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**BUILDING RESPECT FOR  
COPYRIGHT: DIGITAL  
IMPERATIVE, INTANGIBLE  
CAPITAL AND RE-THINKING THE  
ROLE OF IP**

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## Introduction

When you think about raising the question of forming a respectful attitude to IP rights, then naturally the tasks and methods of fight against piracy and counterfeiting come to the foreground. And this is true, but under the condition of traditional understanding of modern IP, when a disparaging attitude to the property of creators and rights holders is fraught with significant damage for the development of economy and culture, understood in a broad sense.

It is also true that the formation of an IP culture is achievable with continued attention to public awareness about the essence of IP rights, the growth of the competence of all layers of the public, including rights holders and users, information intermediaries and representatives of law enforcement and judicial bodies that protect these rights.

At the same time, modern understanding of IP and its functioning take place in a context that is very different from its traditional perception, and it caused by significant technological changes in the life of society. And this, in turn,

requires re-thinking and understanding the reasons and factors that contribute to disrespectful attitude to intellectual rights, and most importantly, the development of approaches and measures that prevent unwanted scenarios in the development of modern IP.

It is from this key moment that I would like to begin this presentation.

***“In future, it seems inevitable that technology will increasingly dictate the shape of the international architecture and its governance”***

(Francis Gurry, WIPO Magazine)

## **I. Modern Copyright and digital imperative**

1. Technologies will have an increasingly dramatic impact on the existing **IP landscape**. IP should not resist, but adapt to them. These changes are not in themselves negative, they must be accepted and understood in order to determine the future evolution of IP.

- ✓ *“The Internet changes everything, the scholars say. If copyright stands in the way, then you’ve got to change copyright.”* (E.Samuels).
- ✓ Despite the fact that the history of copyright XIX-XX centuries. - the history of adaptation of legal norms to constantly changing technologies (telegraph, camera, radio, recording devices, computer), the Internet and the information technologies generated by it have cardinal features that leave a mark on the law.

- ✓ Along with the growth in the number of legitimate use of IP objects on the Internet, the number of violations of moral and property rights is increasing, which associated with the distribution of literary and musical works without the consent of right holders, the trade of counterfeit goods, the registration of domain names that come into conflict with the rights to trademarks, etc., and such violations are trans-boundary in nature, therefore, the question arises about the impact of exclusive rights on the results of intellectual activity.
- ✓ Obviously, Internet users have gained technological advantages due to new platforms of interaction already within the framework of Web-2.0, and due to the very specifics of digital content, in contrast to works in the traditional sense, for the protection of which copyright arose. Thus, the balance between the availability of works on the Internet for users and the stimulation of creators and distributors of copyright objects was broken in favour of the former.
- ✓ Indeed, Internet services and platforms in the framework of Web-2.0, such as Wikipedia, Facebook, Myspace, platforms for user-

generated content, such as Youtube or Flickr, blogs (Twitter), peer-to-peer networks P2P, file-sharing networks (Bit Torrent ), etc., expand the interaction in the exchange of information, thereby creating conditions for unauthorized users that contribute to infringement of copyright. Web 3.0, which came into force and focused on a specific user, will further exacerbate the situation by providing even greater integration and cross-border information space, equipped with "cloud" computing.

- ✓ Along with this, there is a legal degeneration of works turned into digital content. First, due to the information nature of content, the importance of the content of information increases, i.e. the content of the object of copyright, and, in parallel, weaken the notion of form, which protected by copyright. Secondly, new digital forms of creativity arise, such as fragmentation, mixing, mashing, sampling, etc., which blurs the form of the work in the form of content. Furthermore, the prohibitive function of the exclusive right works badly, otherwise the laws of value behave, the notion "copy"

changes its meaning and the notion of "access" becomes more important.

- ✓ **For this reason, here exists an opinion that there is a fundamental contradiction between the territorial nature of IP rights and the cross-border global nature of the Internet and the information nature of the content.** This contradiction touches on many issues of international private law, and in particular, new approaches to understanding the rights of Copyright, as well as the establishment of international jurisdiction and the law to be applied. It is the use of electronic cross-border means of communication, including the Internet, cable TV and radio, which facilitate cross-border disputes involving violations of exclusive rights, and that issue was the subject of a study conducted in 2015 under the auspices of WIPO.

**2.** Digital problems of Copyright unfold on the background of a common digital revolution, which is the formation of a new reality, based on the "digitalization" of production and social processes.

