different, however. The defense of democracy theory limits the media to “constructive”, “responsible”, “balanced”, and “objective” dissemination of information” [8, p. 100].

POPULAR MANDATE THEORY

Let me turn to the final two approaches that animated discussion in the 1990s. The “popular mandate theory” was tied to then (and now) emerging modes of legitimating governments as a consequence of the quality of an election. What are the preconditions for considering a popular mandate to be reliable and what role does the media play in achieving that goal? The popular mandate theory requires a healthy balanced flow of political information to the electorate. The popular mandate theory also has as an aspiration that voters receive a genuine comparison and choice among competing candidates and approaches. The popular mandate theory can justify various forms of intervention: opportunities for candidates, irrespective of wealth or status, to “equitable access” to mass communication and information media. Moreover, it calls for a full and fair presentation of positions and forbids any outside manipulation or distortion. Finally, the popular mandate theory demands serious, “civilized”, and constructive election campaigns and coverage. Government is justified in prohibiting “unethical”, “defamatory”, and “improper” criticism of opponents (or even the constitution itself). According to Foster, re-

viewing the debates of the 1990s, “the popular mandate theory views active media involvement in campaigns with suspicion. It emphasizes the power of journalists to skew political information, processes, and outcomes. To prevent media manipulation and interference in elections, the popular mandate theory permits only objective, nonpartisan and unfiltered reporting of campaigns. It ‘rules out’ any analysis, comparison, and criticism of candidates and positions that could unduly influence voters’ perceptions and decisions” [9, p. 102].

PARENTAL STATE THEORY

I have less to say about Foster’s last category — perhaps the most important — namely what she called the Parental Theory. She identified this theory as characterizing Yeltsin’s response to the election debacle of December 12, 1993, when post-Soviet Russia had the first parliamentary elections and a constitutional referendum. Low voter turnout, unenthusiastic popular endorsement of the Constitution, and decisive repudiation of reformist candidates, parties, and platforms were blamed in large part on a failed information policy. This experience also led, as Foster noted, to a fundamental reevaluation of the short-term prospects for democracy in Russia. Under the new view, Russia was “immature and unprepared for democracy” [10, p. 104]. According to the “parental theory”, the role of information is to nurture a particular kind of democracy. Its function is to create what could be seen as necessary conditions for future development of a democratic system — “social accord” and “political culture”. Current efforts to ensure “traditional values” may be an embodiment of a pervasive parental state approach with dramatic potential consequences for media.

As the 1990s pulsed with these various theories of information flow, policies emerged that embodied elements of these theories — sometimes empowering of individuals but often constricting and censoring speech. This interplay between changing justifications, balances of power and enforced actions gave the 1990s their precariousness. For example, consistent with the “popular mandate” theory, adopted or considered policies included:

“[...] assignment of free air time by lot in equal blocks to all registered candidates; limitations on fees and opportunities for paid political advertisement; and provision of free newspaper space for publication of candidate and party platforms. The Russian government [...] sought to reduce the distorting effects of status on the electoral process by monitoring and restricting media use by government officials, heads of television and radio companies, and journalists who are candidates or candidates’ representatives. The popular mandate theory’s concern with fair and full presentation [...] trans-

lated into extensive legal and extralegal prescriptions on potentially “distorting” practices and coverage. For example, post-Soviet Russia [...] banned public opinion polls and “agitation” for or against candidates immediately prior to or during voting. It has also issued detailed directives regarding the approved format, content, and scope of election-related broadcasts” [11, p. 103].

All these policy initiatives yielded specific outcomes in administration and novel institutions for adjudicating disputes about media and elections or media and societal norms. One significant example that bears examination was a complex enterprise called the President’s Judicial Chamber for Information Disputes. Yeltsin created the Chamber in December 1993 purportedly to assist in effective enforcement, interpretation, and development of norms and rules. It became a tool, as many would conclude, to protect efforts favoring Yeltsin. In terms of theories of information and society theories, almost all were in play. The Chamber could be said, ideally, to probe how information diffusion could be enhanced to create a more informed citizenry. It frequently presented itself as a defender of democracy. Its functioning was justified in terms of enhancing the legitimacy of a popular mandate. President Putin abolished the Judicial Chamber by his decree on June 3, 2000. In its brief history, the Judicial Chamber dealt with issues that are similar to those that confront or are constructed to confront societies today. The Chamber was concerned with media dissemination of information that allegedly discredited state institutions, personnel, and legislation. The Judicial Chamber examined and censured publications and broadcasts said to ridicule the federal legislature as a “farce” and its deputies as “clowns” and “buffoons” as well as broadcasts of offensive, slanderous, and inflammatory statements by candidates [12].

There is a final example of institutional creativity that bears study. Too little has been written, I think, about the effort in 1994 to fashion a Treaty of Public Accord [13], a sweeping and dramatic effort to build on a theory of free expression in society. It is interesting to see the contorted attempts to tame discourse in a world of media, not today’s social media but media similarly open and seemingly unregulable. There was the desire to appear to be wholly open, yet to domesticate speech and to do so in a way that has the attributes of the consensual, the private and the self-policing. One could look back to the 1990s and the attempted Treaty of Public Accord as a precedent. It depended on the illusion of broadly organized voluntary accession, a wholesale move from individual to collective rights, and the invocation of Soviet themes. Under the Treaty of Public Accord almost everyone was intended to be a signatory. The Treaty’s “terms of service” or standards were more forceful than

what one sees in some though not all of today's content moderation arrangements. Some examples (*italics are mine. — M.P.*): The parties to the Treaty “pledged to take all necessary measures to ensure stability within the country”. Or this: “*The organizers of rallies and demonstrations, and local bodies of power and law enforcement bodies accept moral and political, as well as legal, responsibility for ensuring that these actions are peaceful in nature and that they are conducted in strict accordance with current legislation*”. The signatories stipulated that the only constitutional amendments that should be proposed and advanced should be those “*conducive to stabilizing the situation in society*.” In a sweeping effort to be encompassing “the numerous parties to the treaty recognized “*the grandeur of Russian history, with its heroic and tragic pages*”, and recognized as well that that grandeur “*obliges one to avoid simplified or insulting appraisals of the past and to prevent the distortion of historical fact*”.

CONCLUSION

The 1990s in Russia were a period of high experimentation in the shaping of media policies. It was a period of intense drama and a shifting mixture of significant actors with widely differentiated constituencies. Media policy had its veneer of principle and its reality of competition for power. Media policy was a theater through which the new Russian Federation defined itself and a framework for oligarchs and others to create their own form of “democratic development”. The 1990s were a decade in which idealism fluttered in and out of consciousness. In the effort to advance new approaches, one could see the persistence of old theories — Marxist-Leninist theories — in which openness, criticism, broad diffusion of information are instrumental and significant [14]. The impact of the 1990s on the future of the Russian Federation, on media development elsewhere in the former Soviet Union, and on theories of media and democracy — all this will be debated for decades to come. The elemental point here is that — as always — there are important opportunities to gain for the present from examining media debates and policy implementations from the past. The contemporary world — in the West, in China, in Russia — is a scene in which aspects of the crises of the 1990s have their parallels and precedents. Concerns persist about the corruption of elections and the election of the corrupt. Debates proliferate about the rising dangers of free expression to democracy itself and the need to address those dangers. Anxieties about the culture intensify with increasing conviction that social media, rather than being pure engines of freedom, can dramatically undermine cohesion. Foreign media interventions subvert a century of media organized by state

and nation. And media in conflict becomes a subject of increasing importance and complexity as new forms of conflict put in question long-accepted truths about the receipt and transmission of information “regardless of frontiers”. Fedotov and Baturin have organized perspectives on three decades of media development as a way to scrutinize pathways taken and pathways blocked. We are fortunate that they have pressed for this comparative inquiry.

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mation technology, it strengthens and feeds phenomena of a political nature (and therefore *military* according to the famous Clausewitz's definition¹), both from the top to the bottom, from the bottom upwards, and between actors below and actors at the top. The Internet is, therefore, the place *par excellence* of asymmetry, where conflicting faults find their maximum expression, even if often not directly violent. Its versatility allows an extensive use and a multivectoriality that, with other parameters, were also typical of other forms of information in history.

One of the most striking examples of the political role of information, which in very distant historical times could only be more easily promoted from top to bottom, is that of the inscription of Bēhistūn, through which the rise to the throne of the king Darius of Persia in 522 BC. The historical event in question, as Alessandro Campi remembers^[1], presents itself with multiple versions: that of Aeschylus, that of Herodotus, not least that of Machiavelli in the *Discorsi sopra la prima Deca di Tito Livio*. However, it is the description of the event that Dario himself gives that interests us most, as a demonstration of the political use that political power makes of information:

“[...] The inscription of Bēhistūn [...] represents [...] not only the oldest document, among those known, in which we talk about how Darius came to power, but also a sort of official and definitive version of events, used as a primary source by many of those who subsequently narrated them (starting with Herodotus). In this inscription, it is no coincidence, there is never talk of a conspiracy or a palace maneuver, but of an act of justice against an impostor, aimed at restoring the legitimate dynasty, carried out personally by Darius.

[...] Darius' only concern is to appear, in the eyes of his subjects and of history, a legitimate descendant of Cyrus and Cambyses and present himself as the one who, thanks to a solitary action, was able to avenge the deception perpetrated against the Persian people by a rebellious magus.

The “Darius' version”, if we want to define it that way, is on the one hand an attempt to hide the violent

and profane origin of his own power (and to remove the suspicion, advanced even today by various scholars, that he may actually have eliminated not an impostor, but the real Bardiya-Smerdi, therefore the legitimate heir of Cyrus, whose killing in the inscription is explicitly attributed to the responsibility of Cambyses), and on the other a propaganda expedient aimed at presenting his accession to the throne as, at the same time, the execution of a celestial design (which explains the hammering references to the will of Ahura Mazdā, the supreme deity of the Persian pantheon) and a legitimate restoration in the name of historical tradition”^[1].

2. The information carrier from top to bottom, however, will be severely tested by historical events. Notoriously, one of the great technical revolutions was that of movable type printing, which made the production and distribution of texts faster and more effective, but the political purposes of letters were, as we have seen, already widely known. Although this system was devised in China by the inventor Bi Sheng, it is interesting to note what has produced its use in Western Europe, in a sociopolitical sphere notoriously subject to effective polyarchy. This invention has fueled the centrifugal forces with respect to already unstable centers of power, as in the case of the Protestant Reformation against the Church of Rome. The role of the press, notoriously, substantiated the Lutheran claim of distributing the Bible to the people, as well as the spread of the typically Renaissance tendency to use vulgar languages compared to ecclesiastical Latin. The fact that the first book to be produced and distributed by Gutenberg between 1454 and 1455 was precisely the Bible seems almost to be an anticipation of a “democratizing” trend in the religious and spiritual sphere, which however predicted events of catastrophic significance. As in the case of the splitting of the atom due to nuclear devices, the disintegration of a unitary conception of faith led, in Europe, to the bloody Wars of Religion, which still today constitute the hidden face of the civilization of the Old Continent, as well as the extreme dramatic possibility of historical events relating to the question of intercultural coexistence. In other words, cultural diffusion from below also means the possibility of an explosion of widespread conflict, hypothetically also of civil war.

This does not mean that the premises of that European civil war that were the Wars of Religion, or even before the Protestant Reformation, were not already there. Indeed, within the jagged European political landscape, political divergences and different interests proliferated. However, the use of the freer circulation of ideas sharpened certain phenomena and speeded up other processes. Nonetheless, the Hobbesian problem of freedom of

¹ “We see, therefore, that War is not merely a political act, but also a real political instrument, a continuation of political commerce, a carrying out of the same by other means. All beyond this which is strictly peculiar to War relates merely to the peculiar nature of the means which it uses. That the tendencies and views of policy shall not be incompatible with these means, the Art of War in general and the Commander in each particular case may demand, and this claim is truly not a trifling one. But however powerfully this may react on political views in particular cases, still it must always be regarded as only a modification of them; for the political view is the object, War is the means, and the means must always include the object in our conception”. *Carl von Clausewitz. On War* // Start Publishing, Jersey City, 2021, p. 64.

faith in the interior forum contiguous with respect for national religion in the public sphere responded to the needs created by the broader pluralization of thought^[2].

The ambivalence that arose in the modern state between free circulation of thought (however limited by religious institutions and cultural traditions) and common national thought for a long time stemmed the worst possibilities of the international conflict, until it exploded again with the political pamphlets generated by the logical outcomes of the democratism of the French Revolution^[3]. This inevitably led to the demand for the right to freedom of the press throughout Europe, setting the fire of revolution everywhere.

The press, as the most widespread form of communication, has seen its political role increase in an ever greater way, fueling the growth of political movements and favoring the creation of new ones. It had great importance in 1848, in the formation of the socialist movement, in the birth of fascisms, in the creation of programmatic concepts of the European parties after the Second World War. Characters who have changed the contours of world politics have written for the press building, in one way or another, contemporary history.

To this is added the role, greatly understood by totalitarian regimes, that the newborn radio and cinema media were taking on. Wolfgang Schivelbusch writes about the key role that radio and cinema played in society at the beginning of the 20th century:

“The wireless was the acoustic equivalent of film, the first great dream factory and media intoxicant that gave audiences the illusion of being at the center of things. Audiences perceived the solitude of the darkened cinema and the cozy spot in front of the radio not as isolation but as involvement. Radio enveloped the audience in what was being communicated more closely, intimately, hermetically, and totally than ever before. The disembodied voice on the radio was comparable to the visual images of silent movies in that both swept the audience into a kind of psychological undertow. Audience members couldn’t help but use their imaginations to fill in the gaps that resulted from the absence of a sensual dimension — the sound in silent film and the visuals in radio. Receiving, in effect, only half the reality, the audience would supply the other half according to their own wishes, fantasies, and convictions. The panic that broke out in the greater New York area in 1938 after Orson Welles’s broadcast of “The War of the Worlds” is but one example of the power of the mass imagination when it is called upon to supplement a scenario it has experienced only acoustically”^[4].

3. In modernity, the communication relationships between power and the masses are very varied: from top-down communication, to bottom-up communication,

as well as that born from the masses for the masses (as in the case of pamphlets and party political journalism). However, it will be precisely the context of the great international military confrontation that will forge a type of communication for the administrators of power that will completely change history.

Obviously, the reference is to the internet. The genesis of the internet is, as everyone knows, of a military nature. The first draft of what would later become the internet was ARPANET, a network developed by the United States Department of Defense to overcome the problem that would have arisen at the information level in the event of a nuclear war. The years in which Arpanet was born were in fact those of the Cold War, as well as the first steps of contemporary computational technology were instead taken in the Second World War, in the context of the espionage war between the Axis and the Allies. In the specific case of ARPANET, however, a technology born in 1969, the basic idea was to put a network of information centers in communication, so that a distributed architecture of the communication lines could allow the US to maintain contact between the reference points in case of annihilation of one of them by a nuclear device. This obviously brought with it a substantial renewal from the organizational point of view, of the communication infrastructures as well as of the knowledge itself. Its purpose, of a purely military nature, could be as definitive as that of the top-top communication to which we have referred. As mentioned, all this was born from a period of acute conflict, which stemmed first of all from the phase of “hot” confrontation with the European and Asian Axis powers, and then with the great Eastern Bloc and the Soviet power, as well as the rise of China as a new political player on the world stage.

It was only in the nineties that ARPANET changed to the internet, after a phase of use in the exchange of knowledge by universities, thus being marketed to the general public. The purpose of the network changed very rapidly, with two effective phases of “democratization”: in the first, it became a vector of knowledge between academies; in the second, every person who wanted to share his knowledge and information at his disposal with the rest of the world connected to the network would have had the opportunity thanks to the forums. The most logical evolution of all this would have been, shortly after, the social networks, which represent to all effects the channeling of every form of personal expressive capacity into the media chaos of the world wide web.

This process just described could be defined as the birth of a military technology then used for specific purposes, in a certain sense “demilitarized”. Many of the inventions used for civilian purposes today have found their birth within the military, and war is notoriously a

propeller of technical advancement. In addition, there is also the so-called *dual-use* technology, the purposes of which are simultaneously civil and military.

Yet, Julian Assange, in conversation with other hackers and network theorists, and referring to the phenomenon that will later be revealed to be mass surveillance, will express himself in these terms:

“I notice a certain militarization of cyberspace, in the sense of military occupation. When you communicate via the internet, when you communicate with mobile telephony, which is now intertwined with the internet, your communications are intercepted by the military intelligence services. It’s like having a tank in the bedroom, a soldier between you and your wife while texting. We all live under martial law as far as our communications are concerned, we don’t see the tanks but they are there. In this sense, the Internet, which was supposed to be a civilian space, has become a militarized space. But it is our space because we all use it to communicate with others and with our family members. The communications at the heart of our private life today pass on the Internet, so in practice our private life has entered a militarized zone. It’s like having a soldier under your bed. It is a militarization of civil life”^[5].

The period in which this transformation highlighted by Assange would have taken place would have been that of the so-called “war on terror”, which began with the attack on the World Trade Center and the subsequent deployment of American troops in Asia and the Middle East. During this period, all the spaces that America considered strategic were secured, including cyberspace.

In this sense we can realize how the geometries of power with respect to the internet have changed at a very rapid speed, typical of an era of maximum technical acceleration like ours. From the top-top communication function the internet has morphed into a bottom-bottom communication system and then into a top-down vector.

4. However, this is the history of the internet until yesterday, which coincides with a very specific phase of international politics. The United States, heirs of the tradition of global control of the seas of the British Empire, true winners of the Second World War together with the Soviet Union and subsequently of the Cold War against the latter, since the fall of the socialist stronghold have attempted the reorganization of the world according to a specific model, generically defined as “unipolar”. The passage from the unipolar to the multipolar moment, as well as the actual meaning of the terms “unipolarism” and “multipolarism” is debated, and this is not the case to get involved in the specificities of this discourse. What is interesting to note is the increase in the specific weight of an actor on the balance of international rela-

tions at the end of the global bipolar confrontation — the United States — and the progressive overcoming of this phase through the growth of relative magnitude of other actors. Whether multipolarity is an effective theory of international relations and law, a condition of geopolitical equilibrium or a situation of relative plurality of the main actors (already achieved or in the process of being achieved), the point of the situation here lies in the condition of non-hegemony of a single state-political subject.

The history of the internet has long and to some extent coincided with the history of the post-Cold War United States of America up to now. It is a fact that the internet, born in the Us military, began its commercial adventure with the fall of the Berlin Wall. The extension of his field was in many ways also the opening of a great cognitive passage in the world towards Western culture, but it could have been both a vector for the promotion of American soft power and that of countercultural currents. In practice, it was both.

However, it is in this historical phase that the internet has become a synthesis vector of various clashing factors, and this precisely because of the complex historical-political phase in which we are immersed². The West is experiencing a conflict of democratization versus verticalization, which in the world is a confrontation between center and periphery that is multiplying its essence. Finally, also in the Western sphere there is a multiplication of the spheres that compose it.

As for the clash that the internet is experiencing today, we must keep in mind the mechanics of economic centralization that we are experiencing in this specific historical period [6]. These mechanics have produced the giants of contemporary economics, many of whom are the so-called *big techs*. For these, Nicolas Petit coined the term “mologopoly”, explaining how they work both in competition with each other and as a trust, so as to ensure ever greater slices of power [7]. He explains this economic form thus: “the coexistence of structural monopoly with cognitive oligopoly. It calls attention to the possibility of latent and complementary levels of competition in big tech that antitrust and regulatory decision-makers fail to observe. Put differently, while there is an undisputable trend toward industry concentration in the digital economy, there is also a competitive force behind it [7]”.

According to Petit, the conditions imposed by this condition require greater regulation of the power of big techs in matters of privacy, fake news and hate speech

² On the current historical-political phase cf. Orazio Maria Gnerre & Gianfranco La Grassa. Dialogo sul conflitto. Neaples: Editoriale Scientifica, 2019.

[7]. If in the first case, however, the growing effective power of these new economic powers is concretely limited, preventing the indiscriminate use of the Big Data that they collect according to the new models of information capitalism, the other two cases are not so simple. The limitation of the so-called fake news and the so-called hate speech can have more or less political purposes, and the demonstration of this is the controversial and dissonant use that of these concepts is made by the opposing parties in Western democracies. Obviously, the process of regulation according to Petit should be guided, in these cases, by supra-economic political authorities, who can guarantee the public interest against instrumental uses of this type of restrictions.

In addition to the possibilities of restricting the power of big techs by the public sphere, there is the bottom-up use of information technology by society. Damiano Palano describes the connection between contemporary populism and the internet in these terms:

“In recent times, the «telepopulism» of the nineties of the last century has also been accompanied by a sort of new «webpopulism», which has found in the Web the channel for communicating with citizens. The most relevant point, according to this interpretation, is that it is precisely the transformations that have taken place in communication that offer the possibility of going beyond the intermediation of parties and their organization and to establish a direct connection between the leader and the public of potential supporters” [8].

Whole parties of neo-populist brands were born thanks to the web, and the most striking case is certainly that of the *5 Star Movement* in Italy, which, by using the web as an instrument, also solidified a strong idea of freedom of communication, close to the ideas of the various European pirate parties, and an almost salvific conception of the use of new information technologies with respect to the possibility of a palingenesis of democratic processes. Obviously the ideas of the neo-populist parties and movements (I use this label here to be clearer to the reader, even if the discussion on how these contemporary phenomena should be considered should set a more complex discourse) are not anti-hegemonic only in an anti-institutional function, but very often (especially, but not limited to, in the cases of so-called left populism) they are anti-capitalist or in any case against large economic concentrations. Even the so-called “sovereignist” discourse often focuses on the extensive power that is being concentrated in the hands of large corporations, especially that of *platform capitalism*, even where this is considered a secondary problem compared, for example, to migration.

5. Secondly, as another fault line, we undoubtedly have what is a direct expression of multipolarization: in-

ternet today is experiencing an ever greater segmentation due to the fact that it has become the privileged channel of international confrontation. On it, cognitive struggles and *cyberwarfare* are fought simultaneously. The internet is, to all intents and purposes, an instrument of international competition.

“In its recently published mid-year Cyber Threat Report [9], the cybersecurity firm SonicWall reveals that the total number of ransomware attacks in the first and second quarters of 2021 has reached 304.7 million, up 151% from a year prior and already surpassing 2020’s total of 304.6 million attacks. Citing high-profile attacks on Colonial Pipeline, JBS Foods, Kaseya and hospitals worldwide, SonicWall paints a picture of online criminals seizing the current moment of instability and global reliance on cyberinfrastructure to force a “*new business normal*” amid an “*escalating cybercrime arms race*” [10].

This trend had already been highlighted in its early days by the “Chinese colonels”, Qiao Liang and Wang Xiangsui. They conceived, as a characterizing element of the fourth generation war, the non-military war operations, and the role of the web was of fundamental importance in these [11].

If states and institutions have to defend themselves, within an increasingly hostile environment, from threats also coming from the world of the internet, a progressive closure of the same becomes more and more understandable. In this context, the control over information flows also assumes a sense in relation to the screen that one may want to use against the narratives of other international actors who are considered as competitors. All this requires an ever greater segmentation, the only barrier to which remains the attempt to open communication channels towards the citizens of the other political and market spaces in the world. Moreover, this is complicated by the undeniable birth of a real world public sphere, which demonstrates its existence in partial autonomy from the geographical, cultural and political particularities that would like to be impressed on it. In his book *Splinternet* (which takes up a Clyde Wayne Crews’ term used for the first time in 2001³) Scott Malcolmson argues that “the World Wide Web is slowly returning to Earth and its entanglements: states, laws, cultures. Cyberspace, for a host of commercial and political reasons, is becoming many cyberspaces, some of which fit distressingly well onto the old political maps of nation-states” [12].

³ In this case, however, the concept referred to the Author’s wish to divide the internet into many private properties, avoiding the monopolization of this “common”. Clyde Wayne Crews. On my mind, Forbes. — URL: <https://www.forbes.com/forbes/2001/0402/036.html?sh=2a1bf5e65ea3>

This is obviously all the more true when it is possible for a political entity to secure (or seek to do so) full digital sovereignty. To date, the European Union and the Russian Federation are still connected to the global internet, even though they are showing many reservations and studying new projects. Emmanuel Macron's speech at the United Nations Internet Governance Forum in 2018 highlighted very clearly the French President's point of view on all the limitations of the internet and its current formulation: from false neutrality, which does not marry with the principles of European universalism, to the pathologies to which it would expose citizenship [13]. Any criticism made on this dimension is clearly a symptom of a weakness that is manifesting itself, and on the carcass of the internet every subjectivity would like to dine on: for this reason, Macron's appeals to make the web multinationals responsible are in the interest of the established authorities, which in that discourse clearly demand a multilateral relationship between institutions and corporations [13]. On the other hand, according to Macron and Merkel too, it is in Europe's interest to achieve effective digital sovereignty [14].

Russia and China, on the other hand, have "unique political traditions and culture, each has its own approach to managing dissent and opposition, dealing with internet and social media [15]". Their attention to defense and security policies has allowed them to develop a particular approach to informatic issues, clearly different for each of the two countries. Indeed, Russia would have developed a very specific discourse that can be defined as that of "digital multipolarity" [16]. In this context, the defense of the specific interests of each country would coexist with concertation at the level of the United Nations in the regulation of the web.

The more the processes of multipolarization advance, not necessarily understood as an integrated international concertation but also as the disintegration of a single-centered international order, the more these processes of internet dismemberment will go on. The web could disintegrate its fungibility as France and Germany installed different railway rails to prevent their use by enemy trains in the event of an invasion.

