

Subject: “Fairness, Morality and Public Order in Intellectual Property: Harmony and Dissonance (Russian Experience)”

1. The concept of intellectual property (as the combination of rights to works, performances, inventions and other objects, according to cl. VIII, Art. 2 of the Stockholm Convention Establishing the WIPO) closely relates to the categories of fairness, morality and public order. The Russian experience shows either conformity (i.e. Harmony) of rules of copyright, patent and other rights to these categories or non-conformity thereto, i.e. Dissonance.

In accordance with the categories listed and provisions of the major international conventions (Paris Convention, Bern Convention, TRIPS Agreement, etc.), the Civil Code of the Russian Federation (hereinafter referred to as the CCRF) does not recognize as objects of patent rights, in particular, methods of human cloning and a human clone, as well as patentable results of intellectual activity, “if they contradict the public interest, principles of humanity and morality”.

2. Provisions of the CCRF restricting exclusive rights (Art. 1273-1279, 1306, 1359, 1360, 1361, 1400, 1422 and 1456) meet the requirements of fairness, morality and public order (i.e., show Harmony). However, the proposals for the use of “free licenses”, such as Creative Commons, and especially the so-called “global licenses” in the Internet in Russia that are considered unfair by many right holders sound as dissonant. Moreover, Russia tightens legislative measures aimed at combating the so-called “intellectual piracy” (Law No. 187-FZ dated 02.07.2013 and Law No. 364-FZ dated 24.11.2014).

3. Cl. 3, Art. 1252 of the CCRF enabling the owner of exclusive copyright, related right, patent right and trademark right to require for compensation (instead of reimbursement for damages) for the infringement of this right is harmonious with the requirements of justice and public order. Pursuant to cl. 3, Art. 1252 of the Civil Code of the Russian Federation, “the amount of compensation is determined by the court” “based on the requirements of reasonableness and fairness”.

However, amounts of compensation ranging from RUB 10,000 to RUB 5,000,000 (approximately from USD 166 to USD 8,333), as established by provisions of cl. 1, Art. 1301, cl. 1, Art. 1311 and cl. 1, Art. 1515 of the CCRF, obviously contradict both the rules of fairness and morality and the requirements of public order. Therefore, it is not a coincidence that Decree of the Constitutional Court of the Russian Federation dated 13.12.2016 No. 25-P recognizes these norms as non-conforming to the Constitution of the Russian Federation.

4. The rules of collective administration of exclusive copyright and related rights (Art. 1242-1244, 1244.1, 1245 of the CCRF) are rather fair and moral, i.e. harmonious. However, cl. 3, Art. 1244 of the CCRF brings dissonance because it stipulates that the accredited administration company “may along with administration of rights of the right holders with which it concluded contracts”, “exercise administration of rights and collect remuneration for the right holders with which it did not conclude contracts”.

5. Based on the traditional European continental statutory civil law system, the total codification of the intellectual property right was conducted in Russia according to Law No. 230-FZ dated 18.12.2006. Part 4 of the CCRF (Art. 1225-1551) entered into force on January 1, 2008. However, the abolition of six formerly applicable federal laws on copyright, related, patent and other rights from the same date sounds dissonant to the above event.

Furthermore, the concept of intellectual property as “protected results of intellectual activity and means of individualization” (Art. 128, cl. 1, Art. 1225 of the Civil Code of the Russian Federation) brings dissonance in the Russian intellectual property law as contradicting the provisions of cl. VIII, Art. 2 of the Convention Establishing the WIPO signed in Stockholm. According to the Convention, “intellectual property shall include rights” relating to, in particular, “literary, artistic and scientific works, radio and television broadcasts, inventions in all fields of human endeavor”.