- The new digital era is expressed in the application of integrated industrial networks with using the artificial intelligence (AI), the widespread use of high-speed Internet and the Industrial Internet (Internet of things), the introduction of cyber physical systems and neuro-technologies with a fundamentally new mechanism of human interaction and robotic devices, the application of automatic identification services, collection and processing of global databases (big data), cloud "smart" robotic complexes and industrial objects (smart everything), in the development of social networks and a variety of platforms and services in the digital environment, IT communications, including the Internet.
- In this case, the information flow in the digital space grows exponentially. **Each day, 2.5 quintillion data bytes are created, which means that 90% of all data in the world is created only in the last 2 years.**
- Digitization, while developing, stimulates new changes and technological innovations, and they, in turn, rise difficult legal problems in the digital ecosystem, namely, the preservation of personal data in the Internet and the

maintenance of cyber security, the protection of intellectual rights and other constitutional rights of citizens, maintenance of the legality of digital services, protection of the information of critical infrastructure and cloud technologies, ensuring inviolability of private life.

- **It is appropriate to make the following digression** regarding the digital paradigm and its impact on modern IP. The discussion on this issue was initiated by I.Hargreaves in connection with the adoption by the UK in 2010 the Digital Economy Act, later replaced by the new law with the same name from 2017, which expanded the rights of the supervisory authority in the field of IT communications (Ofcom) on the control over the observance of copyright and the expanded jurisdiction of courts for the protection of rights holders, the interests of Internet operators and Internet users (See: Ian Hargreaves. Digital Opportunity: A Review of Intellectual Property and Growth. London: HM Government, 2011. – C.53: <http://www.ipo.gov.uk/ipreview-finalreport.pdf>.; Digital Economy Act. 2017: [http://www.legislation.gov.uk/ukpga/2017/30/pdfs/ukpga\\_20170030\\_en.pdf](http://www.legislation.gov.uk/ukpga/2017/30/pdfs/ukpga_20170030_en.pdf).)
- Digital innovations create an orientation that, following Kant, which considered by experts as

a **peculiar imperative** (i.e., prescription, behaviour resulting from the characteristics of digital technologies), the "**digital imperative**", as analysts from BCG (Boston Consulting Group) called [See: "Mastering the Digital Imperative". Digital BCG, 2017, <https://www.bcg.com/expertise/digital-bcg/default.aspx>].

- **What conclusions follow from the recognition of the digital imperative?**
- **The digital imperative, as noted above, affects the legal regulation mechanism in general and, in particular, in the field of IP, in such a way that often the methods and algorithms of IP circulation, as well as protection of IP rights cannot be mechanically applied in the digital environment. The copyrighted content, freed from the material shell, acquires additional commercial value, since it is possible to deliver it to any point of the globe with minimal costs and additional consumer properties. This property of content causes the globalization of the use of works, including unlawful, and simultaneously increases the investment**

**value of culture, science, education, business and entertainment.**

- Law, as is known for decades, if not centuries, was considered as the main means of forming policy in the field of copyright. However, in the digital environment, as dr. F.Gurry notes, it turned out to be quite tough, and even a limited tool, because in the digital environment with its traffic volume and international, multi-jurisdictional nature, the territorial principle of copyright was weighed in comparison with its action in the physical world. But from this territorial cell, in which it turned out, economic and technological institutions have already escaped. Even the culture of the Internet is now such that the platforms it offers affect the behaviour in the same, if not to a greater extent, than the law. In short, in order for the right to retain its position as the final arbiter in politics, in copyright it must make room for platforms and the Internet culture that they generate. And this is confirmed by the state of the crisis of traditional copyright, when reliance only on the model of tightening traditional copyright does not bring tangible results. It is not by chance that the international and

national legislative initiatives to strengthen the fight against piracy such as ACTA, PIPA and SOPA based on these principles have not entered into force, the French law HADOPI, which provided three-strike procedure to violators with a final blocking their site, was revoked.

### **3. What kind of changes are expected in the field of IP management in connection with the digital imperative?**

- New information-technological solutions will create new opportunities for managing the increasing demand for IP rights, stimulated by the growing role of IP in the knowledge-based economy. The current IP system, according to experts, is capable of solving many new tasks, but not all, because there are fields that are problematic for both IP and other policy fields. Francis Gurry in “The future of intellectual property: opportunities and challenges” (WIPO Magazine, October 2017), considered the application of IT in the field of life sciences and artificial intelligence to those tasks.