6. The last factor to consider is what Damiano Palano defines "audience fragmentation" [17] in his discussion of "bubble democracy". Public opinion in the West has never been so fragmented internally as it is today. Of course, there are long-standing phenomena that have been widely documented and that refer to the fundamental cultural roots of contemporaneity. Bauman, for example, spoke of the division of collective identity into bubbles, bubbles in which individual identity is decom-

posed and reconfigured according to needs and personal will [18]. Of course, this type of cultural identity seems to us as distant from politics in its classical sense, yet the last few years have shown us how every sphere of mass culture can be polarized, and so it has been. The fault here is not necessarily of the internet, and perhaps it is also to be considered a factor of cognitive aggregation of the discomforts created by difficult economic times. In any case, it is in the digital sphere that these radical enmities are most easily reproduced. It is not possible for us to say with certainty whether the functioning of social media algorithms segments dissent or not, but that is what we often see in fact. Also in this case, there are mechanisms of disaggregation and aggregation of the masses. The latest US electoral campaigns, for example, have demonstrated the great capacity of the candidates in polarizing public opinion on issues with extreme divisive potential.

The destiny of the internet therefore seems to have to create real digital spheres of influence that perimeter its own dimension of autonomy. As far as the political dimension is concerned, this phenomenon is very clear and evident in its circumscription, as regards the social phenomenon it is not so easy to predict the results of this process, given that much will depend on the web regulation methodologies, and that these as we have seen could be national, regional, global, or none of these things. Obviously, every vision of the world and of politics presents more or less different solutions to the question of the autonomy of the network or the autonomy of big techs (to be considered also as potential enemies one with the other [5]).

All this presents a completely synthetic and unsystematic sketch of the vectors of influence on the digital sphere, on their interests as well as on their relationships of encounter and confrontation. We have seen how communication flows as a power relationship between a "top" and a "bottom" depending on the situation, just as we have seen the variable geometries between different actors at the top and the bubbles of contemporary democracy at the bottom. Obviously, a more structured schematization of the ideas I have expressed here is urgently needed, and I hope to take charge of them in the near future. However, it must be considered that, changing scenarios and advancing technology, we are here in a field where the possibilities for forecasting are extremely limited and dangerous. The aforementioned scheme, only sketched here, could perhaps explain the mechanics of the relationship between powers and communication, but not necessarily their future organization. The future appealed to in the title is clearly the near future, a future that is already present. One of the aims of the social sciences should be to predict the immediate. For the long term it is necessary to highlight other trend lines.

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THE CHALLENGES OF USING SOCIAL MEDIA AS A MEDIUM OF POLITICAL COMMUNICATION

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Abstract. Social Media has been the most popular medium in the world for political communication across all political structures. Social media has become a platform for both political elites and the grassroots to communicate to citizens and the electorate in the constituency, even in the world of international politics. The main purpose of this research is to determine the challenges of social media as a medium of political communication. Social media is a vital tool to spread mass information, yet there are some leaders who do not use social media and do not even have any social media handle. As part of the study, the researcher will try to determine the reasons behind their decisions. The research findings will highlight the role social media play in modern political communication as well as the challenges faced by social media in political disinformation, false identity, fake news, internet-phobia and the influence of social media managers/CEOs that undermine social media as a medium of political communication.

Keywords: social media; political communication; internet-phobia; fake news; false identity

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- **S**ocial Media has been the most popular medium in the world for political communication across all political structures. Social media has become a platform for both political elites and the grassroots to communicate to citizens and the electorate in the constituency, even in the world of international politics. The main purpose of this research is to determine the challenges of social media as a medium of political communication. Social media is a vital tool to spread mass information, yet there are some leaders who do not use social media and do not even have any social media handle. As part of the study, the researcher will try to determine the reasons behind their decisions.
The research findings will highlight the role social media play in modern political communication as well as the challenges faced by social media in political disinformation, false identity, fake news, internet-phobia and the influence of social media managers/CEOs that undermine social media as a medium of political communication.
- **INTRODUCTION**
Political communication is the main item of activities in democratic and non-democratic society; Political communication is a single tool that is used by political leaders to campaign for votes, design policies, implement policies and accounts to the citizens. Political communication has long been communicated through the traditional media for many years. In the new era of technology, almost all the traditional communication media, be it telephone, radio, television, post mail, newspapers, gongo-beaters etc., are remodeled onto the internet, giving birth to new electronic services such as email, television, digital newspapers. Social media have been video

streaming websites. All this has also been modified into a single social media platform for both parties. As stated, social media include a broad array of internet-based applications [13].

Today, social media have become a battle field for information across the length and breadth of the earth. In international politics, social media have become part of a hybrid tool for supremacy in international politics, social media is not just a platform for communication, but it is also a tool for the influence of super powers. This has effectively influenced the challenges of social media as a tool for political communication.

Social media is growing in all spheres as a medium of communication, politicians have opted the way to use social media for their communication, politicians use Facebook, Twitter, Instagram, Telegram, VKontakte, etc. Some politicians manage their own account; they write, publish and share information publicly on their social media platforms, while others employ social media managers to manage their social media platforms. Instead of journalists monitoring the political activity, political actors themselves produce their content and make them publicly available on the social media platforms [17].

Political communication on social media has a replicate effect on the constituent and beyond, when political leaders post information on social media, followers and friends of political leaders quickly share the information on their social media accounts. The information can spread beyond the boundaries of the constituency. Social media enables reciprocal communication by both users using the social media medium [2].

The features of social media communication make it easier to spread information as well as to manipulate information in a form of propaganda message by the opponents of political parties and political activists, with social media, all users are content creators. Barack Obama is a clear example of a politician who used social media to raise funds, campaign and also influence all America citizens, including young people who, could not vote because they are underage but were able to use social media to campaign for Obama, the method Obama campaign used the internet for his communication has forever changed how election campaign are run, which has also significantly all communication in the political sphere [5].

Social media as stated has transformed the way we communicate, going into the future social media will be the main medium that politician and voters will engage in day to day communication, because it is more advantage than the traditional method of communication. Notwithstanding the advantage there are numerous challenges facing social media as methods of political communication, this paper therefore seeks to analyse the challenges

of social media in political communication by using both quantitative and qualitative research methods to gather data through social media. According to Bouchrika [4], a contemporary method sprung from the mixed methods, either the combination of quantitative and qualitative, also known as triangulation in social research. This method will, therefore, enable the research to study the challenges of social media with empirical data and add additional knowledge to the existing literature.

Social media has also become a platform of information war, just to mention a few in India TikTok has been banned for fear that it will spread propaganda information and also acquire data of Indians to the Chinese government. This information war is likely to increase into a form of multipolar information war.

RELATED WORK

The technological era has changed the old way of communication be it newspaper, radio, post, messenger etc. [1]. Stated, Communication medium and communication technologies play a significant role in ensuring effectiveness of the communication outcome and thus the effectiveness of the medium that best suit the communication channel should not be overlooked. Managers of social media play significant role on how social media users communicate on social media as stated [14], creating a meaningful environment for the users does this. The most central and paramount part of social media manager's role is to take appropriate, strategic steps that ensure meaningful conversations.

Social media platform is the playing grounds for all political stakeholders involve, and they all try to use the same platform to undermine each other superiority or influence on the constituents. As state [11] politicians have the power to influence individuals by adopting certain strategies that compliment populism. Politicians because of their popularity in the community they use populism in social media to influence followers against the opposition or the ruling government depending on the position of the politician.

Social media has taken the role of traditional media and this has created an open space for communication, demanding accountability by the voters has also been easy and effective. Social media has changed how we are governed by making the process more transparent. Many leaders across the world have taken to social media to voice their opinions and priority issues, giving people a better understanding of the government they have elected [10].

The impact of social media has not only changed the method of communication but has also challenged every aspect of political institutions and political culture

and social-political system in the society, social media is therefore a medium for political debate.

Using social media as a medium of political communications comes with numerous daily challenges due to many factors. The challenges people encounter using the internet is directly related to social media because social media also use internet for connectivity and networking. The common challenges involved with social media in political communication are, misinformation, fake news, social media\internet-phobia fake identity, hacking, social media management/ chief executive officer influenced. As stated (European Union, 2021) Social media offer great opportunities to spread false information to a great number of people.

But it is also a challenge on how to manage political information or communication that has elements of security that can be control by government in traditional media to prevent conflict, but on social media is more challenging to control information.

SOCIAL MEDIA AS A TOOL FOR POLITICAL COMMUNICATION

Social media is a powerful political communications medium, with widespread influence over every corner of our society on earth, as we are moving towards the digital revolution. The digital revolution has not only influenced businesses and made the world more accessible to trade, but it has also changed the way we communicate. According to *Datareportal* there are 4.74 billion social media users around the world in October 2022, equating to 59.3 percent of the total global population [16].

Political leaders and activists are aware that politics is numbers; therefore, social media is now the area for all political communication engagements. The effectiveness of social media in communication has attracted Politicians to sign on social media platforms such as Facebook, WhatsApp, Instagram, TikTok, VKontakte, Twitter, YouTube, Telegram, etc. has seen an increase in the number of political accounts for political leaders.

Develop democratic nations and developing democratic nations leaders are all engaged on social media, Notable president that have used social media to the admiration of the citizenry to engage in effective political communicate is Barack Obama. Barack Obama rose to prominence as a political communicator who could deliver speeches with universal themes and the opportunities of digital age to maximum political strength [7]. When Obama left office his successor Donald Trump also used social media effectively especially with the twitter, that require just a combination of few words to get the conversation going, according to Bickart, Fournier & Nisenholtz [3], America presidential campaign, political

commentators urged Donald Trump to give his Twitter account a rest. He did not consider their call; he rather increased his provocative communication, bypassing mainstream media in favor of social media to deliver his messages directly, frequently, at all hours, and without filters.

Journalists and media persons visit social media platforms to read what they post and write on their social media handles and report. Traditional media like Television, radio, newspaper just to mention a few also get their sources of information on social media platforms which they report to their listeners and viewers. Obama and Trump often had their communication on social media been re communicated by traditional media houses, social media has youthful followers, as a result traditional media want to get their information to both the old and young people that are mostly on social media. Almost all young people used smartphone with at least one social media account, therefore making it easy to access political information. According to Dasli [6], media such as social media platforms provide information to individuals, reach them in a short time and spread the available information. Social media is fast, interesting, free to access and communicate that can be access in any part of the planet but with daily challenges associated with the Internet that also poses challenges to political communication.

THE CHALLENGES OF SOCIAL MEDIA

There are numerous challenges politicians and their constituents encounter accessing information on social media. The main challenges that are associated with internet users also affect social media users, such as misinformation, fake news, cybercrime, and so on.

To analyze the challenge, I took data on social media platforms that I belong with members from Ghana and Russia were the majority. The data was used to analyze the issues citizens encounter in identifying, fake news, the official accounts of politicians on social media platforms. Information on social media may come from different social media platforms but initially emerge from one source.

This therefore, makes it difficult to identify real source of information communicate on social media; the medium of communication is very important in political communication. A reliable and verified account will make communication effective, [1] stated communication medium and communication technologies play a significant role in ensuring the effectiveness of the communication outcome and thus the effectiveness of the medium that best suits the communication channel should most overlooked. Fake information has become

the most widespread challenge in using social media; this is because people are more interested in the information of fake news rather than factual or real news. People create fake accounts of politicians to share fake news which tarnish the image of the politicians. Another form of fake news is editing the real information by inserting fake information to discredit the real information.

Another challenge is the way social media developers and managers control the social media platforms. They define the rules and conditions of communication on the various social media platforms; freedom of speech has a limit on various social media platforms. Social media owners and managers directly and indirectly influence the limit of freedom of speech, which sometimes is centered on rules and regulations of the social media application. Donald Trump is one of America president that was removed from Twitter because the managers used their power to suspend his account indefinitely based on his Twitter messages. The managers said he violated Twitter conditions and terms, yet Donald Trump was only expressing his freedom of speech. As soon as the new managers took over Twitter, he was on his way to regaining his account. Elon Musk when he bought Twitter, he did a survey by asking a simple question, to reinstate Trump or not to reinstate, the pull result showed that 51.8% in favor of reinstating Trump and 48.2% were opposed as reported by (Paul & Duffy CNN 2022) Trump account was banned following January, 6, 2021 attack on capitol, Trump account was restored by Twitter chief executive officer, the new owner Elon Musk. So there is a clear indication that managers and owners of social media platforms are challenges to political communication on social media platforms.

Verification of information on social media is very limited, therefore making it a challenge to verify sources of information; information sharing is paramount in political communication, especially during election campaigns. Therefore, there is need for political activists to verify the information for political consumption. Verifying information needs special skills, since information is shared across different social media platforms and it will only take people with skills in communication and technology to verify information.

Misinformation is widely spread on social media, and it is very difficult to control the social media space. The challenges keeps on going as experts find solutions to existing problems, new problems emerge.

DATA ANALYZE AND PRESENTATION

The research data was taking by sending questionnaire on social media platforms that I belong Facebook, WhatsApp, VKontakte and Telegram. Since the study

focus was on the challenges of social media as a medium of political communication, the researcher chose to use social media to gather data to support the study. This is not to say that people who are not on social media platform do not access information on social media.

Table 1. Sex

Sex	Male	Female
Number	49	1
Percentage, %	98	2

The total number of respondents were 50 out of that 49 were male representing 98% whilst 1 was female representing 2%, in general women are not much interested into politics and as the data shows, men dominate in the political sphere therefore, their interest in political communication. There are discussion going on across the world by women advocate, to promote women to go into politics, social media is a very good platform for promoting women in politics agenda.

Table 2. Ages

Age group in years	20–40	41–60	Above 60
Number	30	18	2
Percentage, %	60	32	8

The data of the ages of respondents indicates the interest by young people in social media, people between the ages of 20–40 years were 30 representing 60%, the ages between 41–60 years were 18 respondents representing 36% and above 60 years were 2 respondents representing 4%. The data above confirm that young people are the majority in social media usage. Young people most often used social media to stay informed about current affairs. As compared to older generation who are more likely to get their news source from traditional media such as television, radio, newspapers, and magazines.

Table 3. Sources of political information

Source	Social media	Traditional media
Number	48	2
Percentage, %	96	4

When asked respondents about the source of political information, 48 respondents representing 96% used social media for their political communication, 2 respondents representing 4% access political communication through traditional media. The availability of smartphones and the availability of internet make it easy and free to access information anytime at anywhere;

therefore many people will continue to use social media for their political communication. In contrast it is more difficult to carry televisions along with you and one need to be at home to be able to watch television. People been able to communicate with their political leaders on social media will continue to motivate constituent to used social media as a medium of communication.

Table 4. Challenges encounter

Are there challenges in accessing political communication on social media	Yes	No
Number	49	1
Percentage, %	98	2

When asked are there challenges in accessing political communication on social media 49 people representing 98% answered yes and 1 person representing 2% answered no. This is an indication that they are many challenges in using social media as medium of political communication by social media users.

Similarly when asked to mention some of the challenges they encounter on social media, fake news and misinformation were the most common concern among the respondents, they pointed out that fake news is basic facts of current event on social media.

False identity respondent largely acknowledge that political leaders and activist images, photos and names are used my scammers, internet farmers, to share information and discredit each other for political gains. Scammers used political leader's profiles to scam people and steal money from innocent people at the blind site of political leaders.

Respondent were also concerned about the lack tools to verify false information and the inability of social media managers and application developers to quickly block false information on social media, is not making social media a better place as compare to traditional media in dealing fake news and misinformation. Few of the respondents also mention cyber-attack on social media as challenge to personal data of users.

Table 5. Government control of social media

Do your government control social media	Yes	No
Number	24	26
Percentage, %	48	52

The question on government control on social media had almost a spilt response 24 people representing 48% believed that government control information on social media while 26 people representing 52% believed that government do not control social media. The response

reflect the nature of social media groups or platform I belong and which was where I collected my data, therefore, I further interpreted the data based on nationality. In all my social media platforms Ghanaians are majority except two which the majority are Russians, that is the telegram platform and the VKontakte platform. The answers therefore, reflect this dynamics of nationality and what is happening in their countries. Since in Ghana government has never blocked social media, the responds among Ghanaians will definitely answer no, in contrast Russia government currently blocked some social media platforms before the Russia-Ukraine conflict LinkedIn was blocked and when the war started many more social media platforms where blocked by the government, therefore Russians are more likely to answer yes.

Government in other parts of the world when there is protest or conflict with government, the first thing government authorities does is to block social media platforms to prevent sharing of information or escalation of the protest. Other government block social media for fear of their security, India has blocked TikTok and America government is following suit. The global war on information by super powers is also in play; China is trying to also develop social media application to counter America social media application a place where young people access political information.

To determine the reason why some politicians and political leaders do not have social media accounts, the response was classified into two theories, internet phobia and personal reasons. Many political leaders are internet phobia, inter phobia is the fear of putting one data on the internet, fear that hackers will hack their accounts, fear that people will used their profile to create fake accounts and used for criminal activities. Others don't just want to be on social media due to personal reasons which is difficult to determine.

RECOMMENDATIONS AND SUGGESTION

Based on the findings of this research, the researcher propose these recommendations and suggestions.

Government and application developers should invest in making sure that misinformation is quickly detected on social media and be blocked to prevent it been shared to multiple social media platforms.

Social media platforms should add tools on the platforms to make users to quickly verify information especially political information, to authenticate the facts and reality of the information.

Government should demand that all social media platforms that has user accounts should put measures that will prevent scammers to use profiles and photos of political leaders and activist to scam and defraud people,

this can be done by using facial or photo recognizing tools to authenticate multiple accounts of political leaders and to deactivated suspicious accounts without third party report or complain.

There should be a universal law that will punish scammers and those who create fake content on social media that has security implication to world social media ecosystem. Since fake content from a local community on a single smartphone has the potential to spread across the world with minutes.

Social media should be liberal and free of speech should not be limited on social media and government should make sure social media platforms are not blocked for political gains by the ruling governments.

All political leaders who do not have social media account due personal reasons or internet data phobia, should overcome any obstacle that is preventing them from having social media account and create at least one since political leaders are public servant is therefore necessary to be in contact with them citizenry all the time.

CONCLUSION

Social media has seen a rapid increase in information sharing and effective direct communication between political leaders and ordinary citizens, which will have been impossible on traditional media. Respondents are optimistic about social media, which is the voice for the voiceless. Social media to also feel powerful just as the political leaders and this has make political communication very productive.

Young people are all over social media as earlier mentioned in the data analyses, traditional media is only for the few older people, therefore all political leaders and politicians must be on social media, politicians that are social media phobia should overcome the fear and get involve.

Political leaders and politicians should overcome social media phobia.

Social media increase political communication with voters, political actors and all those in the political process, however there are challenges associated with social media as medium of political communication, the challenges is inevitable but can be managed.

Social media is of great importance especially for young people to communicate about politics through social media free of charge with a smart phone on their fingers.

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MEDIA LAW IN THE COMMONWEALTH OF AUSTRALIA: CURRENT TRENDS IN DEVELOPMENT

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Abstract. In the modern era, the not at all new maxim that information rules the world is getting a new, this time "digital-platform" confirmation of its truth. With the emergence of global online platforms in the 1990s, the categories of "freedom of speech", "freedom of mass information" and "freedom of self-expression", while gradually changing the technological formats of their embodiment and implementation, keep their democratic essence and role in the processes of personal, public and state development unchanged.

As humankind enters its next information cycle, roughly covering the first decades of the 21st century, institutional and regulatory potential of the historically "youngest" information and communication freedom — the freedom of web-based (online) information and communication — is gradually taking shape, gaining institutional and regulatory potential. Like its antecedents (freedom of speech, press, radio and television broadcasting), it requires a certain upgrade of its social regulatory mechanisms as it "matures" and enters into the life of global, national and regional societies.

It is the context of the implementation of this kind of innovation on the example of a specific

- country — Australia — that determines the basic subject
- of this article, its main essential component. Specific and
- topical manifestations of this essence are analyzed by the
- authors of this article using examples of legal and other
- regulatory systems in the Australian media sphere. For
- example, one of the subjects of analysis is the question of
- how is Australia coping with the challenge of updating its
- social regulatory mechanisms in the media sphere. And, as
- a logical consequence of the former, is there any position in
- Australia's relevant experience that is worthy of reception in
- other legal and ethical orders?

Focusing on these issues the authors review some

- of the most interesting decisions taken by the Australian
- government over the past decade. The authors also analyse
- the current law and other regulatory mechanisms and
- instruments in Australia aimed at regulating the mass media
- public relations in this country as well as the main trends of
- their development. In particular, such as pioneer (Australia
- is a recognised pioneer in this sphere of legal regulation!)
- changes in the regulation of digital media platforms on
- the example of Google and Facebook (from October 28,
- 2021 — Meta Platforms, Inc. in Russia, admitted as
- extremist organization by the Moscow Tverskoi Court),
- and quite specific modifications of Australian national
- defamation law.
- **Keywords:** Australia, Commonwealth of Australia,
- European Union, digital platforms, digital services, media,
- media law, media legislation, Russian Media Law, ASMA.

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*Potest lectiones ad urbem et mundum*¹

THE COMMONWEALTH OF AUSTRALIA AS A SUBJECT OF ANALYSIS

Australia's media legal system was chosen as the focus of our study for a number of reasons. *The first* of these was Bloomberg's assessment [1] that Australia has become the world's 'testing ground for digital platform regulation' between 2017 and 2021. Although the NewsMedia and Digital Platforms Mandatory Bargaining Code 2021 amendments to Australia's Competition and Consumer Protection Act, which incorporate the main supporting elements of Australia's model of legal regulation of the interaction between modern Australian digital journalism and the IT giants over the years, have yet to be fully tested in practice and, according to Australian university professor Curtin Tama Leaver, remain "an untested gun in the desk of the Australian federal exchequer", other countries have for some years now been keeping abreast in order to learn from its pioneering attempts to regulate certain areas of the world's IT giants.

The second reason is a certain exotic factor of this country, or more precisely, the fact that its legal system is little known to the majority of Russian readers. In particular, it can be seen as belonging to a different legal system than the domestic one (Anglo-Saxon) and a different historical development of the legal and political systems [2]. *Finally*, an important circumstance of our choice was the availability of legal information on the regulation of mass media relations in this country, which was already revealed at the very beginning of the research. It turned out that the Australian authorities are very responsible about the availability of their national legal information, which is quite abundant in the public domain on official sources.

THE STRUCTURE OF THE COMMONWEALTH OF AUSTRALIA

Before examining how the media sector is regulated in Australia, it is worth saying a few words about the state structure of the Commonwealth of Australia, as this is what determines the specifics of the legal system. Aus-

tralia is a federal state comprising 6 states and 2 territories and the model of Australian federalism is very developed and both states and territories have significant law-making and law-enforcement powers as well as their own legal interests that do not always coincide with the interests of the federal authority. Because of this, and also because Australia is a member of the common law family, a bilevel legal system has been developed, combining federal and state and territory laws. Moreover, laws and regulations may regulate the same area of social relations in different territories in varying ways. At the same time, we should note that the sphere of mass communications in Australia is regulated by law at the federal level.

DEGREE OF REPRESENTATION OF THE SUBJECT MATTER OF THE ARTICLE IN GLOBAL ACADEMIC DISCOURSE

There are a number of studies of Australian media law in the legal scholarship. The most detailed analysis of the Australian media law and related problems can be found in the foreign legal scholarship. For example, Butler and Rodrick [3] analysed the case law, legislation and regulations governing media practices in various fields, such as journalism, advertising, multimedia and broadcasting in Australia. In addition to traditional forms of media, which include television, radio, film, and newspapers, the newest forms of media, such as the internet, online forums, and various digital technologies, are also analysed. Rolf analysed the basic principles of media law as well as the laws which regulate defamation, invasion of privacy, and freedom of information [4]. Fernandez also analysed defamation law, privacy and secrecy, invasion of privacy, freedom of information is also examined and, more than that, highlights some aspects of lawmaking in this area and initiatives to reform media regulation [5]. There are also some articles narrower in subject of analysis, for instance, Dent and Kenyon analyse defamation law in Australia through a comparative content analysis of Australian and US newspaper articles [6], and Flew examined the Australian media law through the perspective of new issues arising from increasing concentration of ownership and control over the internet by a limited number of giant digital corporations [7].

¹ Possible lessons for the city and the world (*latin*).

There are considerably fewer studies of Australian media law in the Russian legal scholarship. Certain and quite interesting aspects of Aboriginal copyright regulation in Australia are covered in Richter, A.G. “International standards and foreign practices of journalistic regulation” [8]. There are also few articles that analyse narrower aspects of media legislation in several states. For example, Nadirova analysed the Australian antimonopoly law in the media sphere through researching the practice and effectiveness of prohibiting cross-ownership of the media in Australia, the United Kingdom, and the United States [9]. She examined deals for the purchase of print and broadcast media from the point of view of their compliance with current legislation, as well as their impact on the level of media concentration, availability of information services and their diversification. Chikishev analysed the Australian law practice of redistribution of income at the mass media market [10]. Thus, we see that in the foreign legal scholarship there is a comprehensive study of the Australian media law, while in the Russian legal scholarship there is no such study.

CURRENT MEDIA LEGISLATION: THE AUSTRALIAN AND RUSSIAN MODELS

Australia does not have a specific media law identical to the Russian one [11]. However, the media legislation of this country comprises a system of federal laws regulating a more extensive sphere of social relations than the Russian media law. For example, telecommunications in Australia refer to communications by telephone, radio and the internet. Accordingly, telecommunications operators are regulated by the same law that regulates the media. The centerpiece of this system is the Australian Communications and Media Authority Act of 2005 [12] that regulates the establishment, functions, powers and responsibilities of the Australian Communications and Media Authority (hereafter ACMA). It is the ACMA that carries out the broadcasting, content and data transmission, spectrum management (radio broadcasting) and telecommunications functions within Australia.

Broadcasters are regulated in more detail by the Law on Broadcasting Services [13, 14]. The Australian Broadcasting Services Act is similar to the Russian Law of 27 December 1991 No 2124-1 “On the Mass Media” (it is almost the same age as the Russian law which took effect on February 8, 1992) but the system of support for its relevance and the pinpoint nature of its impact on the social relations which need to be regulated by its standards is in our opinion different from the similar system in Russia. The main difference is that while both Australia and the Russian Federation have a purely legislative subsystem to support the relevance of the above legislation, the Australian Broadcasting Services Act, like other media legislation,

has a developed practice of upgrading its regulatory framework in the form of so-called Codes of Practice? Which explain in detail the narrower aspects of the application of the “main” law in relation to them and establishing “best practices”. In relation to the Law on Broadcasting Services, there is currently a Code of Practice for Commercial Television [15]. It contains basic rules for the placement of content for television broadcasters. The code also contains rules regarding advertising time and placement on television advertisements, gambling advertisements, program classifications, and rules for news reporting that require accuracy, fairness, and respect for privacy.

It is noteworthy that the Commonwealth of Australia also has standards for children’s television, enshrined in a specific law [16]. Their purpose is, firstly, to promote Australian programs to develop children’s sense of belonging to the Australian people [16, art. 6 (a)], and, secondly, to protect children from the possible harmful effects of television [16, art. 6 (b)]. The first goal is achieved by establishing quotas for different genres of television programs (including those based on the production budget of the programs). The standards also regulate advertising content on children’s television, and the bans contained there are identical to those in Russia, the only difference of which is that in Russia these bans are enshrined in the Federal Law on Advertising [17, art. 6]. For example, both Russian [17, art. 6, p. 4] and Australian [16, art. 20, p. 2] legislation contains a ban on advertising that gives children the impression that possession of the advertised product puts them in a preferential position compared to other children, as well as a ban on advertising that encourages children to persuade parents or others to purchase the advertised product [16, art. 20, p. 1; 17, art. 6 p. 2]. However, there are differences in the legislative regulation of “children’s” advertising: for example, the Children’s Television Standards contain rules about the proper representation of the advertised product. Thus, if the size of the advertised product is not clear, the advertiser must indicate it by means of comparison with something that a child can easily recognize [16, art. 21, p. 4], and if the advertised product requires accessories to use, the advertiser must clearly distinguish between the price of the product and the price of any accessories [16, art. 21, p. 5].

Broadcasters are regulated in a similar way, by the Broadcasting Act which contains basic rules concerning content [18].

COMPLAINTS MECHANISM FOR MEDIA LAW VIOLATIONS

It is noteworthy that if any media licensee (ranging from television and radio broadcasting to the internet) violates established standards, an appeal can be drafted that

will be investigated for a possible violation of media law [19]. ASMA reviews all complaints claiming a violation of broadcasting rules if the complainant has contacted the broadcaster and is not satisfied with the response, or if the complainant has not received a response. ASMA also considers all complaints alleging violations of licensing conditions, standards, and rules for providing online content. This tool for filing complaints is quite popular — in 2022 alone the Australian Communications and Media Authority has published 16 results of investigations [20], but the number of appeals is much higher — so, according to statistics [21], in April — June 2022 ACMA registered 64 appeals only. The largest number of complaints (25) was filed against commercial TV and radio broadcasters and 16 complaints were filed against state TV and radio broadcasters. However, as a result of investigating the complaints, violations were found only in the activities of commercial TV and radio broadcasters.

ACTUALISATION MECHANISMS

Thus, we see that the core of Australian media legislation was created in the 1990s and 2000s, approximately a quarter of a century ago. However, it is constantly being updated in order to ensure the necessary social and legal compliance of its norms with technological change. This is achieved, firstly, by regular amendments to the existing laws and, secondly, by passing codes of practice. In addition, new laws are being passed in areas related to the media, such as, for example, the Internet Safety Act 2021 [22]. Despite this, according to the Australian lawmaker, such measures do not fully cover the changes rapidly occurring in the media field, making 2019 an unprecedented year of review of Australian legislation in this area. Governments (Australia has both Federal and State and Territory governments) have admitted that the “media landscape” is now highly globalised, and have responded by seeking to ensure the relevance of Australian media laws in the digital age through reforming Australian media laws in two ways. *The first* area of reform was a change in the regulation of digital platforms, which includes Google and Meta Platforms, Inc., and *the second* was a change in national defamation law.

DIGITAL PLATFORMS AND COMPETITION PROTECTION ON MEDIA MARKETS

Let’s take a closer look at the changing regulation of digital platforms. The Australian anti-monopoly regulator, the Australian Competition and Consumer Commission (ACCC), conducted an investigation that examined the impact of digital platforms (particularly Google and Meta Platforms, Inc.) on competition in the media and

advertising markets in general and the impact of digital platforms on journalistic content in particular. As a result of the investigation, the ACCC published a report [23] with 23 recommendations concerning issues such as competition, the relationship between digital platforms and traditional media, digital literacy, privacy law reform, taxation and unfair contract terms. The most important of these were recommendations to develop and implement a new regulatory framework to ensure effective supervision of all organisations involved in producing or providing content in Australia, with the aim of creating a level playing field that promotes competition in Australia’s media and advertising markets. To achieve this goal, it was proposed that digital platforms appointed by the Australian Communications and Media Authority (ACMA) be required to implement a code of conduct to govern their relationships with news media businesses, which ACMA would oversee. Following ACMA recommendations, Australia drafted and passed new law in 2021 [24], requiring digital platforms such as Meta Platforms, Inc. and Google to pay local media and publishers for links to their content in news feeds or search results, sparking a broad public and national response [25]. According to Australian Communications Minister Paul Fletcher, “The code will ensure that news media businesses are fairly rewarded for the content they produce, which will help support journalism of public interest in Australia” [26]. The same purposes are intended to be achieved by the Canadian Act of June 22, 2023 [27]. This act is close in content to its Australian predecessor of 2021. However, in several aspects the Canadian act offers a more advanced response to the challenges which prompted the creation of these laws. This Act has been strongly opposed by Meta and Google [28].

INNOVATIONS IN THE SEARCH SYSTEM LIABILITY REGULATION

Next, let us discuss the reform of national defamation law. Although each of Australia’s states and territories has its own defamation laws, these laws are largely similar in terms of containing a set of typical defamation provisions under which a defamation plaintiff must establish: a) the fact of publication (which can be done through any means of communication); b) the defamatory significance of publication, which is defined as such significance as to make the ordinary reasonable reader think badly of or avoid the plaintiff; c) the fact of identification (i.e., some or all readers will consider the message in question to be related to the plaintiff). However, there are defences to defamation charges, which include fair protected report defences, justification (truth) defences, a contextual truth defence, an honest opinion defence,

innocent dissemination and a triviality defence. If the defendant's actions could be qualified as acting under any of these defences, the defendant will not be liable for defamation [29]. The following defamation cases, involving the previously mentioned Meta Platforms, Inc. and Google corporations, have gained prominence in Australia over the past two years and resulted in significant changes in the regulation of liability of search systems in 2022. In *Google LLC v. Defteros, J.* Defteros won a lawsuit against Google after the company failed to remove an article that he claimed defamed him, but Google appealed the case to the High Court. The High Court, however, ruled that Google was not the publisher of the link to the defamatory third-party content displayed as part of the search result, because Google, by providing the search result in a form that includes a hyperlink, does not direct, entice or induce the user to click on the hyperlink [30]. For this reason the fact of publication was found innocent and, therefore, Google was immune from liability.

In *Fairfax Media Publications Pty Ltd; Nationwide News Pty Limited; Australian News Channel Pty Ltd v Voller* [31] plaintiff Dylan Voller sued Fairfax Media, Australian News Channel and Nationwide News for allegedly defamatory comments published at Meta Platforms, Inc. in response to articles posted on the pages of the Sydney Morning Herald, The Australian, Sky News, The Bolt Report and The Centralian Advocate from July 2016 to June 2017. These media organisations were found by the High Court to be the primary publishers of third-party comments made on their public pages at Meta Platforms, Inc. The court ruled that a person's liability as a publisher depends on whether that person, by aiding and abetting the message in question, participated in the transmission of the defamatory information to a third party. The court found that each media company, by creating a public page on Meta Platforms, Inc. and posting content on it, aided, contributed to, encouraged, and thereby promoted the publication of third-party comments.

As it can be seen from the court decisions cited, defamation in the Australian media sphere is an issue that has already led to a number of amendments to defamation legislation came into force in Australia in 2022. For example, a *serious harm test* has been introduced, modelled on the UK test but with significant differences in wording (for example, the Australian serious harm test operates independently of the defamation test). What is more, a single publication rule applied for limitation period purposes, so that the one-year limitation period will not be renewed in certain circumstances where there are multiple publications of substantially the same issue in substantially the same way. Also amendments to enforce the defence of contextual truth come into force. In addition, some amendments are expected to come into effect

from in 2024, such as third-party content defamation immunity for fully passive digital intermediaries providing channels, caching and storage services (especially internet service providers, cloud service providers and email providers), and defamation immunity for search systems that are automated tools for searching the internet [32].

CONCLUSION

Thus, as a result of the analysis of Australian media legislation, it is reasonable to draw the following conclusions.

First of all, there is no special law on the media in Australia identical to the law of the Russian Federation [9]. Its place is taken by a complex system of laws that regulate in detail the operation of social networks and the activities of the internet and mobile telephone service providers in addition to the activities of the media.

Despite the fact that the regulation of the media is combined with the regulation of other social relations, the activities of the media themselves are regulated in sufficient detail. There are many specialised standards for each form of media, including standards for children's television, as well as a mechanism for investigating complaints about violations of these standards and other media legislation, which makes Australian media law more effective.

Secondly, the analysis of the Australian media laws revealed important and useful nuances of legal technique that are only partially used in Russian media law. For example, a detailed list of the basic terms used in the law is given at the beginning of each of the laws mentioned, which immediately eliminates questions about their interpretation. A table of contents is placed at the beginning of each law, making it easier to read and search for information, and the most modern laws are preceded by a brief statement of the law's purpose and key issues.

Thirdly, *codes of practice* play an important role in enforcing media legislation by completing and explaining federal laws, as well as by establishing "best practices".

Fourthly, Australia was found to be thoroughly monitoring changes in media-related information technology and reflecting these changes in legislation in a proactive and up-to-date manner.

Finally, in the fifth place, the possible lessons of the Australian experience of regulating media activities in relation to the digital environment for Russia.

In the Russian Federation, there is no legislation to regulate "platform activity" in relation to the media sphere so far, although its formation is only a matter of time, since the globalisation processes in the economy and other spheres of life inevitably involve the globalisation of the law as well.

Global social, service, content and communication platforms play an arena of emergence, change and ter-

mination of a variety of cross-border private and public legal relations. The establishment of sustainable and harmonious relationships between their subjects, along the lines of the already relatively balanced relationship between the well-known IT giants and the Australian news industry, working for the common good of all subjects of the global information society, is the most important task of the emerging global law and global ethics.

Since the process of digital transformation of social relations in the media sphere is global in nature, Russian legislation and other social regulators of this sphere of social relations should be created with due regard to relevant foreign experience. In our opinion, as of today, the basic legal positions of such experience are most vividly represented in the following legislative and other regulatory acts: The Australian IT Giant Media Negotiation Code 2021 (News Media and Digital Platforms Mandatory Bargaining Code); Bill C-18: An Act respecting online communications platforms that make news content available to persons in Canada 2023; the EU Digital Copyright Directive 2021; and Regulation (EC) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on Competitive and Fair Markets in the Digital Sector and amending Directives (EC) 2019/1937 and (EC) 2020/1828 (Digital Markets Act); as well as the Council of Europe Committee of Ministers Declaration on the Protection of Freedom of Expression and Freedom of Association in Relation to Private Internet Platforms and Internet Service Providers, adopted on 7 December 2011 at the 1129th meeting [34].

The Council of Europe Committee of Ministers Declaration on the Protection of Freedom of Expression...2011 contains a position of principle, in one form or another of terminology, which is common to almost all of the aforementioned acts. According to this position, interference with content that is created for the public domain through Internet media or attempts to make Internet sites inaccessible must be considered in accordance with international standards designed to protect freedom of opinion and the right to impart and receive information, in particular the provision of Article 10 of the European Convention on Human Rights of 1950 and the relevant case law of the ECtHR.

Such an approach will help to form a system of national legal and ethical norms to facilitate the accelerated development of digital innovations, media-platform law as a separate set of normative-legal regulators of media relations in their digital environment, which, in turn, will ensure the successful formation and application of advanced socially significant innovations in the Russian Federation.

In this context, in our view, the legal and other regulatory potential contained in the Concept of technolog-

ical development until 2030 [35] has a certain positive perspective. In particular, the norms of this Concept recognise digital platforms and information services for networking of technological development entities as fundamentally new types of technological development entities, whose effective functioning, in turn, requires a qualitatively new institutional environment and new regimes of legal and other social regulation.

It is clear that so far this governmental regulatory initiative contains only initial guidelines for further search of directions for optimal development of national legislation and other regulatory mechanisms to regulate various forms of digital “platform activities” within the framework of the clearly evident global trend of scientific and technological development towards platformization.

The development of appropriate world-class legislation and other social regulators and their adoption in modern societies and states is not a swift process, it will take much time, but for our country even now it is essential to choose the right direction of development in order not to stray from the global course. We see as such a compass the synchronous and harmonious comprehension and assimilation of both technological aspects proper of the forthcoming modernization of Russian science [36] and economy and the solution of social, political, socio-economic and socio-cultural side effects of this modernization, which are already arising (although not yet in our country) [37].

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IMPROVING TAX ADMINISTRATION IN THE DIGITAL ECONOMY: LEGAL ASPECTS

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Abstract. The dynamic development of information technology, which currently is taking place all over the world, is changing the existing conditions in the economy and public administration. Borders between countries have not been perceived as a barrier to information and financial flows for a long time, and the mobility of capital and the development of financial technologies have led to the fact that the minimization of taxpayers' obligations is increasingly taking place in the digital field. New virtual and hybrid business models are being created, the spread of digital goods and services is accompanied by the development of fraud in the field of electronic commerce, and the emergence of startups based on modern technological solutions leads to the invention of shadow digital assets. As a result, the behavior of not only consumers but also professional participants in the turnover, as well as government agencies, is changing.

Keywords: tax administration, counteraction to tax evasion, digital economy, cryptocurrency, digital financial assets

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The process of globalization daily leads to the emergence and development of new technology that radically changes the reality around us.

- In accordance with the Decree of the President of the Russian Federation dated September 9, 2017 № 203 “On the Strategy for the development of the information society in the Russian Federation for 2017-2030” and the Program “Digital Economy of the Russian Federation” (approved by Government Decree No 1632-p dated July 28, 2017), digitalization has come into all areas of social life, including the financial sphere [1].
- As it was noted by M.V. Mishustin, who at that time headed the Federal Tax Service of Russia, within the framework of the OECD Tax Administration Forum (FTA), held in Santiago in 2019, “digitalization provides unlimited opportunities for improving tax administration” [2]. Indeed, when analyzing the activities of the Federal Tax Service of Russia over the past five years, it is clear, that this principle largely determines the nature of innovations in the field of domestic taxation [3].
- Speaking more specifically on the topic of the domestic experience of reforming the tax system, one of the significant steps in the field of legal regulation of the digital economy was the introduction of the so-called “Google tax”. Since January 1, 2019, Federal Law No 335-FZ [4] of 27.11.2017 has changed the procedure for paying VAT when providing digital services on the territory of the Russian Federation. Now, foreign organizations that provide services in digital form, that is, services provided through information and telecommunications networks, are subject to mandatory registration with the tax authority in the application procedure [5]. In addition, since the entry into force of this law, foreign IT companies providing digital services on the territory of the Russian Federation are required to independently calculate

and pay value-added tax (VAT) in the amount of 16,67% to the budget [6]. As of recently, the tax authorities have been forced to temporarily change the procedure for paying such a tax; due to the difficult foreign policy situation and the introduction of restrictions by foreign states on settlements with the Central Bank of Russia, many foreign organizations have encountered difficulties in transferring funds to pay taxes from accounts opened in foreign banks to the accounts of the Federal Treasury of Russia. To solve the current situation, the Federal Tax Service of Russia issued clarifications in March 2022 that contained recommendations for Russian organizations and individual entrepreneurs who are consumers of digital services specified in Article 174.2 of the Tax Code of the Russian Federation to act as tax agents and independently complete calculations, withhold and pay VAT on transactions with foreign companies, and then accept the amount of tax paid for the deduction [7].

At the same time, when analyzing the tax systems of states that are not members of the Organization for Economic Cooperation and Development (*hereinafter OECD*) (for example, the Russian Federation), it is necessary to take into account that legislative innovations in such countries often outstrip the adoption of conventions at the supranational level of the G20 countries. The conventions adopted by the OECD are not norms of direct action for such countries, but at the same time have a significant impact on interstate relations due to their wide distribution among the leading world powers. As a result, non-OECD member countries are trying to anticipate changes in international tax law by adopting internal acts in order to prepare in advance for a change in the paradigm of international legal regulation and not to fall out of tax relations at the supranational level.

Returning to the example of the Russian Federation, it should be noted that the adoption of Federal Law № 236-FZ [8] on 01.07.2021, well known to the general public as the “landing law”, pursues several goals at once. On the one hand, this is the reaction of the domestic legislator to the daily growing volume of services: the number and the speed of transactions performed by taxpayers have increased significantly, and traditional methods of administration have ceased to be relevant, which required the introduction of new tools to meet the fiscal interests of the state. On the other hand, as noted earlier, the development, and implementation of new principles of taxation of the digital economy is actively underway at the level of the Organization for Economic Cooperation and Development, one of the criteria of which is the number of consumers of digital services on the territory of a particular state (Pillar 1 and Pillar 2). The Russian Federation, as one of the leading actors in international relations, also improves its legal regulation in accordance with global trends.

The “landing law” of foreign IT companies came into force on January 1, 2022. According to its provisions, the owners of websites on the Internet, as well as other information systems or programs for electronic computers, whose daily audience is at least 500 thousand people located on the territory of the Russian Federation, are required to comply with the following requirements:

- to register a subsidiary legal entity, branch, or representative office in accordance with the procedure established by the laws of the Russian Federation, which will be authorized to be responsible for compliance with legislation, including tax, by the parent company, as well as resolve consumer claims;
- for these purposes, a feedback form should be provided on the organization’s website;
- in addition, it is necessary to have a personal account on the website of the federal executive authority that performs the functions of control and supervision in the field of information technology.

Such body is the Federal Service for Supervision of Communications, Information Technology and Mass Media (Roskomnadzor), according to which the new law affected such IT giants as Apple, Google, Meta, Twitter, Viber, Zoom, and others, while some of them (Apple Inc., Likeme and Rakuten Viber) have already taken measures to bring their business activities in line with the new requirements.

The introduction of this measure, according to the Chairman of the State Duma of the Federal Assembly of the Russian Federation V.V. Volodin, will contribute to better monitoring of compliance by large foreign companies with Russian legislation [9].

In addition, we believe that the emergence of such legal regulation of IT business activities will not only contribute to monitoring compliance with legislation in the future, in particular in the field of taxation but also increase tax collection due to the gradual transition to new, digital taxation criteria, such as the number of consumers of digital services within a particular jurisdiction.

If we talk about such a high-risk area of the economy as the issue and circulation of digital assets and digital currencies, thoughts about the need to regulate this area have been expressed for quite a long time in the scientific community, as well as among practitioners who point out the similarity of the crypto economy with offshore territories due to its lack of control by state financial institutions [10].

The need to improve legislation in the field of cryptocurrency turnover is also understood at the level of the state machinery.

One of the first documents that raised the issue of the importance of taking legislative measures to control the

activities of persons engaged in professional activities in the field of cryptocurrency circulation was the Letter of the Federal Tax Service of Russia dated October 3, 2016 No OA-18-17/1027 [11], which proposed to extend the effect of Federal Law No 173-FZ [12] and No 115-FZ [13] on operations using cryptocurrency.

At the same time, in order to increase the effectiveness of legislative regulation, it is first of all necessary to definitively determine the content of the terms used.

Despite this, there is still no unified approach in domestic legislation to the content of the terms “cryptocurrency” and “mining”, as well as regarding the key parameters of economic activity in this area [14].

Currently, there are explanations of the Federal Taxation Service from 2018, according to which, until the adoption of a legislative act, cryptocurrency assets should be considered as property. In turn, this approach requires individuals who make transactions using cryptocurrencies to pay personal income tax [15]. At the same time, the Federal Taxation Service provides for the possibility of reducing the tax base by the number of expenses for the purchase of crypto assets, however, the calculation of the amount of tax, its payment, and filing of a tax return is entirely the responsibility of the taxpayer himself [16]. In the absence of official explanations regarding the list of documents that can be accepted as confirmation of the reality of expenses, the situation of taxpayers in the current situation seems extremely difficult.

The use of cryptocurrencies in the economic activities of individual entrepreneurs and legal entities is even less regulated. According to the Ministry of Finance of the Russian Federation, the decision on the taxation of income from such activities should be postponed until the legislative consolidation of the concepts of “cryptocurrency” and “mining” [17].

The considered approach to the definition of legal regulation of crypto assets is also supported by judicial practice. Thus, the Ninth Arbitration Court of Appeal, in its ruling on case No 09AP-16416/2018 dated May 15, 2018, ordered the debtor in the bankruptcy case to transfer access to the crypto wallet to the financial manager for replenishment at the expense of the bankruptcy estate funds on it. In support of its decision, the court points out that, within the meaning of Article 128 of the Civil Code of the Russian Federation, cryptocurrency should be considered as other property [18].

At the same time, the supreme court notes the significant risks associated with the possibility of using cryptocurrencies to launder funds obtained by criminal means.

In anticipation of the delegation of the Group on the Development of Financial Measures to Combat Money Laundering (FATF) to Russia, the Supreme Court of the Russian Federation adopted Resolution of the Plenum

No 1, on February 26, 2019, in which the real danger of using digital financial assets as the subject of crimes was pointed out, the elements of which are provided for, including (but not limited to) Articles 159, 159.3, 159.6, 172, 174–174.1, 187, 195–197, art. 199–199.2 of the Criminal Code of the Russian Federation [19].

The next important step towards the legislative consolidation of the status of cryptocurrency as the property was the adoption in 2020 of the Federal Law “On Digital Financial Assets, Digital Currency and on Amendments to Certain Legislative Acts of the Russian Federation” [20]. This federal law, in addition to defining the concepts of “digital currency” and “digital financial asset”, finally equated crypto assets to property at the legislative level. However, the peculiarity of the legislative technique is that, based on the text of Federal Law No 259-FZ, the status of property is applicable to cryptographic coins only for the purposes of a closed list of regulatory legal acts in the field of countering the legalization of proceeds from crime and the financing of terrorism; insolvency (bankruptcy); enforcement proceedings and anti-corruption.

However, within the framework of this article, we are interested in the status of digital assets specifically for tax purposes, and this aspect up to now remains regulated only at the level of the by-laws of 2018.

On the one hand, it seems to be only a matter of time, which is confirmed by the speech of the head of the State Duma Committee on the Financial Market of the Russian Federation A.G. Aksakov on April 7, 2022, according to whom, before the end of the spring session of the State Duma, it was planned to adopt amendments to the Tax Code of the Russian Federation, which would finally approve cryptocurrency assets in the status of the property [21]. On the other hand, there is clearly no unified approach to the issue under consideration in the structure of public power, which is clearly seen by the example of directly opposite concepts that were published by the Central Bank of Russia [22] and the Government of the Russian Federation [23] in January and February 2022, respectively.

Thereby, the mega-regulator advocates the introduction of a legislative ban on the circulation of cryptocurrencies on the territory of the Russian Federation. To achieve this goal, it is proposed to completely prohibit the issue and circulation of crypto assets even between individuals, prohibit investments in derivatives derived from cryptocurrencies for financial organizations, and also establish responsibility for the use of cryptocurrencies by individuals and legal entities as a means of payment.

In turn, the Government takes the side not of prohibition, but of regulation. Thus, the concept proposed by the Government distinguishes different categories of

participants in the crypto assets market and also outlines the circle of subjects who are supposed to be charged with reporting to the tax authority information about obtaining the right to dispose (independently or through third parties) of digital assets, as well as transactions with such assets and digital currency balances on accounts. The specified information must be submitted to the tax authority no later than April 30 of the calendar year following the reporting period, while the concept provides for the possibility of communicating information in electronic form (via the taxpayer's personal account or via telecommunication channels).

It is not yet clear which of the proposed solutions will ultimately receive legislative consolidation, but already today several bills are under consideration in the State Duma of the Russian Federation — on the taxation of digital currency and taxation of digital rights, which means that it will soon become known which vector of regulation of crypto assets will be chosen by the domestic legislator.

In our opinion, despite careful elaboration and continuous improvement, the approaches proposed above pose certain difficulties in the field of tax administration and control, and therefore, in the process of adopting the final legislative act, existing approaches need to be supplemented with a number of provisions.

Of course, many concepts of legal regulation of the digital assets market are aimed at solving urgent tasks and challenges, including the field of cryptocurrency circulation, and definitely contain significant novelties that will give impetus to the further development and legalization of the crypto market. Nevertheless, both domestic and international concepts are limited to the fact that they provide for the legislative consolidation of taxation of transactions with digital assets and also impose the obligation to disclose information about their customers and their accounts on cryptocurrency exchanges, digital wallet operators, and other professional intermediaries.

Such innovations will have a significant impact not only on professional participants in the digital assets market but also on ordinary citizens — individuals, the severity of whose tax burden will increase due to the emergence of the obligation to calculate and pay taxes from transactions with cryptocurrency.

Of course, both Russian and supranational initiatives provide certain tax benefits, such as, for example, the ability to reduce the tax base on transactions with cryptocurrency by the number of expenses for the acquisition of digital assets.

At the same time, it is important to note the following points:

First, the value of cryptographic coins during transactions is determined at the exchange rate, which is most

often set in US dollars (USD), whereas, in accordance with the national legislation of different countries, the obligation to pay taxes, as a general rule, must be fulfilled in the national currency;

Second, it seems obvious that the emergence of legislative regulation of crypto investments creates certain security guarantees for ordinary financial market participants, which in the near future will significantly expand the circle of people who will start using digital assets as a source of income;

Last, tax legislation is complex and difficult to understand for “ordinary taxpayers” who will have to face the need to independently calculate and pay tax amounts, as well as track tax periods and apply deductions.

These listed features create significant difficulties for unqualified taxpayers, and increase the risks of the state budget not receiving tax revenues as a result of intentional or accidental errors in the calculation and payment of tax amounts.

In addition, it should be taken into account that a large amount of unpaid taxes (especially at first, during the period of adaptation to the new legal regulation) will inevitably entail the need for tax audits and tax disputes, which will significantly increase the array of work of tax authorities.

In our opinion, all the difficulties listed above will be avoided if we centralize the mechanism of taxation of transactions with cryptocurrency and assign the duties of calculating and paying taxes to professional participants of the financial market — tax agents.

In this regard, we consider it appropriate to send the following proposal to the authorized state bodies of the Russian Federation:

1. Make the following amendments to the Tax Code of the Russian Federation:

Extend the effect of Article 226.2 (as amended by Draft Law No 106872-8 “On Amendments to Part Two of the Tax Code of the Russian Federation (on Taxation of Digital Rights)” to transactions made with digital currency. Additionally, supplementing Paragraph 2 of article 226.2 with subparagraph 4) as follows:

4) *A digital currency exchange operator, a foreign digital currency exchange, or another Russian or foreign organization registered in accordance with the procedure established by law, which, as a professional activity, carries out transactions with digital financial assets (including crypto assets) or provides a platform for such transactions for and/or on behalf of clients.*

2. Make changes to other regulatory legal acts, the subject of regulation of which may contradict Article 226.2 in the new edition.

In addition, for the purposes of improving and developing the legal regulation of the cryptocurrency market at the supranational level, we consider it appropriate to send a proposal to the Organization for Economic Cooperation and Development, the essence of which is as follows:

1) include in the agreement of the G20 countries, drawn up following the results of public discussions of the OECD report “Crypto-Asset Reporting Framework and Amendments to the Common Reporting Standard”, a recommendation for the participating countries to grant the status of tax agents to organizations that, as a professional activity, carry out transactions with crypto assets or provide a platform for such transactions for and/or on behalf of clients (Reporting Crypto-Asset Service Providers);

2) recommend to the participating countries to grant such persons the appropriate rights and obligations of tax agents to calculate, withhold and transfer taxes from transactions with digital assets to the budget, by analogy with granting such rights to brokers who currently operate on the stock market.

In conclusion, it should be noted that the relevance of developing new mechanisms for tax administration and countering tax evasion in the digital economy is recognized by specialists not only at the national but also at the international level. We also consider it important that despite the temporary foreign policy tensions and sanctions imposed against the Russian Federation (such as the European Commission’s ban on providing cryptocurrency management services in our country), increasing tax transparency and combating tax evasion, in our opinion, are global problems, the solution of which is much more effective taking into account the international experience. In this regard, the measures proposed in the framework of this article are aimed at improving not only domestic but also international legal regulation of the digital economy.

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RECENT DEVELOPMENTS IN TRADEMARK FUNCTIONALITY IN THE UNITED STATES

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Abstract. The United States Trademark Act makes unenforceable marks that are “functional.” However, it does not define functionality. Because the Supreme Court decisions on functionality are few in number and ambiguous in meaning, the courts have differed sharply in their approaches to functionality, and their approach is constantly changing.

Keywords: Trademark, Functionality, United States, Courts

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In United States law, there are two types of functionality that bar trademark protection: (1) utilitarian functionality and (2) aesthetic functionality. A good example of utilitarian functionality is one considered by the Supreme Court, which held that a two-spring support (which bent rather than fell with the wind) was functional for a portable traffic sign. The classic example of aesthetic functionality is a red, heart-shaped box for Valentine gift candy. The box is physically no better than any other type of candy box, but no other box would make the same symbolic expression of love. The doctrine of functionality was developed by judicial precedent. In 1998, the United States Trademark Act of 1946 was amended to specifically prohibit the registration of functional acts. § 2 of the Trademark Act, as amended, provides in part:

- *“No trademark by which the goods of the applicant may be distinguished from the goods of others shall be refused registration on the principal register on account of its nature unless it—*
- *...*
- *(e) ...*
- *(5) comprises any matter that, as a whole, is functional”.*

- However, the Trademark Act does not define functionality, so the actual scope of the functionality princi-

ple depends on court interpretations. Before discussing current judicial definitions of functionality, I would like to provide some background on trademark law in the United States and on the judicial system that interprets and enforces the law. Under the English common law that was inherited by the American colonies when they became independent in 1776, trademark protection was based upon judicial precedents, not on statutes. Federal statutory protection for trademarks began in with an 1881 law, revised by the federal Trademark Act of 1905, which was radically changed by the federal Trademark Act of 1946. Common law protection of trademarks has continued under state law, and common law rules have been embodied in statutes adopted in many states.

Unlike the law in most countries, in the United States, both federal and state law protect unregistered as well as registered trademarks. However, protection of federally-registered trademarks is stronger. Under federal law, in the case of trade dress, the burden of proof of functionality is on the alleged infringer in the case of a registered trademark, but upon the trademark owner in the case of an unregistered trademark. Those wishing to pursue United States trademark law further, may wish to download the excellent trademark law casebook by Professor Barton Beebe [1].

The United States has a federal court system; each state has its own court system. The nature of the court systems greatly complicates the interpretation of trademark law. The federal court system has three levels: 94 district courts, 13 courts of appeals and one Supreme Court. Decisions of the Supreme Court are precedents binding on all lower courts. There are 12 circuit courts of appeals. Decisions of each of these courts are precedents binding only on federal courts within its region. For instance, the Court of Appeals for the Second Circuit has jurisdiction over the territory of New York and two other eastern states, while the Court of Appeals of the Ninth Circuit has jurisdiction over the territory of California and 11 other western states.

There is also a “United States Court of Appeals for the Federal Circuit,” which was created in 1982 as the successor to the United States Court of Customs and Patent Appeals. One of the primary reasons for the creation of the Court of Appeals for the Federal Circuit was a perception that the interpretations of patent law were quite different in the various Federal courts of appeals and that parties involved in patent disputes were abusing the system by engaging in “forum shopping.” To solve this problem, the Court of Appeals for the Federal Circuit was given exclusive jurisdiction over all appeals in patent cases, subject only to possible review by the Supreme Court, which however, only very rarely grants review in patent cases.

However, the pattern of differing precedents interpreting federal law in various regions continues for trademark cases, because the Court of Appeals for the Federal Circuit was not given exclusive jurisdiction over appeals in these cases. Rather, in trademark cases, the Court only has non-exclusive jurisdiction over appeals from Decisions of the Trademark Trial and Appeals Board, an administrative tribunal within the Patent and Trademark Office. However, decisions of the Board also may be attacked by a suit brought in a federal district court. Decisions of the Federal Circuit in trademark cases are precedents binding on the Patent and Trademark Office, including its Trademark Trial and Appeal Board, but not on other federal courts. Sometimes the Federal Circuit gets a trademark issue attached to an appeal from a patent decision of a Federal District Court. In such a case the Federal Circuit attempts to apply the precedents of the Circuit where the District Court is located. Such Federal Circuit Decisions have no precedential force.

Decisions of state courts interpreting state trademark law are subject to review for constitutionality by the Supreme Court, but are not subject to substantive review by any federal court.

The United States Supreme Court receives a total of about 5000 petitions for review of all types of cases each year, but grants only a small fraction of these petitions — it hears only about 70 cases each year. A grant of review is more likely if there is a difference in the precedents of the various federal circuits. Nevertheless, because the Supreme Court only rarely agrees to review trademark disputes, many differences between the interpretations of the Trademark Act among various federal circuit courts persist for years, or even decades. In particular, in the since the Supreme Court was created in 1790, it has considered only four cases involving trademark functionality. The “shredded wheat” case [2], decided in 1938, held (under the law prior to the Trademark Act of 1946) that no trademark rights could be claimed in the form of breakfast cereal produced under the teachings of an expired patent. The *Inwood* case [3], decided in 1982, held, “In general terms, a product feature is functional if it is essential to the use or purpose of the article or if it affects the cost or quality of the article. The *Qualitex* case [4], decided in 1995, held that a mark was not aesthetically functional if alternatives existed, but was functional if: “exclusive use of the feature would put competitors at a significant non-reputation related disadvantage”; and the *TrafFix* case [5], decided in 2001, which stated, “Because the dual-spring design is functional, it is unnecessary for competitors to explore designs to hide the springs,” and went on to reaffirm the *Inwood* test.

Two questions were left without clear answers by the decisions interpreting the 1946 Act. First, if and when it

was appropriate to consider alternatives in evaluating utilitarian functionality, and second, whether the features of a product should be considered as a whole or considered individually in determining functionality. The federal appeals courts are divided on these two issues.

The Federal Circuit, though bound by these three Supreme Court decisions interpreting the Trademark Act of 1946 (as amended), has relied heavily on the holding of a decision made in 1982 by its predecessor court, the United States Court of Customs and Patent Appeals. This case, *Morton-Norwich* [6], concerned a spray bottle for household cleaning liquids. The Court of Customs and Patent Appeals evaluated the various parts of the bottle separately for functionality, and applied a four-part test for functionality, in which the availability of alternatives was weighed along with other factors. This test was adopted by the Federal Circuit in *Valu Engineering* [7]:

“To determine whether a particular product design is de jure functional, we have applied the ‘Morton-Norwich factors’: (1) the existence of a utility patent disclosing the utilitarian advantages of the design; (2) advertising materials in which the originator of the design touts the design’s utilitarian advantages; (3) the availability to competitors of functionally equivalent designs; and (4) facts indicating that the design results in a comparatively simple or cheap method of manufacturing the product”.

The present paper discusses the differences among the federal appellate courts in considering two aspects of the *Morton-Norwich* approach, the consideration of alternative designs, and the consideration of the functionality of a combination of features. In an excellent article [8], published in 2020, lawyer James J. Aquilina provided a detailed and helpful discussion of discussed the current state of the role of alternative designs in assessing trademark functionality in each of the federal circuits. Mr. Aquilina summarized the situation in mid-March 2020 as follows:

*“Not all circuits have definitively addressed whether evidence of the availability of alternative designs may be considered in the trade dress functionality analysis. Of the circuits that have, only the Sixth Circuit (which was reversed in the seminal *TrafFix* case) refuses altogether to consider alternative designs. The circuits that will consider alternative designs generally take two different approaches, and will either: (1) consider alternative designs from the outset as part of the Morton-Norwich multifactor functionality test (Fourth, Seventh, Ninth, and Federal Circuits); or (2) consider alternative designs as the second step of a two-part test only if the trade dress is determined to be non-functional under the traditional *Inwood Labs* test (Third and Fifth Circuits)”.*

I will focus on new positions taken by the courts since Mr. Aquilina prepared his article and also on a topic he did not cover, whether functionality should be considered with respect to the overall combination of elements in a product or with respect to each individual element separately (as in *Morton-Norwich*).

The Second Circuit, which previously had rejected the *Morton-Norwich* approach to utilitarian functionality in dicta in the “red-soled shoe” *Louboutin* case [9] turned this dicta into holding in *Sulzer* [10], which concern color-coding of dentist supplies.

With respect to alternative designs the Third Circuit, in October 2020, adopted a decision in the *Ezaki Glico* case [11] that appeared to exclude consideration of alternative designs altogether: “the existence of other workable designs is not enough to make a design non-functional.” This decision alarmed trademark lawyers. The International Trademark Association submitted an amicus (“friend of the court”) brief, urging the Third Circuit to reconsider its decision [12]. The court did reconsider its decision and issued a new decision with a number of changes, including the following language: “The existence of other workable designs is relevant evidence but not independently enough to make a design non-functional.” [13].

In *CTB v. Hog Slat*, the Fourth Circuit moved away from the weighing of alternative designs as one of four factors [14]. This case was a suit by the holder of a registered trademark for the trade dress of a pan chicken feeder against a defendant selling an almost exact copy of the chicken feeder. The color of the bottom of the feeder attracted chickens; the shape of the top of the feeder prevented chickens from getting trapped in the feeder. The Fourth Circuit affirmed a summary judgement for the defendant. The court, relying on the fact that features with these functions (although differing in form) were claimed in a utility patent issued by plaintiff, held that the third *Morton-Norwich* factor — the availability of alternatives was irrelevant in the light of *TrafFix*. The court distinguished and limited the holding in *McAirlaids* [15], which Mr. Aquilina had cited in classifying the Fourth Circuit as using the *Morton-Norwich* approach.

The Seventh Circuit, in *Flexible Steel Lacing*, likewise distinguished *McAirlaids*, and, in so doing, appeared to move away from the *Morton-Norwich* approach [16].

As mentioned above, the Aquilina article did not analyze the other important aspect of *Morton-Norwich*, namely the suggestion that a collection of non-functional features could not, as a collection, amount to functionality. In contrast, in the oft-cited *Leatherman* case, the Ninth Circuit stated:

“Nor can the fact that there are many other multifunction tools with a variety of appearances (including the

second Toolzall) preclude Cooper from faithful copying of the PST. While it is appropriate to look to possible alternatives when judging whether a design is functional, the evidence here was unequivocal that none of the alternatives offered the same functionality as the PST. Even though many of the tools likely are highly functional and useful, none of them offer exactly the same features as the PST. For example, a particular alternative design might be substantially larger than the PST. As such, it might actually be preferred by a customer seeking a heavier-duty tool to keep in the car. A customer looking for a tool to carry in a pocket every day, though, might prefer the compactness of the PST. Leatherman does not have the right to preclude competition in any particular subset of the overall market” [17].

In conclusion, I would note that the differences among the approaches of the federal appellate courts to trademark functionality are far from being resolved. Indeed the addition of the prestigious Second Circuit Court of Appeals to the list of courts rejecting the Morton-Norwich approach, the differences are becoming more pronounced. Further the differences on other aspects of trademark law are also continuing. It is clear that the Supreme Court is highly unlikely find time to resolve these differences. These differences could be resolved by giving the Federal Circuit jurisdiction over all trademark appeals just as it now has jurisdiction over all patent appeals. However doing so would entrench the Morton-Norwich approach and quash the very legitimate objections that various federal circuits have to this approach. While the United States system may seem disorganized to an outside observer, often some courts of appeals will find a reasonable solution to a difficult legal problem, paving the way for the Supreme Court eventually to follow this solution.

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THE FUTURE OF INTELLECTUAL PROPERTY LAW

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Abstract. Intellectual property law has adapted slowly and often poorly to the rapid advances in science and technology and the spread of the Internet and high-speed communications. This article identifies some of the problem areas that have appeared and emphasizes the urgency of modernization and reform of the governing law.

Keywords: Copyright, Design Protection, Domain Name, Intellectual Property, NFT, Non-Fungible Token, Patent, Plant Protection, Right of Publicity, Trademark, Trade Secret, Utility Models.

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INTRODUCTION

The famous American baseball player and popular philosopher Yogi Berra is known for his remark, “It’s tough to make predictions, especially about the future”. Thus, this article ventures into dangerous territory.

Intellectual property is like a zoo, full of different types of animals. In the nineteenth century, Charles Darwin succeeded in developing a general theory of evolution by “survival of the fittest” explaining both the common elements and the differences among these animals. Darwin, however, clearly saw the limits to his theory, and added a second theory, that of sexual selection, involving not the survival of the fittest, but the success in the market for reproduction, explaining the development of bird plumage as a way of signaling to the opposite sex.

Intellectual property, like evolution, has two separate theoretical explanations. The first is that of providing an incentive for creative activity. The United States Constitution explicitly provided for the enactment by the federal government of patent and copyright legislation effective through the states, “to promote the progress of science and the useful arts”. Translated from eighteenth-century English to modern, this phrase would mean “to promote the progress of knowledge and useful technology”. Just as evolution has enriched the world through the survival of the fittest and most beautiful, patents have led to highly beneficial inventions and copyrights have led to a world ever richer in the arts. Trademarks, have served quite different functions by signally quality and facilitating consumer search. Given the very different nature of the basic types of intellectual property, it is no surprising that the United States Supreme Court decided, almost a century and half ago, that the patent and copyright clause of the Constitution did not grant Congress the power to regulate trademarks, but left the way open for Congress

to use its power to regulate commerce to create nationwide trademark protection [1].

James Madison, one of the drafters of the Constitution (and later the fourth president of the United States), in urging the adoption of the Constitution, had argued, “The states cannot separately make effectual provision for either” copyright or patent [2]. The issue of unification of intellectual property law raised by Madison has now moved from an issue for a single country’s legal system to the issue of intellectual property law at the international level. The nineteenth and twentieth centuries saw partial unification of intellectual property law by multilateral treaties and new international institutions. Intellectual property in the twenty-first century faces serious challenges from rapid advances in science and technology and widening conflicts between information-exporting and information-importing countries. I’d now like to turn to discussion of various areas of intellectual property in two groups, first, those encouraging creative activity and investment, and second those encouraging product quality and facilitating consumer search.

As I mentioned, some branches of intellectual property law, for instance patent and copyright, have as their purpose the creating of incentives for creativity through the grant of exclusive rights. However, because the incentives are based upon the creation of monopoly rights, which result in decreased production, it is important that there be a proper balance between the benefits of incentives and the negative effects of monopoly.

Other branches of intellectual property law, such as trademarks and marks of geographic origin, have as the purpose the insurance of quality and the facilitation of customer choice. However, in these branches of intellectual property, it is necessary to maintain a balance between exclusive rights on the one hand and the benefits of competition and free speech on the other. In this article, I would like to discuss the imbalances that have emerged and are emerging in intellectual property law along with some measures that are being taken or could be taken to deal with them.

PATENT

When the United States patent system was created over two-hundred years ago, inventions were simple; few businesses held more than one or two patents; and expired patents put important technologies into the public domain. Today the situation is very different in two respects, the emergence of huge patent portfolios and the rapid obsolescence of technology. In the early years of the United States patent system, no businesses owned large patent portfolios. The most serious problem facing patent law in the twenty-first century is continued rap-

id growth of huge patent portfolios by giant corporate groups. IFI Patent Claims Services publishes a highly useful list of the 250 largest patent portfolios [3]. The list shows that, as of 2021, fifty-one corporate groups each owned over 10,000 unexpired patents. Samsung led the list with over 80,000 unexpired patents. The rapid obsolescence of technology has made largely irrelevant the idea embodied in the United States Constitution that a patent owner should receive a monopoly for a limited time in return for the disclosure of the invention and its eventual passage into the public domain. The current pace of advance of science and technology means that a large portion of inventions are obsolete by the time the patents expire, so their entry into the public domain is of little use. Meanwhile patent portfolios continue to grow. Apple currently has about 18,000 patents [3]. In 17 years nearly all of these will have expired. But Apple is adding about 2700 patents a year, so that in 17 years at this pace it may have accumulated about 46,000 new patents. The ever-increasing number of patent applications makes it more and more difficult for patent offices to ensure that patents are only issued for really new and creative inventions.

Such huge patent portfolios create a serious barrier to entry for the kind of small startup company that has often led in technological advances. Startups will need to spend large amounts of initial capital paying expensive lawyers to guide them through the patent minefield. Further, they will need more cash to pay for licenses to patents that block their way. Meanwhile large established companies with extensive patent portfolios and large legal staffs are in a much better position to overcome these obstacles to innovation. In particular, they can use their patent portfolios as bargaining chips to obtain needed licenses and use their expert legal staffs to challenge dubious patents.

Developments in some countries have mitigated the negative effects of the huge portfolios, but much more needs to be done at the international level. In the United States, the Supreme Court has eliminated the doctrine that an injunction should be issued for every patent infringement. In the 2006 case of *eBay v. MercExchange*, the Supreme Court overturned prior judicial practice by holding that injunctions should not be available automatically for all infringements [4]. This decision was of great importance for prospective entrants into fields such as the design and manufacture of mobile phones and self-driving vehicles, because of the existence of thousands of patents on the relevant technologies.

The denial of injunctions would be of little use to new entrants if they faced royalties based upon the total value of their entire product, for instance, if the patent-holder of a single patent related to mobile phone technology could seek a royalty as a substantial percentage of the typical \$400 cost of a modern mobile phone. However, the

courts have developed a number of limiting doctrines. In *Samsung Electronics Co. v. Apple Inc.*, the United States Supreme Court held that an award of profits for infringement of a design patent on the design of a mobile phone display, would be based not on the profits from the sale of the phone as a whole, but rather on that portion of the profits that was attributable to the display [5].

Another major limitation relates to FRAND (Fair, Reasonable, and Non-Discriminatory) licensing of SEPs (Standard Essential Patents). International standards have become of every greater importance during the twenty-first century, particularly in the area of the Internet of things, in which interoperability is essential. A good example is the ability of mobile phones to roam worldwide and to connect with WiFi routers and Bluetooth devices anywhere. Several decades ago it was realized that the best technical approach to a standard often was protected by one or more patents, called “Standard Essential Patents”. Further it was understood that requiring use of a patented technology to meet a standard would give undue bargaining power to patentees [6]. A related problem was that of patent stacking, the situation in which compliance with a standard would require licenses from a number of different holders of Standard Essential Patents. Leading SDOs (Standard Developing Organizations) have adopted a policy of refusing to create standards requiring the use of a particular patent unless the patent-holder would agree to contract to license the patent at fair, reasonable, non-discriminatory terms. The European Union has issued a directive dealing with this issue [7]. Approaches have varied in the courts in the United States. Some courts have intervened to set royalties, using the standards for awarding reasonable royalties adopted in the *Georgia Pacific* case in 1970 [8]. A very different approach was taken in a recent case involving mobile phone patents, *HTC v. Ericsson* [9]. In this case, Ericsson had signed a FRAND contract governed by French law with the relevant standards setting organization. The court analysed the case not as an intellectual property case but rather as a case of application of the French law of contract interpretation. The court essentially left to the jury the interpretation and application of the FRAND clause of the contract.

UTILITY MODELS

Some countries allow the protection of “utility models”, improvements lacking the major inventive step needed for patent protection. Other countries, for instance, the United States, where the Constitution requires an “inventive step”, do not offer protection for utility models. There is an important, but unanswered question of economics, namely whether or not there should be an intermediate form of protection for useful advances that do

not meet the requirements for patentability. Arguably, the advantages accruing to the business that is first to market an advance and thus has a brief monopoly should be enough to encourage minor advances. Given the basic disagreement on this question, and the difficulty of obtaining objective economic evidence, it is unlikely that any international harmonization of utility model protection will take place during the twenty-first century.

DESIGN PROTECTION

Various countries offer protection to product design through design patents or design registration. Despite the undoubted importance of encouraging products that are not only useful but also are beautiful, there are problems with design protection. One problem, like the problem with huge utility patent portfolios discussed above, is that large design patent portfolios may create undue barriers to entry by small competitors. Another problem, which has found different solutions in different countries is that of repair parts. If the left front fender of a car is damaged in an accident, the owner will want a left fender that not only keeps mud from flying toward the windshield, but that also matches the right fender. If there can be a design patent on automobile fenders, I (or my insurance company) will have to pay a monopoly price to repair the car. Some countries have partially solved the automobile repair problem by denying design protection for parts of a car that are normally not visible, such as carburetors.

VARIETIES OF LIVING THINGS

Genetic engineering has revolutionized the protection of varieties of living things. At one time, intellectual property protection of living things was limited in the United States to plants that could be reproduced with the same genetic material, such as by grafting. With advances in science, this protection has been broadened internationally to include seeds and genetically-engineered life. It is often said that genetic engineering will be, for the twenty-first century, the advance that computerization was for the twentieth century. One can expect many new issues to arise, in particular the complex ethical and practical issues of genetically engineered human beings. I just mentioned some issues with protection of the design of spare parts such as fenders and carburetors for automobiles. However, these issue pale in comparison with the possibility of engineering replacement limbs and organs for humans.

TRADE SECRECY

The extensive replacement of hardware by software is revolutionizing trade secret law. Thieves and disloyal employees no longer measure individual parts with a ruler or

photograph design drawings; they download terabytes of programs and data to flash drives or remote servers [10]. A notorious example is the case involving Google, Uber, and the former head of Google's self-driving car program, Anthony Levandowski, who defected to Uber taking a huge amount of software and data with him. In an arbitration, Levandowski was ordered to pay Google 179 million dollars. His new employer, Uber, agreed to pay Google 245 million dollars to settle a lawsuit [11]. Levandowski also was convicted of the Federal crime of trade secret theft [12], but was pardoned by President Trump after lobbying by a major contributor to the President's campaign fund [13].

Another problem has been the expansion of trade secret theft from individual actions by disgruntled employees to coordinated actions by nation states in the ever intensifying atmosphere of economic and military competition. The vastly increased size of trade secret thefts and the emerging role of national intelligence services has led to much more active enforcement and, as noted above, unfortunately to the politicizing of trade secret enforcement.

Trade secret law presents special problems for businesses operating internationally, because of difference among countries in laws concerning the qualification of information for trade secret protection and in laws regulating employer-employee relations.

COPYRIGHT

There are four major negative trends in copyright law: first, the growing number of "surprise" copyright violations in which someone inadvertently uses copyright-protected material, second emergence of an ever growing number of "orphan" works, whose uncertain copyright status prevents their use, third the extension of copyright to computer software, and fourth, the overexpansion of the rights of copyright owners by anti-decryption legislation. The following discussion will highlight these problems and some of the attempts to solve them.

First I will turn to what I call "Surprise" copyright infringement. Such infringement can occur in two ways, either due to a misunderstanding of the complex rules or the relevant facts bearing on copyright ownership or, most commonly, due to the uploading by users of infringing material to social networks or other websites. Over thirty years ago, the United States Supreme Court provided for leniency for an infringement caused by a misunderstanding of complex legal rules. In the case of *Stewart v. Abend*, the court held that there was no automatic right to an injunction, and decided that the copyright owner could only recover reasonable warranties reasonable royalties for the surprise [14]. There is ongoing debate worldwide over the other problem,

namely how to apportion responsibility for uploaded infringing material. Obviously the users of social media and other websites are liable for uploading such material, but such users are often anonymous or are teenagers or others lacking money to pay damages. The much-debated question is whether the copyright owners or the website maintainers should be responsible for policing such uploaded material. In the United States, a solution was found in the Digital Millennium Copyright Act [15], which placed the burden of policing upon the copyright owner while freeing the website maintainer from damages if it took down infringing material upon notice from the copyright owner. It may be time to reexamine this allocation of responsibility in light of the increasing availability of digital search techniques for finding infringing material. The 2019 European Directive on Copyright [16] provides for a more balanced, but much more complex approach to the respect burdens upon the websites hosting uploads and the copyright owners.

Second I will discuss "orphan" works. These include works in the public domain whose copyright status cannot be determined easily and also copyright-protected works whose owners cannot be determined easily present a special problem. In my opinion, the universal adoption of the Berne Convention and its enshrinement in WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) was a great mistake. In particular, it created a huge and ever growing number of "orphan" works. Thus, I believe that the United States made a great mistake in abandoning its longstanding system, which put published works in the public domain upon publication if they lacked a copyright notice, otherwise after a relatively short twenty-eight years, if the owner failed to file for renewal. Under that system anyone could determine the copyright status of published work merely by checking for a copyright notice. The system effectively prevented the emergence of orphan works and achieved a good balance of incentive for creation and the public interest. In 1675, the great scientist Isaac Newton, in a letter to Robert Hooke, made the famous statement: "If I have seen further it is by standing on the shoulders of Giants". Given that all new creations rest on earlier creative efforts by others, it is only appropriate that there be a balance between incentives and the public domain. The universal adoption of the Berne Convention has upset that balance in two ways, first by creating uncertainty as to the ownership and end date of copyright, and second by creating an excessively long term. The already excessively long term has been made worse by legislation in many countries extending the term by decades beyond that required by the Convention.

A possible compromise approach to orphan works may involve several steps. Some of these have been would not require renegotiation of the Berne Convention; oth-

ers might require the extremely difficult task of revising the Convention. Some steps indeed have already been taken in the United States. Numerous countries and the European Union have considered reforms to deal with the orphan works problem [17]. Many of the proposed and adopted changes, however, are very timid; they do not come close to solving the problem. Typical proposals would restrict remedies to “reasonable royalties” if the copyright-owner had made a “diligent search” for the copyright owner. This reverses the principle applicable in many other areas of property law, for instance laws concerning transfers of immovable property, which place the burden upon property owners to ensure that their ownership is reflected in public records. It is contrary to the universal approach to patents and to the approach of most countries to trademarks, which places a similar burden on owners of these types of intellectual property. The problem with the reasonable search approach is that there is no easy way to define what constitutes a “reasonable search” and that a thorough search may be extremely expensive. Another suggestion has been to retain the present length of copyright protect, subject to repeated filing of renewal and payment of renewal fees by the copyright owner [18]. However, this would be difficult to implement in a way that would not violate the Berne Convention. It would be even more problematic in that the Berne Convention is incorporated in TRIPs and thus national laws requiring renewal formalities and fees would be subject to attack through the World Trade Organization’s dispute settlement procedure.

Third I will discuss problems by the extension of copyright to software protection. Such protection is in conflict with the longstanding principle that copyright should protect only literary and artistic works, while useful works should be protected by patents and then only if they involved an inventive element and with protection for a relatively short term after an enabling disclosure. In case of patent protection, nothing prevents other businesses from making devices compatible with patent devices or repairing patented devices. However, copyright can hinder such independent work.

In the United States, both Congress and the courts have put some limits on the overbreadth of copyright protection, but many problems remain, both here and around the world. In a leading case, *Google LLC v. Oracle America, Inc.* [19] the United States Supreme Court gave a broad interpretation of the principle of “fair use” embodied in the United States Copyright Act to allow Google to copy over 10,000 lines of Oracle’s code for the Java language so as to ensure compatibility with Google’s Android software. However, it is far from clear that other countries, whose legislation limits “fair” uses to a fixed list, would reach the same result.

One encouraging development in copyright law has been the worldwide recognition of free and open source software (“FOSS”) in legislation, for instance in a European Union copyright directive and in court decisions in various countries [20]. Much more, however, needs to be done to remove uncertainties in this area [21].

A fourth problem area is that of restrictions on access to encrypted and password-protected copyrighted information. While such restrictions aid greatly in the fight against piracy of books, music, and video, they also limit traditionally permitted uses of copyrighted material. A good example of the problems created by these restrictions is that of the Digital Millennium Copyright Act in the United States. This Act allowed the Librarian of Congress, as the head of the United States Copyright Office to proclaim, on a regular basis, a list of exemptions to the DMCA’s prohibition on circumvention of copyright protection. The most recent such list was adopted in October 2021 [22]. It retained many of the prior exemptions aimed at uses for critical comment, education, and handicapped access. It also substantially broadened exemptions for circumvention for repair to include to include all consumer products. Litigation is ongoing on the question of monopolization by Apple of the process of sale of applications and payment for upgrades of applications. The leading case, which is currently in the courts is *Epic Games, Inc. v. Apple, Inc.* [23]. A popular vote in one state, Massachusetts, approved extending an existing “right to repair” to include access by independent repair shops to modifications of automobile software downloaded over the Internet [24].

In the future, the issues of conflicts between intellectual property rights and the right to compete in such widespread areas as mobile-phone applications and automobile repairs, will be come more and more important.

TRADEMARK

The twentieth century was marked by successful efforts to simplify the international trademark registration process and to broaden the protection afforded to trademark owners. The Madrid System has simplified and reduced the cost of registering trademarks in multiple countries [25]. The idea, first developed widely in the United States of protecting trademarks against “dilution” by the use of marks with respect to completely different types of services has been spread to the world by Paragraph 3 of Article 16 of the TRIPs agreements, which provides:

3. Article 6bis of the Paris Convention (1967) shall apply, *mutatis mutandis*, to goods or services which are not similar to those in respect of which a trademark is registered, provided that use of that trademark in relation to those goods

or services would indicate a connection between those goods or services and the owner of the registered trademark and provided that the interests of the owner of the registered trademark are likely to be damaged by such use.

The combined result of these two developments has been a serious new problem for the twenty-first century, that of the increasing unavailability of “good” trademarks. A business that wishes to market a new product is likely to encounter problems in various countries, both of previously registered marks for identical or similar goods and of marks registered for quite different goods by large companies that can afford to litigate to protect their marks from so-called dilution. By the lack of “good” trademarks I mean the limited availability of trademarks, particularly word marks, that are short, memorable, and convey a positive feeling. A recent extraordinary thorough empirical study shows that such trademarks are becoming increasingly less available, particularly for products to be marketed internationally [26]. This situation is a serious barrier to entry by new firms in a market dominated by older established businesses with easy-to-remember marks.

Two other areas of trademark law are likely to be of importance in the twenty-first century. The first involves the delineation of trademark protection from patent law. Trademarks, which if necessary formalities are observed, can last for ever, should not be available to protect useful features of products, which should be protectible only by patents, meaning that protection should require an inventive step and should be strictly limited in time. Drawing the line between trademark protection and patent protection is not easy. It has led to extensive litigation in the United States, for instance. There is as yet no internationally-accepted approach to this problem. Developing such an approach will be a challenge for the twenty-first century.

A second frontier is the line between trademark protection and freedom of speech. Should protection be denied to trademarks that offend some customers, or should trademark protection be granted to such marks, leaving the marketplace to decide if customers would be so offended that they would not buy the product. How free should critics and competitors be to make negative comments on products while referring to the trademark? Opinions differ on these issues, with the result that there may be a patchwork of different regulations in different countries.

OTHER AREAS RELATED TO INTELLECTUAL PROPERTY

Next I’d like to turn to some areas closely related to the main branches of intellectual property law. I do not think it matters whether these areas are considered “intellectual property” or not. What matters is that many of the issues emerging in the twenty-first century with these

areas raise the same questions as I have discussed with respect to intellectual property.

DOMAIN NAMES

Domain names have much in common with trademarks. In the recent “booking.com” case, the United States ruled that a domain name could function as a trademark [27]. Unfortunately, way that the domain name system has developed on the Internet has resulted in a violation of a basic principle of trademark law, because competition can only flourish if all competitors can use their products’ generic names. It is a universal principle of trademark law that no one can have trademark rights in the generic name of a product. No one can have a valid trademark in “beer,” “restaurants,” or “surgery.” However, on a first-come first-served basis, in the days of the “dot com” gold rush, astute speculators captured thousands of generic “dot com” domain names, such as “weather.com” and “hotels.com”. Indeed, the study I cited above that found that the supply of trademarks was largely exhausted also found that the supply of generic and geographic terms in the dot-com domain was largely exhausted [26]. Attempts to reform the domain system to eliminate this generic advantage have failed. ICANN, the organization that administers domain names, attempted to improve this situation by instituting a system of generic top level domain names [28]. Many of these domain names correspond to generic words, such as “.beer”, “.restaurant”, “.surgery”. Some names, such as “.beer” are open to all. Others, such as “.archi” are limited to a particular type of business. Hundreds of new top-level domains have been created [29]. In 2013, even before the new system was launched, an article in the authoritative publication *The Guardian* correctly predicted that the new name system would fail [30]. The system has been a total failure. Businesses have found that they must have a dot-com name to succeed on the Internet. Thus the problem of monopolization of generic names remains. Because of vested interests, it is now too late to consider what could have been a solution, namely allowing all business in a particular area to share a generic dot-com name with links to their business site.

In some countries business make wide use of country specific top level domains, such as “.ru” for Russia. The question of exhaustion of generic names in such country level names is a ripe subject for empirical research. I note for instance that the well-known vodka, “Russkiy Standart” has cleverly obtained both “vodka.com” and “vodka.ru”. A Polish liquor company has not only captured the website “vodka.pl”, but is selling vodka with the trademark “vodka.pl”. A more appropriate use of a liquor site is “cognac.fr”, which is owned by an association of grape growers, distillers, and marketers of the beverage bearing the famous appellation of origin.

RIGHT OF PUBLICITY

The right of publicity, i.e., the exclusive right of individuals to allow use of their name or identity for advertising purposes has been recognized for decades in the United States. This right serves as an important source of income for famous entertainers and athletes. In the United States, the right is recognized in most states by common law, statute or both. However, most other countries do not recognize this right directly, though many may protect the right indirectly by legislation restricting the use of people's images [31].

Numerous questions concerning this right remain open for resolution in the twenty-first century. As a matter of economics, the right allows celebrities to maximize the income from their personas by avoiding both underutilization and overexposure. A natural rights theory suggests that each person should enjoy the benefits of their achievements, such as the extensive effort required to succeed at sports. But is making the rich richer an appropriate goal for the legal system? Should untalented but good-looking persons be given the chance to turn their appearance into money? Should persons with ordinary looks and no particular achievements have a right to publicity? Should the right to publicity pass by inheritance and if so, how long should it last? Should the right to publicity be alienable? Should creditors be able to attach the right of publicity? Should the right of publicity apply only to a person's image or also to the person's voice. Should a person have a remedy against the use of look-alike or sound-alike models? Should it apply to objects associated with particular persons, such as a famous driver's well-known racing car?

In the United States, the right of publicity grew out of the right of privacy. The two rights are still related. Should a movie star be able to swim at a nudist beach without worrying about photographs being taken and sold by paparazzi? Should a teetotaling sports star be able to prevent his likeness from being used to sell whisky?

Finally, are the differences in views on these and other questions so fundamental that the right to publicity, in contrast to most branches of intellectual property, be left to local legislation and not made the subject of international unification, international treaties, and international enforcement efforts?

NON-FUNGIBLE TOKENS

The twenty-first century has already seen at least one new type of intellectual-property related right and certainly will see more. A highly-debated new type of intellectual property is the "non-fungible token" (or "NFT"). These tokens are elements in a block-chain, most often in Ethereum. However, non-fungible tokens, although based on a link in a block-chain are not like the Ethereum or Bitcoin cryptocurrencies,

which are fungible, in the sense that one unit of either is completely equivalent to another unit of the same cryptocurrency, just as a dollar coin is equivalent to any other dollar coin, or a ruble coin is equivalent to any other ruble coin.

The first "non-fungible token" appeared in 2014 [32]. Since then numerous NFT's have appeared [33] Ethereum has defined official standards to ensure the uniqueness of NFT's in its blockchain [34] NFT's based on other blockchain systems are sure to follow. However, there are numerous outstanding legal issues [35].

There are many possible uses for NFT's, as the Ethereum website advertises [36]:

NFTs are currently taking the digital art and collectibles world by storm. Digital artists are seeing their lives change thanks to huge sales to a new crypto-audience. And celebrities are joining in as they spot a new opportunity to connect with fans. But digital art is only one way to use NFTs. Really they can be used to represent ownership of any unique asset, like a deed for an item in the digital or physical realm.

But a major question remains with respect to NFT's and other new forms of intellectual property that will be invented in the twenty-first century? Are they really a useful innovation or are they primarily a new way of defrauding the public. Such fraud has long been a problem in traditional forms of intellectual property, for instance vanity presses that promise authors fame and fortune from their copyrighted works, but which only end up charging exorbitant fees for insignificant results, or inventor assistance firms, which charge amateur inventors large fees for advice, but almost never end up creating valuable patents.

A comprehensive article warns of the numerous possibilities of fraud with NFT's connected to digital art works [37]. Once a digital artwork is available on the Internet, either directly or through an NFT, anyone can make an unlimited number of identical copies and connect each copy to an NFT. There is no simple way for a buyer of an NFT of a digital art work to know how many NFT's of the same work are available nor to know if the NFT was authorized by the artist. In a recent notorious case, a new organization sold newly-minted NFT's for 2.7 million dollars and then disappeared with the customers money [38]. In another case a copyright owner forced a takedown of a sales platform that had sold millions of dollars worth of NFT's [39].

RICH VERSUS POOR

In this article, I have discussed numerous existing and emerging problems in the intellectual property system. As I have noted, there are possible, and sometimes easy solutions for these problems. I would like to close with what is

the greatest problem facing intellectual property today. In the world economy, the richer countries tend to be producers and exporters of intellectual property and users and importers of raw materials, while the poorer countries tend to be producers and exporters of raw materials and importers of intellectual property. The imbalance has been partially rectified by the policies of the OPEC Plus Cartel, but in the long run the use of local renewable energy sources in the richer countries will restore the imbalance. The imbalance in intellectual property, on the other hand, is built into the system of intellectual property treaties in general and in particular in the WTO's Trips agreement.

During the COVID pandemic the effect has been particularly evident. Rich countries, such as Japan and Canada have been able to pay for imported vaccines and achieve extremely high vaccination rates [40]. In contrast, the poorer countries of Africa have had extremely low vaccination rates [41]. World Health Organization statistics show a radical difference between the rich countries and the poor [42]. There is no doubt that the intellectual property system along with government support of basic science has worked wonderfully in encouraging the rapid invention of safe and effective vaccines and the development of effective medications to treat the disease. The difficult task remaining is to maintain these incentives for invention while finding a way to bring the inventions to all those susceptible to the disease.

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THE “ACTIVITY OF CHOICE” ON THE WEB AND THE PRODUCTION OF INTELLECTUAL PROPERTY RIGHTS: THE MEDIA CONSUMPTION BETWEEN FREE SERVICE AND UNPAID WORK

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Abstract. The purpose of this article is to reflect on some of the consequences of the activities commonly carried out by users on the Internet on an economic and legal level, proposing their possible framing in the current legal frameworks.

Keywords: Internet, prosumer, unpaid work

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- **T**he theme of this article is related to the reflection on the nature and effects of the activities that users commonly and daily carry out on the Internet.
- The question before us is whether such “behaviors” can be considered within a system of value production, here also properly understood as generating wealth.
- As an introduction, it must be said that if we consider the categories of tangible and intangible assets, it is certain that the activities carried out are of an intangible type. Could we, therefore, attract them into the sphere of immaterial labour, given that they have an economic relevance?
- In fact, with regard to what is strictly operated, they usefully produce data and information both directly and indirectly. We refer here, with respect to the first case, to the personal entry of data in the form of the upload of images, writings, sounds and so on; compared to the second, we refer to the indication of tastes, preferences, locations on multiple levels, deriving from the same choices of interest made with respect to content already present on the Web (choose a service, listen to a message, looking for a product are themselves actions that give shape to our virtual image, indicative, at least in part, of our real one). Thus, the data so provided and, conversely, extracted in this way express the boundaries of our person and allow an extraction of identity, computerized [1].
- All this produces a value, not only of use but also and above all of exchange, taking into consideration the preciousness of what is linked to these procedures, useful both for political and commercial purposes and for proper security policies, even in the different plots that each of them can practice.
- If this is correct, we can define the user’s activity as productive work. It is no coincidence that the user, in the form of the consumer, has been defined as *prosumer*, at

the same time consumer and producer of information content. It is, therefore, an activity properly of creation (of products), which also recalls the discourses on the “merchandise-audience”.

In general, *data mining* can be understood, according to some positions, as “bartering” an intended activity of (self-) exploitation with the offer of a free service [2], which hides the alienation of the product from its manufacturer [3]. Such activities can be productive in many ways and at the same time: productive, as we said previously, of wealth, as well as productive of social expressiveness (clearly, qualifications can diverge: there may be for the same act an economic productivity but not a social one and so on).

If we take into consideration the category of productive work as a reference, we can also get to the point, for these activities, at their approach to the category of reproductive work, intended as a reproduction of cultural values that are purely “generational”. This perspective, which brings us closer to a theoretical background proper to post-Fordist bio-capitalism, also brings us back to the considerations on “domestic” work. A proper scheme and very useful phenomenon in this sense, but misunderstood and hidden, precisely because it is apparently confined, formally in the free sphere of private life, to personal behaviors socially expected and compliant, but economically unpaid, despite their being essential to allow (socially) the maintenance of the dominant (and culturally hegemonic) economic system.

This brings a pure monetization of “free” time and a modification of the behaviors that are adopted there, for properly productive [4] purposes. However, it is not generally allowed to speak of work *status*, despite the presence of an activity that (indirectly or even directly) could justify it (although, as a bond of subordination, the link is more psychological and economic than purely labor-substantial).

If we then add here the manifestations of *gamificatio* [5] of computer action, for which even what objectively should not be pleasant can become pleasant, we see that the question also concerns the level of self-consciousness, that is, the consciousness of one’s own action. The work on the image accomplished on oneself in the computer world (perhaps exhibitionally) in view of an adequate interactive self-maintenance is certainly done for oneself, in relation to social dictates, but it is also extremely economically useful for the computer framework.

At this point, it is noted that the problem of framing the activities under consideration is relevant both on a political-economic level — even possibly in the context of a materialist critique of the digital economy — and on a proper legal level.

In relation to this last mentioned level, the traditional categories deriving from our civil law and the specific labor law ones can help us, at least initially.

Even before that, however, it must be said that, in order to refer to one of these areas, it is necessary to ask whether, in the context of the relationship between the user of the platforms in the so-called Web 2.0 and the platforms themselves, what is used by the user can be considered an apparently free or semi-free service or other.

Can there be some sort of collaborative co-creation, at least in part, legally recognizable? Is “collaborative consumption” a (more or less) collaborative production? If we consider it this way, we would have to evaluate the relationship in terms of sinallagmaticity, going to detect any mismatch between performance and counter-performance and, therefore, an imbalance of the relationship, theoretically amendable with the classic instruments of civil actions. If, on the other hand, we consider that the activity of the users as properly considered an unpaid work (in a context of extraction of a value surplus or even of a “toto-value” through an alienating speculation, namely, as alienation of the product of labor from the same worker-producer, thus going to reason in the course of a materialist criticism of the digital economy), the remedies of economic and formal recognition appear theoretically useful, although difficult to practice.

The questions that cannot fail to arise here are related to the sufficiency of the legal actions that can be individually proposed to correct contractual anomalies or to counter any alterations, speculations or dispossessions of value before a framework of global interest.

Even the collective expansion of these actions (in the form of *class actions* or industrial actions) does not really seem to resolve the issue completely.

Even overcoming these difficulties of framing and reconstruction within a classic legal framework (civil and labor law), rigidly focused on the idea of contractual “anomalies” of different types, with the risk of reducing the issue to hypothetical remedies that tend to be individual and not focusing on a necessary public intervention, there has been talk of a possible direct proposal, focused on a “digital social income” as [6] an element of resolution; not without problems, however, as noted with regard to a sort [7] of “contributory income on social bases”, it relates the “documedial” *surplus* with a new possible dimension of the work of the spirit of *homo sapiens*, also thanks to an income redistribution and a different use of the asymmetrically derived income. The proposal of digital social income, in fact, given that digital expressions are pure substantive expressions, and that existing computerized is only a sub-specification of actually existing (despite the possible practices discrepancies between the two levels of existence), ask substantial doubts, as well as concrete difficulties, preferring to speak of income redistribution policies that know how to enhance (even just recognizing the value produced)

those work activities increasingly different from the purely material ones of our previous homo *faber* and progressively further away from the sense of suffering and fatigue etymologically connected to work.

Therefore, in the face of the inadequacy that our traditional legal categories can express, we can only stress the importance of the phenomena noted also for the purpose of rethinking the political and economic paradigms of reference.

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LEGALIZATION OF PARALLEL IMPORT IN THE RUSSIAN FEDERATION

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Abstract. In 2022, more than 1,000 foreign companies left the Russian market. In March 2022, the Russian government legalized parallel import. This was a response to the discriminatory policy of Western countries towards the Russian Federation. Such a decision by the Government was due to its desire to support the national entrepreneurs, as well as to preserve the former standard of living of Russian consumers and to maintain the range of items on the domestic market.

While in concept parallel import has a wide range of advantages, in practice there are several issues to which entrepreneurs and consumers must adapt. Adjusting to new realities, this topic requires in-depth analysis and elaboration because parallel import is already an integral part of modern development, not only in the economic sector but also in the sphere of intellectual rights for the means of individualization. The development of a legal framework for parallel import, improving its every month and adjusting the existing legislation to the increasing sanctions pressure, justify the relevance of the chosen topic. The research aims to identify existing problems, explore advantages and disadvantages, and uncover risks and consequences associated with parallel import.

Keywords: parallel import, exclusive rights, goods, liability, abuse of rights, trademark owner, consumer

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- **I**n the context of unprecedented sanctions pressure on the Russian Federation, the Government of the Russian Federation began a large-scale legislative effort to legalize parallel import. The Government of the Russian Federation expands the list of products allowed for parallel import every month. Based on the statistics, Russia imported goods for more than \$20 billion in December, up from \$17 billion in November [1]. This statistical data shows a gradual increase in goods imported by parallel import.
- As a result, parallel import is developing and strengthening in the domestic market. If some years ago the legal community faced the question of parallel import and the lack of a legal basis for its implementation, now it is quite difficult to challenge the legality of parallel import. There are legal acts, laying the bases of parallel import.
- In the current international environment, the legalization of parallel import is an important step, providing national consumers with the opportunity to enjoy the same goods and benefits. The main aim of parallel import is “to meet the demand for products containing the results of intellectual activity” [2]. However, it is impossible to discuss only the positive side of parallel import. As things stand now, Russian legislation lacks a comprehensive definition of parallel import, so to work out the issue of parallel import in practice, the legislator should develop a strong legal basis for parallel import.
- The practice of legalization of parallel import already existed in Russia: until 2022, parallel import was allowed in Russia and any seller could go abroad, purchase goods and dispose of them in the domestic market. Since 2022, after the amendments made by the Supreme Arbitration Court to the law “On Trademarks” parallel import was prohibited [3] what was also preserved in the Civil Code. Until recently, the parallel import was beyond the law. The trademark owner was the only entity that could

import and distribute the product in the territory of the state, or give permission to distribute its products.

Work on the legalization of parallel import began a long time before March 2022. Back in 2014, the Federal Antimonopoly Service drafted a bill that proposes the removal of restrictions and prohibitions by rights holders in the importation into Russia of goods put into circulation with their consent abroad. Thus, it was proposed to legalize parallel import 9 years ago. Nowadays parallel import is a response to price policy, quality and assortment discrimination of the Russian market and its consumers.

In March 2022, the Government of the Russian Federation issued Decree No. 506 “On goods (groups of goods) concerning which certain provisions of the Civil Code of the Russian Federation on the protection of exclusive rights to results of intellectual activity expressed in such goods and means of individualization with which such goods are marked” (hereinafter — the Decree No. 506) [4] which legalizes parallel import. The Government expands the list of products allowed for parallel import every month. Nevertheless, despite the rather fierce dispute over the parallel import, it is still impossible to find a unified definition of the term “parallel import”. To analyze the effectiveness and actual need for parallel import, it is worth clarifying what is meant by parallel import.

Earlier there were only official importers in Russia. They were carried out by the foreign right holder independently through a dealer network. Consequently, the absence of the consent of the right holder indicated a violation of his intellectual rights. Such a violation allowed the right holder to protect his rights and interests through all legal means, including recourse to the court. In May 2022 the Federal Law 08.03.2022 N 46-FZ “On Amendments to Certain Legislative Acts of the Russian Federation” was supplemented by the provision, which establishes that the use of the results of intellectual activity, as well as means of individualization of those goods, the list of which is established by the Government of the Russian Federation, is not a violation of the exclusive rights of the right holder [5].

Parallel import is the legal delivery and further sale of goods, not through official distributors, but through any suppliers who have purchased goods abroad from official dealers [6]. It is a simple definition, the essence of which boils down to this: any seller can go abroad, buy goods, and sell them in Russia. It is not necessary, as before, to have the consent of the rights holder to distribute his products. Parallel import can also be defined as “the introduction into civil circulation of goods protected by a trademark through importation without the permission of the right holder into a country not intended for its distribution” [7].

Khusainov (2019) defines parallel import as a situation where the original product, officially marked with a trademark, is imported into the territory of another state without the permission of the right holder [8]. Pirogova (2008) gives a slightly different definition of parallel import. From her point of view, parallel import refers to goods legally produced, imported and sold in the territory of another state, and then “reimported to the country of origin” [9]. However, it is difficult to agree with this interpretation of parallel import: it is inadmissible to reduce parallel import only to the final process of re-importation of goods. It is quite possible that the seller in general does not give a thought to the re-importation of products, i.e. carries out the usual import for sale in the market.

Often parallel import is meant the importation of fake, counterfeit products. The import of infringing goods has nothing in common with parallel import, while it involves the import of original products, but by passing the consent of the original right holder.

According to Article 1229 of the Civil Code of the Russian Federation, the use of the results of intellectual activity and means of individualization without the consent of the right holder is illegal and entails liability. Within the meaning of article 1515 of the Civil Code of the Russian Federation, counterfeit are goods on which the trademark is illegally placed [10].

In our opinion, it is not quite clear what the legislator means by the illegal placement of a trademark. Does it mean that the sign is placed without the consent of the right holder in general, or that the trademark is placed without the consent of the right holder when importing goods into a particular country? Is it always possible to confirm that the illegal placement of a trademark is a sign of infringing items?

Yaroslavtsev (2020) notes that fakes are only those products that are made “without the knowledge and control” of the right holder of the trademark [11]. The concept of parallel import, on the other hand, includes the import of genuine articles, distributed without the control of the right holder. The sale of counterfeit goods is a public offence, thus its sale restrains by criminal liability. Parallel import is a commercial issue, which includes not a violation of public interests, but a violation of the distribution scheme [12]. The criterion for distinguishing between counterfeit goods and products imported by parallel import is an attempt to change the original brand (the so-called “Abibas rule”).

Parallel import combines both private and public interests. As noted by Pirogova (2011), the essence of the concept of parallel import hides the entrepreneurial interests of right holders, distribution companies, as well as the interests of consumers. In addition to the private

law side of parallel import Pirogova (2011) notes public interest, which consists of the growth of economic indicators of the state as a whole [13].

In connection with the analysis of parallel import, it is necessary to address the issue of importing goods for personal use. If a person imports goods for personal use into the territory of another country without the permission of the right holder, will such a person be considered to have violated the norm of the Civil Code of the Russian Federation? Can we conclude that the provisions on parallel import also apply to products that are imported for personal use?

Article 1359 of the Civil Code of the Russian Federation states that the use of objects of patent law (invention/utility model) for “personal, family, household purposes” is not a violation of the exclusive right to an invention, utility model or industrial design.

Similarly, according to Article 1273 of the Civil Code of the Russian Federation, the free reproduction of a “lawfully disclosed work” is allowed without the consent of the right holder and appropriate remuneration payment. Thus, if a person intends to use the goods only for personal advantage, and not to derive income and profit, then such a person will not be considered to have violated the norms of the Civil Code of the Russian Federation. The essence of parallel import includes not only the import of goods into another country without the direct permission and consent of the right holder but also the further **introduction of goods into civil circulation**.

According to Article 129 of the Civil Code of the Russian Federation, civil commerce is the alienation, and transfer in the order of universal succession of objects of civil rights from one person to another. At the same time, as was noted in the decision of the Arbitration Court of Moscow of 24 April 2012, the introduction into civil circulation is a process of a compensatory nature [14]. Personal use does not presume deriving income or profit, it is not a question of compensation, therefore, when a person imports goods into another country without the permission of the right holder just for personal needs, there is no violation of the law. Moreover, importing products for personal use only is not a parallel import.

Articles 1359 and 1273 of the Civil Code of the Russian Federation are included in Part IV of the Civil Code of the Russian Federation but do not refer specifically to the means of individualization. The author believes that in light of the conversation about the exhaustion of rights to a trademark, it is also essential to refer to Chapter 76 of the Civil Code of the Russian Federation, which is fully dedicated to the rights to means of individualization. Chapter 76 of the Civil Code does not contain a norm similar to articles 1359, 1273 of the Civil Code. The pur-

pose — personal use, profit-making, entrepreneurial activity — are the criteria for copyright and patent law. Speaking about trademarks, about the permission or prohibition of their use, the main criterion will be exactly the introduction of goods into civil circulation [15].

Subparagraphs 1 Clause 1 of Article 328 of the Customs Union (now invalid) contained a provision stating that measures to protect intellectual property rights are not applied to goods transported by individuals for personal use [16]. There is no such provision in the current Customs Code of the Eurasian Economic Union. Consequently, the question of whether the import of goods for personal use is parallel import remains unresolved at the legislative level.

In our opinion, the import of goods by an individual for personal use cannot be considered a parallel import, since the individual does not intend to introduce the goods into civil circulation and then derive profit and income from it. Accordingly, the importance of goods for personal use does not violate the exclusive rights to the trademark of the right holder.

LEGISLATIVE INNOVATIONS ON PARALLEL IMPORTS 2022: THEIR IMPACT AND SIGNIFICANCE

In Russia, the parallel import was fully legalized in June 2022 by Federal Law No. 213-FZ [17]. P. 3 of Art. 18 of the Federal Law “On Amendments to Certain Legislative Acts of the Russian Federation” from 2022 provides that the use of results of intellectual activity (goods/groups of goods) which were included in the list established by the Russian Government, as well as the use of trademarks — is not a violation of the exclusive rights to results of intellectual activity or means of individualization [18].

By issuing the Decree No. 506 the Russian Government gave the Ministry of Industrial Trade (hereinafter — the Ministry of Industry and Trade) the right to determine the list of goods available for parallel import. Later, the Ministry of Industry and Trade approved the list of goods allowed for parallel import [19], which is edited every month. It is important to note that the list of goods is exhaustive, so if any product is not on the list, it is not subject to parallel import. Accordingly, if the importer resorts to the import of goods that are not allowed for parallel import, he bears responsibility for the illegal import of products without the right holder’s permission.

In the context of the analysis of legislative innovations on parallel import, it is necessary to analyze the theoretical component related to the principles of exhaustion of the exclusive right to trademarks and then pay attention to the main conclusions of judicial practice after 2022.

Before the introduction of the above-mentioned legislative innovations, the regional and national principles

of exhaustion of the exclusive right to trademarks were in force in Russia. According to the first principle, the permission of the right holder to sell his products in any country entails the permission to sell the same goods in the territory of the union or association, to which that country belongs. For example, the regional principle of exhaustion of the exclusive right to the trademark is established for the EAEU member states. The regional principle is laid down in clause 16 of annexe № 26 to the Treaty on the EEU [20], and in Russia, it is valid under part 4 of Article 15 of the Constitution. Therefore, when applying Art. 1487 of the Civil Code of the Russian Federation should be considered in connection with the international legal principle of the exhaustion of exclusive rights to trademarks [21].

According to the national principle, which is enshrined in article 1487 of the Civil Code of the Russian Federation, it is possible to introduce goods into civil circulation only after the right holder has started selling these goods in the territory of the country where the further sale of products is supposed. Earlier it was expected that the import of goods with the right holder's trademark into Russia to introduce it into a civil transaction is one of the ways of using the trademark, allowed only with the consent of the right holder [22]. Accordingly, the import of goods without the permission of the right holder is a violation of the exclusive rights to trademarks [23].

Due to the adoption of Decree No. 506 in Russia, there is a transition from the regional and national principles of exhaustion of exclusive rights to trademarks to the international principle. According to the international principle, if a product has started to be marketed in one country, it can be freely sold in any other state without the permission of the right holder. Such principle of exhaustion of rights to trademarks is the least advantageous for the right holder, as he loses absolute control over the movement and sale of the goods marked with his trademark.

Thus, it can be stated that in the current political and economic conditions the establishment of exceptions and exemptions to the national principle of exhaustion of rights to trademarks, on the one hand, is economically justified and forced. On the other hand, on the legal side, such exceptions are not quite correct in the legal field. Some scholars confirm that the Government of the Russian Federation does not have the proper authority to cancel the regional principle of the exhaustion of exclusive rights without making amendments to the Treaty on the EAEU [24]. Moreover, the problem of the innovations on the legalization of parallel import lies in the uncertainty of the duration of the introduced exceptions, therefore, it is difficult to predict how the legalization of parallel import will affect the economic and legal field [25].

Immediately after the adoption of Decree No. 506, judicial practice on the application of the innovations began to take shape. Courts made a "group" of conclusions concerning the impact of the legalization of parallel import on social relations.

For example, a month after the adoption of Decree No. 506, the foreign company Guangdong Funway Food Co. argued that the contested document violated both the provisions of the Constitution of the Russian Federation and the provisions of laws prohibiting the Russian Government from adopting acts contradicting federal laws. The court denied the foreign company's application, noting that its claims fell within the competence of the Constitutional Court since they required an examination of the constitutionality of the provisions of the contested Decree No. 506 [26]. It can be assumed that the foreign company is unlikely to challenge the act adopted by the Government: it is enough to recall the Decision of the Constitutional Court No. 8-P of February 13, 2018, in which parallel imports were found to be legal.

In another case, the Court of Intellectual Rights explained that Decree No. 506 does not have retroactive force, so it cannot be applied to disputes that arose before its adoption [27].

An important conclusion about the inadmissibility of suspending the execution of a court decision in conditions of legalization of parallel imports was made by the Fourteenth Arbitration Court of Appeal, which left unchanged the decision of the Arbitration Court of the Vologda region from 2021. Let us turn to the circumstances of the case. The foreign company "Chanel Sarl" (hereinafter — the plaintiff) appealed to individual entrepreneur N.M. Ablisimova (hereinafter — the defendant) to recover compensatory damages for illegal use of trademarks. The defendant, disagreeing with the decisions of two instances, appealed to the Court of Intellectual Rights. The case was considered in a cassation instance in May 2022.

In the cassation appeal, the defendant first asked to suspend the proceedings "until the cancellation of the restrictive measures against unfriendly countries following the established procedure," and then, in a clarified cassation appeal, asked to deny the rights holder claim as a whole. Also, the defendant, referring to Resolution No. 506, indicated that in March 2022 the Western countries took restrictive measures against the Russian Federation. In this regard, the actions of the plaintiff, who is located in Switzerland, which joined these restrictive measures, "should be regarded as an abuse of right, which is an independent ground for refusal to satisfy the claim" [28].

In our opinion, this court case demonstrates the abuse of rights, not on the part of the right holder, but on the part of the domestic entrepreneur. The defendant

committed the offence before the legalization of parallel import but wanted to benefit himself in a difficult foreign economic situation.

ADVANTAGES OF THE LEGALIZATION OF PARALLEL IMPORTS

The legalization of parallel import is a forced response to the withdrawal of foreign companies from the Russian market. Parallel import does allow consumers to enjoy all the benefits that were freely available before the sanctions. Nevertheless, the researchers on this topic are debating how justified is the legalization of parallel import in the Russian Federation. We suggest that we first turn to the arguments presented by supporters of parallel import.

Firstly, the supporters of parallel import believe that its legalization will lead to saturation of the market with all the goods that consumers need. Almost every month the list of goods for parallel imports is supplemented. Initially, the list included such goods as perfumes, clothes, shoes, watches, appliances, vehicles, electronics, metals, and fuel. The list included products from Apple, Samsung, Mitsubishi, Renault, Tesla and Toyota. Thus, since February 2, 2023, the list was supplemented by many brands of toys, games, as well as sports equipment. It is such brands as Adidas, Manchester United, Real Madrid, Disney, DC Comics and Marvel [29]. BMW products were also added to the list. However, although on November 2, 2023, the Ministry of Industry and Trade added Marvel, Disney, Pixar and DC Comics to the list of products allowed for parallel import, Russian consumers will not be able to watch foreign films in cinemas. The thing is that in terms of Art. 1263 of the Civil Code, cinematographic works, as well as TV and video films — are audiovisual works. According to the Commodity Nomenclature of Foreign Economic Activity of the EAEU, audiovisual works are not recognized as goods [30]. Therefore, they cannot be included in the list of goods for parallel import.

Secondly, the legalization of parallel import contributes to the development of a competitive environment in the market. In the case of parallel import, the importer's actions in coordinating the importation of goods are considerably reduced: he does not need to obtain the consent of the official right holder. Consequently, there is an opportunity to import a huge list of goods and even those which previously were impossible to deliver to the Russian Federation. The expansion of the range on the consumer market will lead to increased competition among manufacturers, marketplaces, and retailers. It is known that increased competition leads to an improvement in the quality of goods, to offer more favourable conditions to the buyer.

Third, the legalization of parallel import can reduce the number of counterfeit products on the market. Often, infringing goods are sold at a lower price than the original, which is attractive to the consumer. With parallel import, firstly, one can import original goods without a long chain of approval with the right holder, and secondly, the consumer will more often choose the original product than the counterfeit, because there will not be a strong cost gap. Moreover, sellers are not profitable to sell counterfeit goods anymore — article 16.1 of the Code of Administrative Offenses of the Russian Federation still provides responsibility for the illegal movement of goods across the border of the Customs Union [31]. In the case of legalized parallel import, there is no such risk for the seller.

Fourth, the introduction of the international regime of exhaustion of rights to means of individualization can have an impact on the price factor of the products offered. Large foreign brands have different pricing policies depending on the country where the goods are imported. The pricing policy depends on the economic situation in the country as a whole, the development of the market segment, and consumer demand for a particular product [32].

RISKS OF LEGALIZATION OF PARALLEL IMPORT

The legalization of parallel import does not contain any risks for the consumer. For the average buyer, nothing will change from whether the goods are sold by an official distributor or by an entrepreneur who imports goods through parallel import. After all, parallel import, exactly as it is presented by the legislator and the scientific community, is the import of original goods. It does not matter to the consumer whether the goods were imported through parallel import or an official distributor, while what matters to the consumer is the result — the originality of the product.

The other side of parallel import is related to the buyer's servicing guarantees. Previously, when products were imported into the territory of the Russian Federation through an official representative, it was he who undertook the obligation to provide repair services for the products. In the case of official import, the manufacturer itself established the period of warranty service of the product, in the event of its breakdown. The manufacturer formed a fund for devices and spare parts that may be needed for repairs and then brought them to the country where the goods were sold. The official distributor worked directly with the manufacturer of the goods and did not incur any additional costs for repair services [33]. With the legalization of parallel import, the chain of interaction between the consumer, the seller and the service provider has significantly changed. Now in the

territory of the Russian Federation, the official manufacturer “does not plan” to service the repair of the product in case of its breakdown, since the manufacturer has left the country and it is no longer profitable to invest in the economy.

In this regard, entrepreneurs who sell products imported through parallel import have to assign a warranty period and enter into contracts with service centres for the products themselves. Thus if the consumer discovers a defect in the goods, the retailer is responsible for it with its funds.

In respect thereof, it is incorrect to affirm that parallel import will significantly reduce the prices of imported goods. Many marketplaces and retailers can leave prices at the same level, as their personal warranty costs for devices will increase.

This position is confirmed by statistical data. In practice, price differences are not as significant as they are represented in theory. It is noted that the decrease in prices for such categories of goods as clothes, shoes, and TV sets can be from 3% to 5%, which is insignificant. Concerning the reduction of prices for premium goods — it can range from 8% to 10%, but as Radaev (2011) points out, it will have practically no effect on consumer activity, because the share of global brands in Russia is generally low [34].

Among the advantages of the legalization of parallel import is often referred to as an increase in the range of goods in the market, since entrepreneurs will be able to supply products that were previously banned for import into Russia by the rights holder. However, Russian society can already observe the opposite effect of this thesis. In April 2023 news that Russian stores faced a shortage of board games “Monopoly” and also there is a shortage of games UNO and “Scrabble” [35]. The issue with the supply of board games is quite challenging, as they all have to be translated into Russian. If technology is arranged so that in any country users can choose any language of the interface, then with board games, unfortunately, such a setting is impossible. Thus, the legalization of parallel import will not work, because it requires additional localization of the product, in the case of board games — a trivial translation into Russian. As a result, the goods will not appear, but disappear from the Russian market.

The next risk of the legalization of parallel import is related to secondary sanctions. If it turns out that shipments of sanctioned goods are sent to Russia, even if not directly, manufacturers can be subjected to personal sanctions [36]. For example, in March 2023, Turkey stopped the transit of sanctioned goods through its territory to Russia. Turkey’s customs system blocked the clearance of sanctioned goods. Many experts believe that the suspension of parallel imports through Turkey

was due to pressure from Western countries. So far, this problem is not acute and there has been no precedent for a complete suspension of the transit of sanctioned goods to Russia. However, it is impossible to predict how much pressure will affect parallel imports in the future.

CONCLUSION

The issue of parallel import has become even more crucial in the context of international sanctions imposed on Russia. Parallel import implies the import of original products introduced into civil circulation by the rights holder in the territory of his state. In this connection, the consumer should not be concerned about the deterioration of the quality of the goods, the risk can only be associated with the quality of warranty service.

If in the beginning, the positive effect of the legalization of parallel import was visible, namely the increase in the number of young entrepreneurs, the entry of new goods into the Russian market, and the reduction in the cost of these goods, now consumers can observe the manifestation of its negative aspects. More and more experts are voicing the opinion that the prices of products of parallel import will soon increase or return to their previous levels. The supply of those goods for which localization is required, for example, trivial translations into Russian, is beginning to be disrupted. As for the emerging practice, the courts are trying to maintain a balance of interests and not to “give in” to domestic entrepreneurs who abuse the law.

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THE SPECIFICS OF WORKS OF FINE AND PHOTOGRAPHIC ART QUALIFICATION AS A CONDITION FOR PROTECTION OF RIGHTS AND LEGAL INTERESTS OF THEIR AUTHORS IN CONTEMPORARY LEGISLATION OF RUSSIA AND GERMANY

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Abstract. This present research helps to ascertain, that there is a relation between rights defense for the authors of creative works in the field of photography and fine arts with the specifics of qualification in accordance with the applicable legislation of the works which are created by such authors.

Keywords: Copyright, copyright defense, comparative legal analysis, intellectual property, copyright for photography, copyright for paintings

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• INTRODUCTION

- Over the past years, the legal provisions regulating copyright have been actively reforming, and these changes
- considerably affect the rights of authors of works of fine and photographic art. Nowadays, copyright rules are fully incorporated into the fourth part of the Civil Code of the Russian Federation and continue to develop taking into account the change and complication of legal relations in the field of creative activity. Despite the positive dynamics, there is a significant number of legal relations in connection with the creation and use of works of photographic and visual art, which need to improve legal regulation.
- Besides, Russia has been adjusting national copyright law within a considerable time period, including works of fine and photographic art, in accordance with the world standards stipulated by the Partnership and Cooperation Agreement between the Russian Federation and the EU countries, which aims to promote political, trade, economic and cultural cooperation between Russia and the EU, as well as in connection with Russia's entry into the World Trade Organization. In addition, in recent years, active attempts have been made in the international arena to strengthen control over the copying, publication and movement of information in digital form, including works of fine and photographic art.
- For legal science and scholarship, which is addressed mostly to the national law, the use of comparative law is

extremely important, since it helps to establish the ways to solve the same problem in different countries, and allows expanding the horizons of legal research — to take into account the positive and negative experience of foreign countries.

German legal science and scholarship have a rich tradition and experience in multilateral copyright studies for photographic and artistic works, as well as an extensive base of practical material that can be used to develop directions for improving Russian legislation in this area.

WORKS OF FINE ART

Russian legislation (paragraph 1 of article 1259 of the Civil Code of the Russian Federation [1]) distinguishes the following copyright objects as a separate group: works of painting, sculpture, graphics, design, graphic stories, comics and other works of fine art. Separate groups include works of decorative, applied and scenography art, as well as photographic works and works obtained in ways similar to photography.

The German Copyright Law refers to works of fine art a fairly wide group of objects: subparagraph 1, paragraph 1 § 2 of UrhG (Urheberrechtsgesetz — German Law for the Copyright 09.09.1965 with amendments from 23.07.2021 [3]) covers, in addition to works of fine art, architectural structures, works of applied art and projects (drafts) of such works.

Such a broad qualification of this copyright object can be explained by the fact that the German legislator applies the concept of “work of fine art” as a generic. This general concept refers to works of “pure” fine art, works of applied art, as a special case — architectural structures, as well as drafts and drawings of these works [45, p. 53]. In practice, German lawyers include painting, graphics, plastic forms, sculpture, as well as similar objects of modern art. The scenery also belongs to this group [21]. Houses, churches, stadiums, towers, squares qualify as architectural works if they represent a personal intellectual achievement [41, p. 17]. The legislation of the Russian Federation separates works of decorative, applied and scenographic art, as well as works of architecture, urban planning and garden and park art, including in the form of projects, drawings, images and layouts from works of fine art, which entails a different set of powers for authors of such works (this separation is demonstrated particularly in paragraph 1 of article 1259, articles 1291, 1294 of the Civil Code of the Russian Federation). In particular, the authors of works of decorative, applied and scenographic art are deprived of the “droit de suite” (right to follow) and the right to access, which seems to us not entirely logical. From our point of view, works of decorative, applied and scenographic art would be more appropriate to

include in the group of works of fine art, since the main difference between these works from works of fine art is the possibility of their applied use, which does not diminish their artistic value. With the wording in force in Article 1259 of the Civil Code of the Russian Federation, a painting made on canvas will have a greater level of protection than a painting made, for example, on the cover of a box or on a vase, so it seems to us that such a restriction of the level of protection of a work is not fully justified, depending on which medium it received its objective expression. The inclusion of works of decorative, applied and scenography art in the group of works of fine art would help to resolve this issue and resolve these contradictions that exist in this area of regulation. This approach is also present in the Russian legal scholarship [39].

The subject of art does not have to consist from a long-term material: it can also be created from short life material — from chocolate or marzipan, from oil, sand, snow or ice. For example, for German legislation as an object of copyright can be qualified tattoo [40] and masks [49, p. 114], in Russian legislation — makeup [10], packaging and appearance of confectionery [11].

The category “work of fine art” in German law includes all two- or three-dimensional constructions that express their aesthetic content through means such as color, line, volume, space and boundaries [46, p. 39]. Such approach of UrhG, which puts all works that use similar expressive means to the concept of “works of fine art”, the German lawyer Dr. Winfried Billinger connects with the difficulties of distinguishing different types of these works in certain cases [46, p. 60].

In Russian copyright, all these objects differentiated. From our point of view, works of decorative, applied and scenography art would be more appropriate to include in the group of works of fine art. With the wording in force in Article 1259 of the Civil Code of the Russian Federation, a painting made on canvas will have a greater level of protection than a painting made, for example, on the cover of a box or on a vase, so it seems to us that such a restriction of the level of protection of a work is not fully justified, depending on which medium it received its objective expression. The inclusion of works of decorative, applied and scenography art in the group of works of fine art would help to resolve this issue and resolve these contradictions that exist in the described area of regulation.

In support of this conclusion, the following definition of S.A. Sudarikov can be cited: “Works of applied art are works of fine art expressed in applied goods produced in an industrial, craft or artisanal way” [37]. Thus, S.A. Sudarikov directly refers works of decorative and applied art to works of fine art.

Drafts of works of fine art are subject to legal protection in both Russia and Germany. The author does not

lose this privilege even if he later does not implement this sketch [38, p. 52]. Anyone who finishes someone else's work is recognized as a processor under German law [49, p. 102] (§ 23 UrhG). The very concept of fine art ("Kunst") in German law is not clearly defined [50, p.80; 45, p. 52], but judicial practice, if it is necessary to distinguish "pure" fine art from its other types, proceeds from the purpose of the created work [45, p. 53]. It is generally accepted that a work of fine art has only aesthetic content, and a work of applied art — also a functional purpose [42, p. 555]. Professor Heinz Püschel notes that the most difficult thing in such situation is to distinguish works of art from other aesthetic achievements [47, p. 29], as it can be extremely difficult to decide whether this work (especially in the field of industrial forms) belongs to the arts and crafts or can only be regarded as an object of industrial property (Geschmacksmusterrecht zugängliches Produkt).

Moreover, if this object also has novelty as a model or sample, it can also be protected in this capacity in addition to copyright [44; 45, p. 88].

Despite the possibility of such a double protection, German copyright is close to the French concept of "unité de l'art" — art remains art, no matter how it is used. Based on this principle, works of fine and applied art are put in the same position [42, p. 557].

Russian doctrine also stands on the position of multiple protection of works of art in the field of copyright and patent law. For example, the drawing may form the basis of a trademark or be the creation of the creator of an industrial model as an object of patent law [38, p. 84]. S.A. Subbotina notes [36] the frequent recommendation to register the packaging of products, if original, as volume trademarks or industrial designs, but justifies the possibility of protecting such images as only as a work of fine art (without additional registration as a trademark), and in the form of an object of copyright or patent law at the choice of the copyright holder (when registering as a trademark). However, despite the above principle of double protection, in judicial practice there are cases of delineation of the methods of protection of the work depending on its use: for example, the judicial division of the Supreme Court of the Russian Federation [7] in 2010, the work of fine art, which is the basis of the trademark, was deprived of protection as a work of copyright for the reason that this work was used for commercial purposes. However, the recent Russian judicial practice overcomes this approach and supports the author of the result of creative activity. In particular, at the end of 2022, in a similar situation, the Intellectual Rights Court defended the author's rights regarding the design of the product label and the photographs created by the same author, collecting compensation from the defendant for the illegal use of these objects [15].

The "double status" of works of fine art is also connected with the fact that in Russian law objects-carriers of copyright works may not belong to the field of intellectual property law. Thus, objects that give shape to a work are often cultural values. In this case, they are subject to legislation on culture [38, p. 84; 30].

Graffiti is also recognized as a work of fine art under German and Russian law. A feature of this copyright object is that such a work is often in conflict with the ownership of the building on which it is located. Therefore, the owner has the right to eliminate graffiti from the object of his property [46, p. 47]. At the same time, like any other object of copyright, graffiti enjoys the right to inviolability in the sense that this work should not be distorted, although it can be completely destroyed [46, p. 226].

The unlawful or offensive content of a work of fine art or the creative act itself does not affect the existence of copyright protection. Thus, the caricature depicting the former Prime Minister Franz Joseph Strauss in the form of a pig serves as an example of the simultaneous presence of both copyright and the composition of the criminal offense (BVerfGE 75, 369 = NJW 1990, 3026) [49, p. 113]. The immoral content of the work of art does not question the possibilities of author's protection in the Russian doctrine of law [38, p. 81].

An example of an illegal creative act is the application of graffiti on the cars of an electric train traveling from Lesnoy Gorodok to Moscow, on the fact of which a criminal case was initiated under the article "Vandalism" [52]. According to the Moscow 24 information channel, coloring train cars is a subspecies of graffiti art called Whole Car or TrainWriting. Unauthorized drawings are the subject of irritation of the authorities of many cities of the world, while legal graffiti is gaining popularity in Moscow — following the United States and Europe. This fact can be confirmed by the decision of Moscow Mayor Sergei Sobyenin to decorate underground passages and facades of houses in Moscow with graffiti [51].

Considering the fact that an architectural work in accordance with the German legal norms is classified as a work of fine art, a concept "Panoramafreiheit" deserves our attention. The concept is formulated in UrhG § 59 and grants the right to distribute and publicly reproduce works which are permanently on public roads, streets or squares, by means of painting or graphics, by means of light image or film. For buildings, this right can be applied to the appearance only. However, in a case of using the image of a building by making posters, the German Supreme Court took the side of the author and decided about the need to obtain permission from the creator of the architectural work for the production of posters with the image of such work (BGH, 05.06.2003 — I ZR 192/00 — Hundertwasserhaus).

WORKS OF PHOTOGRAPHIC ART

Both German and Russian legislation absolutely coincide with the name of the group of protected objects of photographic art: “photographic works and works obtained by methods similar to photography” (subparagraph 5, paragraph 1 § 2 UrhG, paragraph 9, paragraph 9, article 1259 of the Civil Code of the Russian Federation).

But, despite the semblable similarity of the protected object, there are significant differences in its regulation by Russian and German law.

In particular, the object “photography”, unified for the Russian legislator, splits in German law into several concepts that are quite unusual for domestic legal literature.

Thus, the Law on Author’s and Related Rights of Germany distinguishes works of photographic art (Lichtbildwerke — subparagraph 5, paragraph 1 § 2 UrhG) in the sense of personal intellectual creation [41, p. 17] and regular photographs (Lichtbilder — § 72 UrhG). The main legal difference between these objects is the duration of the protection period. Works of photographic art according to § 64 UrhG, along with other objects of copyright, are protected 70 years after the death of the author. Simple photographs are guarded only 50 years from the moment of origin.

The practical distinction between works of photographic art and simple photographs is fraught with some difficulties. For example, in a work of photographic art, reality is not only photographed, but also emphasized in its individuality. The creative compositional solution may be to define the boundaries of the frame, the distribution of light and shadow, exposure, subsequent improvement of the frame by retouching or small photomontage [49, p. 119]. At the same time, a work of photographic art, despite some differences in production, is recognized as individual television frames [20, p. 470, 472], as well as film or video frames, and it is always assumed that this individual frame also contains the necessary artistic solution.

Digital paintings created on a computer are neither works of photographic art, nor simple photographs, since they are not obtained from radiation energy. German judicial practice classifies them as works of fine art [28].

Simple photographs and works obtained in a similar way are images that are created by means of light or other radiation energy and, above all, are fixed chemically or digitally. The protection of a simple photo does not depend on its fixation, for example, on a film negative [49, p. 332]. Images of virtual objects made using a computer through electronic programs are not simple photographs according to German judicial practice [23]. In some cases, such images, according to German courts, do not contain sufficient creative input.

Purely mechanical reproductions, such as those obtained in the process of photocopying or creating a fac-

simile, are not objects of German copyright. They are a simple reproduction even when the original format is changed [17]. Otherwise, it would be possible to extend the security period of a simple photograph by re-photographing as long as desired. Such situations should be delimited when the museum photographs restored works of fine art at certain intervals, which gives rise to a new copyright object every time.

For the protection of photography under German law, the purpose for which the photography was performed does not matter. If it was made for advertising, but does not contain personal spiritual creation, it is protected as a simple photo, and if this photo meets the requirements of paragraph 2 § 2 of UrhG, it is protected as a work of photographic art [18]. Photographs depicting scientific works also refer to works of photographic art [47, p. 30], by protected German copyright.

As mentioned above, Russian judicial practice indicates that the results of creative activity are subject to protection “regardless of the purpose and dignity of the works, as well as the methods of their expression” [12]. However, in Russia, despite the provisions of paragraph 1 of Art. 1259 of the Civil Code of the Russian Federation, which speaks about the protection of works, including works of fine art and photographs, regardless of their dignity and purpose, judicial practice is formed [7], testifying to the refusal of copyright protection for the work of art, if it is part of a trademark whose purpose is to be used commercially as a means of individualizing goods.

As in the case of works of fine art, double protection of photography is allowed — as an object of copyright and as a brand. On 31 March 2010, the German Federal Court, [19] in deciding whether the registration of Marlene Dietrich’s photograph as a stamp was possible, ruled that registration as a trademark or data which is used for any purpose other than advertising, without the purpose of describing the goods and services concerned, should not be prohibited by reason of such use alone. Russian judicial practice [9] also indicates that a citizen’s photograph can be used both unchanged (format) and on another scale or color, with its application to goods, with the inclusion of a trademark or service mark in the composition.

COPYRIGHT OWNERS FOR WORKS OF FINE AND PHOTOGRAPHIC ART IN RUSSIA AND GERMANY

In accordance with Art. 1257 of the Civil Code of the Russian Federation, a citizen whose creative work it was created is recognized as the author of a work of science, literature or art. § 7 UrhG adheres to the same position.

The legislation of both countries emphasizes the obligation of personal creative contribution to the creation

of the work (Article 1228 of the Civil Code of the Russian Federation, Article 2 § 2 UrhG). The creative contribution to the work, its presence, absence and scale is a defining moment for the availability and quality of legal protection for the authors of the works in question.

For the author of a work of fine art, Russian and German legislation does not establish the necessary minimum of creative contribution, and provides them with protection regardless of the significance of creation (Article 1259 of the Civil Code of the Russian Federation). Russian judicial practice recognizes the results of creative activity to be protected “regardless of the purpose and dignity of the works, as well as the methods of their expression” [12]. However, despite this principle, there are court decisions [7] indicating a refusal to protect the copyright for a work of art if it is part of a trademark, the purpose of which is to use it commercially as a means of individualizing goods.

In particular, the importance of creative activity for determining the possibility of protection by domestic copyright was considered in detail by V. Ya. Jonas [32], proving the need for such to create any new copyright object.

Despite the fact that the protection of a work of fine art does not depend on the size of the creative contribution, German judicial practice ambiguously covers this issue. In particular, even those who create works with “insignificant contribution” are recognized by the authors of works of fine art (German doctrine uses the term “*kleine Münze*” — “small coins” in this case) [27]. For example, the Supreme Court of Berlin recognized the author of the drawing with jumping trout the right to demand remuneration for such a work, although he classified such a work as “*kleine Münze*” [24]. Logos for a mobile phone, in turn, were also recognized as a kind of works of fine art related to the “*kleine Münze*,” but did not receive the qualification of a copyright object. Thus, it can be concluded that in Germany the court in some cases decides whether the artist’s creative contribution to a work of fine art is of sufficient value to provide such a work with protection for as an object of copyright when classified as “*kleine Münze*” [27].

The problem of creative contribution to the work on the part of the photographer was relevant from the very moment when the art of photography was born. While the presence of the artist’s creative contribution to the work was not in doubt among lawyers, the presence of a significant technical component in the process of making photographs made many legal scholars very critical of the possibility of recognizing the photographer as a copyright subject [29; 48, p. 331]. This position was also enshrined in the legislation of the time when photography arose and the authors of photographic works tried to achieve recognition by the legislator of their copyright.

Thus, P. Miller, recognizing photography as an object of copyright, noted that “the main provisions of photographic property differ from those of artistic property only to the extent that the first lacks a personal element (the creator’s spiritual connection with creation)” [34].

In its Note on the Photographer’s Copyright to the State Duma of 11 Russian Photographic Societies back in 1910, they sought equality of the photographer’s copyright with the creators of other works of art [31, p. 1]. The authors of The Note rightly noted that “photography is a fine art that is equal to others, and must be equalized with them by law” [31, p. 5].

In the need for copyright recognition by photographers, they also referred to the fact that when several persons shoot the same plot, the pictures are always different, and each of them carries a bright fingerprint of the author’s personality, so the link to “mechanical methods” of obtaining images should cease to play the role of denying the artistry of such works.

It was not easy to recognize the photographer as the author in Germany. During the development of the 1870 copyright bill, it was decided not to include rights for photographers in it, since photography was considered just a craft requiring only technical skill, and therefore, like the works of other crafts, it could not be subject to special protection, and her works should be provided to general use [33].

Currently, discrimination against the authors of photographs has been eliminated in Russian legislation. They are equalized in their rights with the authors of all other works of art (paragraph 1 of article 1259 of the Civil Code of the Russian Federation), which cannot be said about German law. The isolation of “photographs without artistic content” (*Lichtbild* — § 72 UrhG) puts photographers in an unequal position, producing photographs that are quite comparable in artistic strength and expressiveness. It seems not entirely fair to attribute, for example, all photographs produced on vacation or with a family to the concept of “simple photographs” — that is, those that are devoid of sufficient artistic content. Based on these provisions of German law, we can directly talk about the existing discrimination of photographers working as individuals. If the general rule of copyright provides the same protection of creativity to any person, including one incapacitated under civil law, then § 72 UrhG frankly diminishes the level of protection of the photographer who created the simple photo. In the articles of Russian lawyers, ideas have recently appeared about the delimitation of “everyday” photographs from original photographs [35].

It remains unclear on what grounds the issue of the artistic content of photographs in German practice is being resolved: usually applicants for the right to be called

the author of a work of photographic art present diplomas on the education of a photographer and documents that the author works professionally as a photographer, which, however, does not always serve as decisive evidence. In its decision in the case of photographs of works of fine art, the Supreme District Court of Düsseldorf ruled that “photography, which offers nothing more than artisan impeccable reproduction of the depicted object, is not a work of art and in the case where the depicted object, in turn, is a work of high rank” [26]. This position of the court is disputed in German legal literature. For example, Henrik Lement in his book “Photographing Objects of Art” and Professor Gerhard Pfennig in a review of this book [43, p. 625] refer to the fact that the process of shooting an art object, especially a three-dimensional one, may require a lot of creative effort from the photographer to reveal the true essence of this work, so it is highly doubtful to classify absolutely all photographs depicting other works of art as simple photographs.

As the author of simple photography, television and cameramen defended themselves in German law until 2002, if it was a separate frame. These individual shots are protected regardless of the copyright of the entire film [20, p. 470, 472]. This norm was contained in § 91 UrhG [50, p. 1087] and was abolished due to the fact that the German legislator wished to eliminate discrimination against operators and give them the rights of authors of works of photographic art.

Of interest is also the problem of protecting the motive of photography, which was most widely developed in German judicial practice in 2006-2008. The ambiguity of this problem is that the protection of the plot of photography runs counter to the fundamental principle of delimitation of form and idea for both German and Russian copyright [53]. That is, in any work of art it is the objective expression, the form of any idea, but not the thought or idea itself that is defended. In the case of rephotography of the same plot, the question arises of whether this is its free use or a dependent subsequent creation in the sense of § 23 UrhG.

A clear distinction in this case is especially difficult, since in the case of photography, the form and idea merge together, and the artistic level of photography often depends more on the choice of plot than on the way it is expressed. The decisions of German courts in this area balance between the provision of legal protection for creative photographs and the need to protect the freedom of the plot. Excessive copyright protection could be deplorable for photographers: a plot once used in a photo would be closed to other authors.

According to Russian judicial practice, “only an individual can be the creator of a work, while its status does not matter” [4]. In this case, there was a dispute about

the authorship of an individual entrepreneur on a graphic work. There are no obstacles to compensation for the moral damage of an individual entrepreneur, the copyright for the photographic work of which was violated [16].

However, based on the paragraph of the second article 6 Federal Law of 18.12.2006 N 231-FZ “On the Enactment of Part Four of the Civil Code of the Russian Federation” [2], the copyright of legal entities that arose before the 03.08.1993 (before the entry into force of the Law on Copyright and Related Rights) ceases seventy years after the publication or creation of the work. The rules of part four of the Civil Code of the Russian Federation apply to the relevant legal relations by analogy. Moreover, according to the Resolution of the Plenum of the Supreme Court of the Russian Federation No. 5, the Plenum of the Supreme Court of the Russian Federation No. 29 [13], such legal entities are considered authors of works for the purposes of law enforcement. Nevertheless, this does not mean the recognition of the relevant legal entities by authors with the entire complex of intellectual rights to the work. Personal non-property rights to the corresponding works belong to individuals.

Some features of the distribution of rights to images of cartoon characters are described in paragraph 12 of the Review of Judicial Practice in Cases Related to the Resolution of Disputes on the Protection of Intellectual Rights (approved by Presidium of the Supreme Court of the Russian Federation on September 23, 2015) [5]. The rights to characters in audiovisual works — animated films created before August 3, 1992, belong to the company that shot the cartoon, that is, the film studio (or its successor). Individuals who took part in the creation of cartoons during the specified period do not have exclusive rights to cartoons and their characters.

The owner of the exclusive right to the character of the animated film as part of the work is the owner of the exclusive right to the animated film, i.e. to the entire work as a whole.

Copyright for an audiovisual work, and, therefore, for characters of animated films — actors in the work, is recognized by a legal entity — the enterprise that shot the film, which met the requirements of Part 1 of Art. 486 of the RSFSR Civil Code in 1964, which was in force at the time of the creation of animated films.

Article 6 of the Federal Law of December 18, 2006 N 231-FZ indicates that the copyright of legal entities arose before August 3, 1993, that is, before the entry into force of the Law of the Russian Federation of July 9, 1993 N 5351-I “On Copyright and Related Rights,” terminated after seventy years from the date of the legitimate publication of the work, and if it was not made public — from the day the work was created. The rules of part four of the Civil Code of the Russian Federation apply to the

relevant legal relations by analogy. For the purposes of their application, such legal entities are considered the authors of the works.

14.07.2022, the production designer of the animated (cartoon) film was included in the authors of the audiovisual work (clauses 4, 1 of article 1263 of the Civil Code of the Russian Federation).

Only an individual can be considered the author of a work of fine art or a photographic work in German law, which is also enshrined in judicial practice, in particular in the decision of the Berlin District Court of May 10, 1989 [25]. In this decision, the court determined that the ability to be an author or photographer in the sense of §§ 2 and 72 UrhG belongs only to individuals. A legal person may be the holder of the rights to use simple photographs that were taken by the satellites used by him only if the individual who is the author or photographer transfers such rights to him. A legal entity that uses satellites does not have the right to require the indication of its name in accordance with § 13 of the UrhG when publishing photographs taken by its satellite.

At the same time, under Russian law, a legal entity, in the presence of a dispute over the right to use a work of fine art or part of it, must prove the fact that the rights to the work were transferred to it, even if such a work was created as part of an official assignment. This is confirmed by judicial practice, in particular in the decisions of the Supreme Arbitration Court of the Russian Federation. So, in 2000, the Supreme Arbitration Court of the Russian Federation ruled [14] that copyright for a work created in the order of fulfilling an official assignment in a scientific or other organization belongs to the author of the work. If the author's property rights were transferred to them by a legal entity, he can freely defend his violated right to use the work. For example, the existence of an exclusive license from a legal entity and the fact that there was no agreement between the heiress of the author of the work of fine art "Zhnitsa" and the distillery on the use of a fragment of this work on the labels of manufactured products allowed the legal entity — the owner of the rights to the work — to claim compensation for its violated right [8]. There are precedents for the protection of rights by legal entities and in the case of photographs — for example, in the process of considering the case in several instances, OOO "PKP Zavod Vysokotekhnologichnogo Oborudovaniya" was able to defend its right to recover compensation from another legal entity in connection with the placement of controversial photographs on the defendant's website without the consent of the plaintiff [6]. In accordance with paragraph 23 of the Review of the practice of resolving disputes related to the protection of foreign investors by courts (approved

by the Presidium of the Supreme Court of the Russian Federation on 12.07.2017), a foreign legal entity also can demand compensation in its favor for copyright infringement in a Russian court, but in this case it is obliged to confirm its status as a foreign legal entity.

If we are talking about photographic works created during the performance of official duties, but in addition to agreements with the employer, in the absence of evidence that the photographs were taken by the employee as part of the performance of official duties and official assignment, the employee has the right to claim compensation for violation of the exclusive right to the works created by him [5].

CONCLUSION

As we can see, law enforcement is moving towards an increasingly clear acceptance of the fact that creative work and the results of creative activity are subject to protection. The collected compensation for copyright infringement is increasingly significant and stable and a systematic decline in their level is gradually becoming a thing of the past. Thus, once adopted by the courts, the reduction in compensation for the illegal use of photographic works to 10 thousand rubles was replaced by a different approach and in modern Russian realities such compensation can reach more than 600 thousand rubles for 5 photographs [6].

I would also like to note the tendency of Russian law enforcement practice to protect workers who create creative works during working hours, but in addition to contractual obligations to the employer.

German law continues to maintain to some extent discriminatory norms in relation to simple photographs, unlike works of photographic art, and we see here some vices of possible protection of those authors whose works will be qualified as simple photographs.

In Russian law, in turn, some restrictions are subject to artists who create objects of decorative and applied art, deprived of such rights that are granted to authors of works of fine art, for example, access rights and rights to follow.

Therefore, in connection with the facts set out in this Article, it can be concluded that the protection of the rights of authors of works of fine and photographic art in Russia and Germany, the set of such rights, opportunities and the degree of protection of the legitimate interests of authors are inextricably linked with the qualification of the works created by them, which confirms the importance of legal clarity in establishing clear principles of such qualifications at the legislative level and in the formation of law enforcement practice.

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NEUTRALIZATION, TECHNOLOGY, ALGORITHM: REFLECTING ON ARTIFICIAL INTELLIGENCE STARTING FROM CARL SCHMITT

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Abstract. Carl Schmitt’s contribution to the study of law is of great proportions, especially since his approach to the subject has always been hybridized with the great themes of politics and technical development. This is why his work is still relevant today, and can be applied, as this essay does, to the question of the development of artificial intelligence and its practical applications. The essay therefore proposes to trace, through an immersion in Schmitt’s thought, an examination of the problem of artificial intelligence in the face of matters of law.

Keywords: Carl Schmitt; Artificial intelligence; Philosophy of Technology; Philosophy of Law; Neutralizations.

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• INTRODUCTION

- Carl Schmitt is an author who was rightly considered an anticipator. Anticipator, because he was able to see within the historical period in which he lived — undoubtedly a crucial period — all those trends that then developed, and are still developing. Carl Schmitt also had a taste for great forecasts himself, which he emphasized in personalities that he explored in depth such as Donoso Cortés and Alexis de Tocqueville. If in Donoso Cortés he traced the awareness of the political potential of Russia, which he foresaw would first carry out a socialist revolution, in Tocqueville there was an element strictly connected to the quantitative questions of the masses and of technology, which already led to foresight regarding certain phenomena still in development today.
- «*Democracy in America*, by the great French historian Alexis de Tocqueville, pulled the rug out from under Europe’s self understanding, and produced the prognosis that an inevitable democratization and centralization of humanity would be fullfield in America and Russia. [...] Tocqueville is also the first author who provided a cultural and historical-philosophical diagnosis closely tied to the above-mentioned foreign policy prognosis [...]. For Tocqueville, the 1789 revolution was a symptom of a process of irresistible centralization» [1].

«Tocqueville’s prognosis states that humankind will irresistibly and inevitably continue further along the path it has long been on, toward centralization and democratization. But the forward-looking historian does not rest content with having determined a general developmental tendency. He identifies simply and clearly the concrete historical powers that [will] carry and accomplish this development: America and Russia [2].

It is in fact extraordinary that a young European jurist could have conceived of such a prognosis over a hundred years ago, when the dominant picture of the world of his age was still entirely Eurocentric. [...] What Tocqueville predicted in this way was no vague oracle, no prophetic vision, and no general historical–philosophical construction. It was a real prognosis, won on the basis of objective observations and superior diagnoses, registered with the courage of a European intelligence and expressed with all the precision of a French mind. [2]»

This approach that Schmitt shared with Tocqueville led him to meditate on those phenomena that would prove to be long-term. We ourselves can use this type of approach to reflect on the premises and the results of those aspects of contemporary technical development that will condition and already condition the sphere of law and society.

Carl Schmitt, whose versatility is widely recognized, remains primarily a jurist. His reflection hinges on that close and inextricable link that law has with history and politics. Furthermore, in history, following the path of German thought at his time, some forces of various kinds move, such as capitalism, secularization, technology and so on. These trends affect the future as much as the present, and develop towards their logical conclusions. In this sense, Carl Schmitt’s thinking can provide us with excellent starting points for a broader reflection on artificial intelligence and the issues it raises.

First of all, it is important to understand what technology represents in Schmitt’s discourse. The discourse on technology, as anticipated, has a great importance in the German philosophy of the early twentieth century, and unfolds in the problem of changing ways of life and society set by technological advances. In this sense, the problem of the machine develops the question of human alienation in the object as described by Marx himself.

The question of technology is not for Schmitt only a problem linked to the transformation of the natural and social ecosystem of the human being, although there is also this element — he describes in a few lines the planet transfigured by technology as «the mechanistic world of big Cities, whose stone, iron, and glass structures lie on the face of the Earth like colossal Cubist configurations [3]» –, but it has to do with much deeper issues, linked to the destiny of human society and of man himself. The problem, as posed by Schmitt, takes on a philosophical

dimension of great significance, which in its most important passages compared to the thought of Plettenberg’s jurist becomes specifically philosophical-juridical. Indeed, separating the question of technology in Schmitt from the juridical dimension is strictly speaking impossible, since it is closely linked to it, especially with regard to that process of *neutralization* and *depoliticization* to which he referred in his work.

TECHNOLOGY AND THE JURIDICAL PROBLEM

Carl Schmitt, in *The Concept of the Political* [4], argues that a slow but inexorable process is underway in the world. This neutralizing process seeks to prevent the possibilities of conflict, while paradoxically exasperating them in its final stages. The neutralization of every divisive element, both of the social world within the communities and of the international world that brings them together, takes place from time to time according to more general and less partisan principles. Towards the climax, this process is substantiated more and more explicitly in the pre-eminence of technology over any other issue.

«The process of progressive neutralization of the various areas of cultural life has come to an end since it has arrived at technology. [...] Large masses of industrialized peoples still adhere to a dark religion of technicism today because they, like all the masses, seek the radical consequence and believe they have found here the absolute depoliticization that has been chasing each other for centuries and with which the war ends and universal peace begins» [4].

However, according to Schmitt, technical neutralization was preceded by various other neutralizations, the first of which was the neutralization of theology by jurisprudence. It is from this that the European public law on which the Eurocentric world order was founded for a long time is born [5].

«This is how *ius publicum Europaeum* emerged from the confessional civil wars of the sixteenth and seventeenth centuries. At its beginning stands an antitheological slogan, a call for silence that a founder of modern international law directs to the theologians: *Silete, theologi, in munere alieno!* [“Keep quiet, theologians, on alien territory (sc. on matters outside your remit)!”]. This is what Albericus Gentilis shouted against them, on the matter of the just war debate.» [6].

At the time of law, and specifically of European law, that of technology finally followed. The phantasmagoric possibilities of creation and destruction arising from technology have surpassed the law in its capacity to contain phenomena.

«It was the consistently technical age that [...] completed the profanation without remainder. This age laid

bare with inexorable logic where jurisprudence stands, namely between theology and technique, and placed the jurists before a difficult choice, in that it immersed them in the new objectivity of pure technicity. [...] Instead of a comfortable hotel, the bunkers and barracks of the technical age open up. Now it is the jurists who receive a call to silence. Now it is to them — should there still be enough Latin — that the technicians of potentates and dogmatists can shout: *Silete jurisconsulti!* [“Keep quiet, lawyers!”]» [6].

In reality, in Schmitt’s work one can glimpse an even greater possibility of neutralization in the capitalist economic phenomenon, which “allies itself” with technology, but represents the extreme enemy of the political form [3], where technology can still hypothetically be subjected to this last one [7].

The theme of law thus becomes fundamental in the relationship with politics and technology, since in Carl Schmitt’s thought all these elements are only functions of a broader historical process, and manifest, in a never univocal way, certain basic tendencies. In other words, law and technology in history have moved towards complete neutralization in the economy at the expense of politics and religion (which also constitute a sort of equation in Schmittian thought, hence the theme of “political theology”), but law tends to be neutralized by technology and economics as a vestige of certain principles and presuppositions of a metaphysical nature.

In fact, the technical (or economic) temptation for Schmitt tends to be around the corner, especially in the political sphere, which risks being captured, in his reflection, by purely formal conceptions of the same. Moreover, these conceptions would be legitimized by certain ideas in the field of law, and especially of constitutional law. Hence his famous diatribe with Kelsen.

THE MACHINE AND REPRESENTATION

What distinguished Kelsen’s normativistic approach from Schmitt’s was the role of politics with respect to law. Notoriously, Kelsen proposed a “pure” vision of law, in which the political problem was not posed. Plettenberg’s jurist was of a different opinion, opposing his “decisionist” theory to it.

«Kelsen advocated, along neo-Kantian lines, a pure theory of law, where judgements are given following existing laws. He wanted to purify legal practice from all the political, sociological and arbitrary elements that might distort it. Similarly, the political aspect of decisionism was directed against legal positivism and against Kelsen’s theory of a pure law. The debate culminated in a direct confrontation between Schmitt and Kelsen on the question of the relationship between the sovereign and the

constitution. Who should be the guardian of the constitution in times of crisis? Who should be given extra-legal powers to save the constitution and to restore public order and security when the welfare of the people is under threat? In other words, who is the sovereign?» [8].

The problem raised by Schmitt with respect to the Kelsenian vision was that of the law conceived as a machine: a self-sufficient system which, once started, did not need to be stopped. The jurist’s only duty, according to Kelsen, was therefore to serve this machine. Schmitt’s opposition to this thesis was part of a greater political-cultural climate that opposed, on various fronts, a necessary and pre-established dimension [9]. This demonstrates very well the risk of the technicalization of law, which is also inherent in the possibilities of the political dimension.

From here we can draw even better the features of the technical question in Carl Schmitt’s thought: the machine world, is one in which a fundamental element of the sphere of human society is absent — namely *decision*. This principle, that of decision, is in turn associated with the sphere of politics, which completely overlaps with that of associated life. In its turn, however, it determines the juridical universe, starting from those fundamental laws that organize societies — namely *constitutions*. Going to the root of the juridical problem, Schmitt sees in it the political cause, or rather the taking of a position regarding what a state and a social community should be. In opting for this choice, or rather for one reality rather than another, a community defines itself through its decision maker. The decision maker can obviously be any human subject who expresses, through this stance, a free will in the right conditions. Hence the famous Schmittian concept according to which «whoever rules over the state of exception therefore rules over the state, because he decides when this state should emerge and what means are necessary [7]».

The state of exception is nothing other than that chaotic moment in which the political protoplasm of any juridical position is crystallized, in other words the point from which laws and regulations emerge. The close relationship that emerges from this between politics and jurisprudence can only apparently be ordered chronologically, since politics in this sense constitutes the area constantly underlying the legal screen, without thereby affecting its nature. In other words, this does not mean that jurisprudence is necessarily “captured” by mere questions of partisan political interest, but that it derives from the primitive decisive moment.

Obviously, a jurisprudence conceived in this way has some results, and a jurisprudence conceived in a different way has others. These results are in any case found in society, since law governs it. A state in which the apparent neutrality of the law is in force (which here does

not mean the equality of people before the law itself) is a state whose political element is subjected to a technology. This technology can disguise itself as legality, technocratic politics, domination of the markets, but the same thing remains in the claim of neutrality.

There are two risks involved in this possibility, and both actually converge. The first risk is that of the interested exploitation of the claim of neutrality. The latter was advanced in the twentieth century by political liberalism, but it does not represent a disinterested position. Although it was substantiated by opposition to the sphere of politics, nevertheless liberalism did politics, that is, it entered a polemical, conflictual plane.

«As a historical reality, liberalism has escaped the ‘political’ just as little as any other human movement, and even its neutralizations and depoliticizations (of education, economy and so on) have a political significance» [4].

In this sense, any neutralization ultimately does not respond to any neutrality of the results. Just as jurisprudence, which asserted itself against the theological sphere in a process of pacification between European nations, was produced by politics, a principle easily traceable in the work of Thomas Hobbes [10], so technology can serve very specific partisan interests, as well as certain neutralistic positions. of international law¹.

«Technology is no longer neutral ground in the line of that neutralization process and any politics of power can make use of it. [...] The final meaning is only gained when it becomes clear which type of politics is strong enough to master the new technology» [4].

On the other hand, a great Schmittian teaching is that according to which every claim to neutrality always conceals a vested interest.

Regarding the problem of the decision, the other sore point towards the technology manifests itself. The technology is to be considered what is completely different from the human being. Within his domain, nothing reaches decisive and exceptional moments, but everything proceeds according to rhythms marked by strict regulatory structures. The problem of technique is above all a representative problem, and which therefore has to do with the deprivation of the aesthetic and theological sphere, where the latter is the reservoir from which jurisprudence has drawn the symbols for its charismatic legitimacy.

«The jurists’ withdrawal from the church was no secession to a holy mountain, rather the reverse: an exodus from a holy mountain to the realm of the profane.

¹ «In short, the League of Nations is an instrument of “indirect” politics, for the protection of the victors and their spoils, and for the punishment of the vanquished; its universalism is in reality imperialism, a weapon of war that presents itself as an instrument of peace.» Carlo Galli, *Lo sguardo di Giano. Saggi su Carl Schmitt*, Il Mulino, Bologna 2008 [translated from Italian].

On leaving, the jurists took some holy trappings [*Heiligtümer*] with them, whether openly or secretly. The state decorated itself with some simulacra of ecclesiastical ancestry. The power of earthly princes was augmented by attributes and arguments of spiritual descent» [6].

However, the technology annihilates this use of symbolic trappings, which refer to orders of metaphysical ideas: «it was the consistently technical age that first eliminated [the holy trappery] and completed the profanation without remainder» [6].

The representative dimension, however, according to Schmitt, belongs at the same time to the religious and political sphere, and remains in the juridical one. This remoteness of the world of technology from this dimension, indeed its real negation, contrasts it in substance with the world of law [3]. This is all the more true when the aims of the technique are purely economic:

«Economic thinking knows only one type of form, namely technical precision, and nothing could be further from the idea of representation. The association of the economic with the technical (their inherent disparity is still to be noted) requires the actual presence of things» [3].

All this because «the technology remains [...] culturally blind [4]», that is, it lacks that linguistic dimension that would make it representative.

ARTIFICIAL INTELLIGENCE AND DECISION

Having explained how for Carl Schmitt neutralizations steer the world in a certain direction, it is easy to understand the trends that are developing today. The question of decision and sovereignty set by Carl Schmitt is indeed of burning topicality, and the problematic possibilities of technology have not only not been stemmed, but are visibly increasing with the exponential growth of calculation and operational skills.

Schmitt in his text on the *Dictatorship* raises the essential problem of political sovereignty [7]. The latter, which is realized with the decision within the state of exception, is what constitutes the substance of the political sphere, whether it is the prerogative of men, parties or social classes.

As we have said, it is the decision which, according to Schmitt, founds the social orders and substantiates the constitutions. The decision is the sphere of action of the human being in his fundamental social and relational essence. What happens when machines can simulate the decision? The problem bursts into his treatment of Hobbes’ thought.

«The functionalism [of] “objective legalities” [of technology], coherent in itself, eliminates the notion of a personal decision precisely because it does everything “by itself” according to its own type of logic, without any specific decision. Talking about “decisions” in this area

would be as absurd as trying to pretend that the alternation of red and green in the traffic lights of a modern road is a series of “administrative acts”, that is, decisions, in order to organize it according to legal concepts and to insert it into the system of traditional administrative law: it would be a completely unscientific procedure, as it is naively anthropomorphic.»²

The machine therefore does not have the power to make an authentic decision, for the simple reason that it is not a human being, and cannot replicate (if not in appearance) human behavior right down to its deepest springs. The problem that is posed in this Schmittian passage is basically that of the algorithm, through which the machine produces results even more precise than human ones, but which are not composed of forms of reasoning and — above all — of expression analogous to those of man.

The process of neutralizations therefore turns out to be a movement of progressive annihilation of human nature and its power over the world. Neutralizing thought, which Schmitt identifies with liberalism, is a great attempt at the expulsion of sovereignty from the social sphere [4]. In doing so, however, there is also the supreme possibility of the abdication of every issue to the computing power of the machine.

On the one hand, as we have said, every claim to neutrality (through law, technology, economics) turns out to be a partisan artifice for the promotion of one’s point of view. On the other hand, the risk of neutralization is that it absorbs everything and shapes the world in the image and likeness of nothingness.

Here we can advance all our reasoning and our prognosis on the issue of artificial intelligence. First of all, we must consider how it, like any product of technology, is culturally and politically determined by its creators. Considering the disciplinary roles towards society that it will certainly find itself fulfilling in the courts, it will be important to consider the scale of values according to which it can operate. On the other hand, if the fundamental question of the algorithm is that it develops its calculation and analysis capabilities, it is also true that it is informed by culturally determined systems of knowledge.

Furthermore, the use of artificial intelligence is also hypothesized for reading the large amounts of computer data stored by security agencies. The political value (in the polemical sense) of artificial intelligence is undoubted. The implementation of its use in military operations as in police operations will probably enjoy the justification of the neutrality of the algorithm, reaching new levels of intensification of violence through the excuse of

neutralization, as clearly foreseen by Carl Schmitt with respect to any analogous phenomenon [4].

Many proposals already advance the thesis of replacing various high-level professionals with artificial intelligence, such as the CEOs of large companies [11]. If artificial intelligence were to somehow take the place of policy makers and legislators, the question of normativism already raised in the diatribe between Schmitt and Kelsen would be proposed again on a further level and with greater intensity. The transfer of fundamental “decisions” into the hands of artificial intelligence would prove to be a retreat from the field of action of human freedom in its expressive forms of freedom and sovereignty.

However, it is in its use in reinforcement of the capabilities of mass surveillance that artificial intelligence shows its riskiest possibilities. In some pages of *Discipline and Punish* Foucault outlines the essential characteristics of the Benthamian Panopticon, a project that has often been compared to that of mass surveillance:

«An important device, because it automates and deindividualizes power. This finds its principle less in a person than in a certain programmed distribution of bodies, surfaces, lights, gazes; in an apparatus in which the internal mechanisms produce the relationship in which individuals are taken. The ceremonies, the rituals, the marks by which the most-of-power is manifested by the sovereign, are useless. There is a mechanism that ensures the asymmetry, the imbalance, the difference. Consequently, it matters little who exercises power. Any individual, chosen almost at random, can operate the machine: in the absence of the director, his family, friends, visitors, even the servants. Just as the motive that moves it is indifferent: the curiosity of an indiscreet, the malice of a child, the appetite for knowledge of a philosopher who wants to visit this museum of human nature, or the wickedness of those who take pleasure in spying and to punish. The more numerous these anonymous and transient observers are, the greater the risk of being surprised and the restless consciousness of being observed increase for the detainee. The *Panopticon* is a marvelous machine which, starting from the most diverse desires, produces homogeneous effects of power.

A real subjugation mechanically arises from a fictitious relationship. So that it is not necessary to resort to means of force to force the condemned to good conduct, the madman to calm, the worker to work, the pupil to apply, the sick to observe the prescriptions.

Bentham marvels that panoptic institutions could be so light: no more bars, chains, heavy locks; it is enough that the separations are clear and the openings well arranged. The power of the old “security houses”, with their fortress architecture, can be replaced by the simple and economic geometry of a “house of certainty”. The

² Carl Schmitt, *Il compimento della Riforma. Osservazioni e cenni su alcune nuove interpretazioni del Leviatano*, in *Sul Leviatano*, Il Mulino, Bologna 2011, pp. 161-162 [translated from Italian].

efficacy of power, its constricting force, has somehow passed over to the other side — to the side of the surface of application. He who is subjected to a field of vision, and who knows it, takes the constraints of power into account; he makes them play spontaneously on himself; he inscribes in himself the power relationship in which he plays the two roles simultaneously, it becomes the principle of his own subjugation. In fact, even the external power can lighten its physical burdens, tend towards the incorporeal; and the closer he gets to this limit, the more his effects are constant, profound, acquired once and for all, incessantly brought back: perpetual victory that avoids any physical confrontation and that is always played in advance» [12].

The most important feature of this control device is depersonalization, a fundamental attribute of the neutralization process that liberalism has carried out in history, according to Schmitt. The conclusion of the era of discipline imparted in the name of a personal authority within a system of royal sovereignty is the topic investigated in *Discipline and Punish*. It is replaced by a completely different method, fed by another conception of the world, which is opposed to human arbitrariness. The *deus ex machina* is the most direct result.

Artificial intelligence, in its many possibilities, cannot be distinguished from any other technological means. Of course, it represents one of the most important developments in human technology, but like any other product of technology, it should be evaluated for pros and cons on the basis of clear ethical principles and with an eye to future possibilities. Attention to the possibility of transformation of the fundamental attributes of the human being by technology is never enough, and special attention should be paid to the ideologies that move and that take advantage of technological development.

The impact of artificial intelligence must thus also be measured with respect to the sphere of jurisprudence, where it must be considered as a pure product of the world of human culture, and as such closely connected to all those nuances of human life that have characterized its existence until now. The actual risk is that of the possibility of an overriding of the law by an artificial intelligence which, through its estimates, can influence the decision-making processes of policy makers or judges.

Yet another problem arising from the question of artificial intelligence, and closely linked with the decisionist theses, is the possibility that it crystallizes, through the self-multiplication of the code lines of its algorithms, the stage of thought we have reached this historical phase, or to which the political or economic power that will build it has reached. This would ultimately annihilate that imaginative possibility that resides in human intuition, thanks to which the sciences as we know them were also formed.

It would close the possibility of the exceptionality and what derives from it, from every point of view.

The two problems arising from the question of technology in general, and from that of artificial intelligence in particular, therefore seem to converge: if on the one hand the technique is a tool of any ideology, but ultimately allows itself to be employed by the theses of neutralization, these same theses that presuppose its necessary dominion to escape from the field of human arbitrariness. The danger lies in that concept that Carl Schmitt already attributed to Karl Marx: «a society built exclusively on progressive technology [...] would soon destroy itself and its technology [3]».

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ARTIFICIAL INTELLIGENCE AND AUTHORSHIP OF INTELLECTUAL PROPERTY

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Abstract. The appearance of the extremely powerful artificial intelligence chatbot “ChatGPT” in late 2022 has made urgent the finding of solutions to the questions of the authorship and protectability of works created with the aid of artificial intelligence. These questions are particularly acute in the areas of copyright and patent law where human creativity traditionally has been a requirement for protection. The present article discusses these issues in the light of experiments with ChatGPT.

Keywords: artificial intelligence, copyright, patents, trademarks, trade secrets, ChatGPT, chatbots, law, authorship

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In writing this Article I used Version 3.5 of ChatGPT (short for Chat Generative Pre-trained Transformer), a chatbot made available to the public in November 2022 by OpenAI in November 2022. Version 4.0 of ChatGPT became available in March 2022. It is much more powerful. For instance, Version 3.5 made an mediocre score on the examination used by many states in the United States for admission to the practice of law. In contrast Version 4.0 made an excellent showing on the same exam [1].

I asked ChatGPT: “What are the problems of authorship by AI in copyright and patent law?” It gave me the following answer:

“The increasing use of artificial intelligence (AI) in creative works has raised questions about the authorship and ownership of such works. While AI can generate unique and original content, it is currently incapable of legal personhood, raising concerns about who owns the rights to the work.

In copyright law, the traditional notion of authorship is based on human creativity, skill, and effort. Copyright protects original works of authorship fixed in any tangible medium of expression, and the author has the exclusive right to reproduce, distribute, display, and perform their work. However, when AI is used to create a work, it is difficult to determine who the author is, as the contribution of the programmer and the AI system can be significant. It is also unclear whether the traditional standards of originality and creativity apply to AI-generated works.

In patent law, inventorship is similarly based on human contribution, and a person who conceives of an inven-

tion is entitled to a patent. However, if AI systems are involved in the process of inventing, it is unclear whether they can be listed as inventors or co-inventors, as they are not legal persons.

Another issue is the potential for AI-generated works to infringe on the copyrights or patents of existing works. If an AI system is trained on existing copyrighted or patented material, it may generate works that are too similar to those protected by intellectual property rights. This raises questions about whether the use of AI in creative works could lead to an increase in copyright and patent infringement.

Overall, the problems of authorship by AI in copyright and patent law are complex and require careful consideration by legal scholars and policymakers”.

ChatGPT’s training data base did not include material after 2021. I would like to give an updated and more detailed answer to this question, specifically with respect to United States intellectual property law.

The starting point is a leading Supreme Court case, decided in 1884 [2]. This case concerned whether or not a portrait of the famous author Oscar Wilde could be protected by copyright, given that a camera had played a key role in the making of the photograph.



Pic. 1. Portrait of Oscar Wilde

The Supreme Court ruled in favor of copyright protection, on the finding that the photograph was:

“a useful, new, harmonious, characteristic, and graceful picture, and that plaintiff made the same ... entirely from his own original mental conception, to which he gave visible form by posing the said Oscar Wilde in front of the camera, selecting and arranging the costume, draperies, and other various accessories in said photograph, arranging the subject so as to present graceful outlines, arranging and disposing the light and shade, suggesting and evoking the desired expression, and from such disposition, arrangement, or representation, made entirely by plaintiff, he produced the picture in suit”.

In contrast to this case, a federal court ruled that no copyright was available, because of lack of human creativity when a monkey took an excellent selfie [3]:



Pic. 2. Selfie made by a monkey

Unlike most countries, and in possible violation of the Berne Convention, the United States requires that works be registered to obtain full copyright protection. In 2022, the Copyright Office denied registration to a picture created entirely by artificial intelligence [4].

On March 16, 2023, the Copyright Office, drawing on the cases described above, issued detailed guidance on works created with the aid of artificial intelligence [5]. It stated:



Pic. 3. Picture generated by AI

“Consistent with the Office’s policies described above, applicants have a duty to disclose the inclusion of AI-generated content in a work submitted for registration and to provide a brief explanation of the human author’s contributions to the work”.

In addition to the pictorial works discussed above, copyright also applies to written works. However, a federal court has held that a work described by the parties as a collection of sayings “authored by non-human spiritual beings described in terms such as the Divine Counselor, the Chief of the Corps of Superuniverse Personalities, and the Chief of the Archangels of Nebadon” [6] could be protected by copyright for its selection and ordering of the “sayings” but that the individual “sayings” could not be copyright because they were not stated to be by a human author.

Consider the following (with my apologies to the Heinrich Heine and Mikhail Lermontov). I asked ChatGPT (in Russian) to write a short poem about a spruce in the north and a palm tree in the south.

ChatGPT:
(Google translation)

*“In the north, a pine sways in the wind,
In winter it is covered with snow, white and fluffy.
And in the south a palm tree, caressed by the sun,
The leaves are soft, full of warmth”.*

(My translation)

“The pine in the north with the wind may lean,
Covered in winter by snow, white and clean;
The palm in the south, touched by sun’s rays
With its fronds all soft and ablaze”.

It is well established that not only great poems, but also bad poems are protected by copyright. Thus the poem produced by ChatGPT is not copyrightable be-

cause not created by a human, even though it would be copyrightable if written by a human.

Likewise the English translation made Google Translate is not copyrightable because not made by a human. However, your humble servant’s bad translation of the uncopyrightable poem is protected by copyright, because even a bad human translation is protected by copyright. This suggests an interesting strategy. In 1997 someone published a purported translation of the 13th century diary of a European traveler, who purportedly visited China before Marco Polo. However, he stated that he withheld the original manuscript [7]. Assuming for the purpose of discussion that the diary is genuine, it would, after 700 years, be in the public domain. However, by publishing a translation and withholding the original, the author of the translation obtained copyright protection for the only available version of the diary.

ChatGPT can write computer code. I asked ChatGPT: “Write a program in the c language that prints “Hello World””.

ChatGPT:

Here’s a simple C program that prints “Hello World” to the console:

```
#include <stdio.h>
int main() {
    printf(“Hello World\n”);
    return 0;
}
```

Complex questions will arise with respect to the extent of disclosure of artificial intelligence elements required to register copyright to computer code.

Patent law raises questions similar to copyright law. Consider the response of ChatGPT when asked (in Russian) to invent a bicycle (“Изобрети велосипед”). It provides some very good ideas for things that people might try to invent, but is very far from anything that could be submitted as a patent application. Here’s ChatGPT’s reply in Russian with my translation added.

ChatGPT:

As an artificial intelligence, I am not an expert in the area of designing bicycles, but I can suggest some ideas that might be interesting.

1. *LED wheels: a bicycle with plastic wheels with LEDs of various colors mounted in them. This could be useful for safety at night or low visibility and also for a beautiful effect.*

2. *A bicycle with solar panels: a bicycle that could be charged with by solar panels placed on the frame. This*

could be particularly useful for long trips when there is no way to charge the battery of the bicycle.

3. An electric bicycle with an advanced navigation system: a bicycle provided with a modern GPS-navigation system. This could be useful for those that love to ride in unfamiliar places and could warn them of threatening danger.

4. A bicycle with a universal handlebar: a velocipede with a handlebar that could be mounted in any direction. This could be useful for those who have problems with vision or steering when it was necessary to go in a very narrow space.

5. A folding transformable bicycle: a bicycle that easily could be folded and transformed into other types of transport — for instance into a skateboard or scooter. This could be particularly useful for travel in town, when it is necessary to switch quickly to other setups.

In the paragraph 3 of its answer ChatGPT, to my surprise, made a very basic mistake in Russian grammar. It said “предупреждать они”, which I have translated as “warn they” using the analogous mistake in English grammar. Perhaps this mistake gives some clue as to how ChatGPT operates. Undoubtedly, this and similar problems will be fixed in improved versions of the chatbot.

The situation is very different with respect to trademark law. In the United States trademarks must meet various specific requirements, such as identifying goods of a particular maker, not being confusingly close to existing trademarks, and as not being generic names. However, there is no requirement of human creativity. Consider the following reply by ChatGPT when I asked “Suggest a trademark for a new electric car company.”

ChatGPT:
Elevatelectric

This mark not only meets the legal requirements. It also has a positive tone that might be useful in selling electric vehicles.

Trade secrets are protected if they have economic value and are not publicly available. Since there is no requirement of creativity, information created by artificial intelligence can be fully protected if it meets the general trade secrecy requirements.

Now, I return to a warning that ChatGPT gave to me. As I mentioned above, it said:

“Another issue is the potential for AI-generated works to infringe on the copyrights or patents of existing works.

If an AI system is trained on existing copyrighted or patented material, it may generate works that are too similar to those protected by intellectual property rights. This raises questions about whether the use of AI in creative works could lead to an increase in copyright and patent infringement”.

Getty Images, a leading supplier of stock photographs has filed suit against an artificial intelligence company, alleging [8]:

This case arises from Stability AI’s brazen infringement of Getty Images’ intellectual property on a staggering scale. Upon information and belief, Stability AI has copied more than 12 million photographs from Getty Images’ collection, along with the associated captions and metadata, without permission from or compensation to Getty Images, as part of its efforts to build a competing business. As part of its unlawful scheme, Stability AI has removed or altered Getty Images’ copyright management information, provided false copyright management information, and infringed Getty Images’ famous trademarks.

This case alleges copyright infringement at the stage of training of an artificial intelligence system. There may (or may not) be a defense of “transformative fair use,” since the defendant may claim that it is not duplicating Getty’s product but rather is merely using it as data to create a completely different and highly useful product. However, if the resulting output to users includes images identical or highly similar to the photographs in Getty Images’ Collection, Getty would have a straightforward claim of copyright infringement.

To conclude, I fully agree with ChatGPT’s statement that:

“Overall, the problems of authorship by AI in copyright and patent law are complex and require careful consideration by legal scholars and policymakers”.

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About the UNESCO Chair on Copyright, Neighboring, Cultural and Information Rights at HSE University

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The International Scientific and Educational Center “UNESCO Chair on Copyright, Neighboring, Cultural and Information Rights” (abbreviated as “UNESCO Chair at the HSE University”) was built by the decision of the Academic Council of the HSE University in October 2020 under the Agreement between UNESCO and the National Research University Higher School of Economics (HSE University) dated August 7, 2020.

The Center traces its history back to the UNESCO Chair on Copyright and Other Intellectual Property Rights, established by initiative of the Permanent Representative of the Russian Federation to UNESCO in 1993–1998, Ambassador Extraordinary and Plenipotentiary of the Russian Federation (ret.), Doctor of Legal Sciences, Professor Mi A.S. Griboyedov (Moscow University) was signed on June 12, 1994. The Chair cooperates with the UNESCO Institute for Information Technologies in Education and the Commission of the Russian Federation for UNESCO.

The UNESCO Chair realizes versatile research, education, consulting, and expert activities in the field of freedom of creativity and freedom of expression, legal and ethical aspects of information pluralism. The Chair works on the progress of the informational society and multilingualism in cyberspace. The Chair toils on overcoming the digital divide, transhumanism technologies, and the impact of artificial intelligence on social and legal institutions. All this requires the stable functioning of the Science of Russia). The journal is presented in the Russian Science Citation Index (RSCI).

The latest issue and archive of the journal are on the website of the UNESCO Chair: <https://hse.ru/unesco/tis>; and on the journal web page <https://tis.hse.ru/>.

The UNESCO Chair at the HSE University also publishes a monthly newsletter “Sreda”, distributed free of charge in electronic form by subscription. The newsletter contains information about normative legal acts coming into force, drafts of new laws, decrees and resolutions, precedent judicial decisions, past and upcoming scientific conferences, seminars, forums, etc.

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