According to F.Gurry, in addition to policymaking challenges, a system challenges

also arise, one of which relates to the fundamental principle of transparency upon which the existing IP system is built, since all those who seek an IP right must fulfil an important condition of publicly disclosing certain information about the new technologies, products, services or object of copyright. And thanks to this principle, others find out who owns IP rights and the scope of them, which in turn facilitates the exchange and use of these rights and, as a result, supports of technological development, business and social progress. This function undertakes by the public sector, which held public records of property rights, usually IP offices, and the emergence of new technologies such as “**blockchain**”, which offers a secure means of record keeping, can be expected to further blur the lines between the public and private spheres. “Blockchain” technology does so by means of a private technology rather than a public register. **There are interesting experimentations with blockchain in the copyright sphere**, and it can easily foresee its application in all areas of IP licensing. Thus, with “blockchain” technology the private sector may become an ancillary record keeper. That is why, according to Francis Gurry,

we need to consider what impact that will have on the transparency of the market for knowledge goods, will it improve IP rights management systems? However, certainly this technology has huge potential.

## **II. Intangible capital and re-thinking the role of IP**

Along with the digital imperative, there are extremely important factors that shape the context of the functioning of IP.

1. As noted in the recently published WIPO study on the current state of IP, entitled "Intangible Capital in Global Value Chains" (WIPR, 2017), over the past few decades, the wealth creation centre has moved away from tangible assets, i.e., physical capital to intangible assets, or intellectual capital (capital, based on knowledge). This is manifested in the sphere of investments.

- This important transition explaining the context of the functioning of IP is confirmed by the fact that in the economy of a number of industrially developed countries more investments are invested in capital based on knowledge than in physical capital, and the growth rate of capital investments based on knowledge is steadily outstripping the growth rate of investments in physical capital, and this transition, naturally, entails a change in the focus of competition,

which is increasingly aimed at obtaining a competitive advantage stemming from knowledge-based capital. That is why we see a growing rate of investment in capital, based on knowledge. The competitive advantage provided by capital, based on knowledge is expressed in the form of innovations that cover all technological, design, organizational and marketing information used for commercialization of new products, services or processes.

2. The WIPO study showed that almost one-third of the value of manufactured goods sold around the world was based on "intangible capital", such as brand, industrial design and technology. **"Intangible capital will increasingly determine the well-being and fate of firms within the framework of modern global production-marketing chains"** (WIPO Director General Francis Gurry). This amount is about 5.9 trillion. US dollars - shows that intangible capital accounts for twice as much of the value of manufactured goods as it does for buildings, equipment and other forms of material capital. It also confirms the growing role of

intellectual property rights, which are often used to protect intangible and related assets in the world economy.

**Let's emphasize some of the conclusions made in the World Intellectual Property Report (WIPR) 2017:**

- In the period 2000-2014, intangible capital accounted for an average of 30.4 percent of the value of all sold industrial goods.
- The share of intangible capital increased from 27.8 percent in 2000 to 31.9 percent in 2007, but since then it has remained almost unchanged.
- The total income from intangible assets in the period from 2004 to 2014 grew by 75 percent in real terms, amounting to 5.9 trillion US dollars in 2014.
- The three commodity groups - food products, motor vehicles and textiles – accounted for almost 50 percent of all income generated by intangible capital in global value chains.

The report notes for "converting raw materials into parts and components, assembling final products and delivering them to the end consumer involves supply chains that span an increasing number of economies across the

globe. These chains are in development, they lead to economic growth and integration of economies, and contribute to the globalization of production.

Intangible capital – notably in the form of technology, design and branding – permeates global value chains in important ways.

The research shows that pre-production and post-production stages play an increasingly role compared to the production stage and they form a large share of the total cost of production. It is these stages that reflect intangible capital – in the form of technology, design and brand values, as well as worker's skills and managerial know-how.

In this regard, the study emphasizes that of the three factors of production - labor, intangible capital and material capital in the formation of the value of the main component is the intangible capital, twice the share of material capital.

**3.** Another important transition, explaining the context of the functioning of modern IP, is a geopolitical transition from West to East. Francis Gurry's point of view is confirmed by factors introduced into the production of knowledge, as well as by the final results (While in 1994 Japan,

China and Korea accounted for 7.6% of all international patent applications, in 2012 it is already 38%, which is more than the share of the EU or the USA).

➤ **Another transition**, as noted in the work of Francis Gurry "Re-thinking the role of intellectual property" is associated with the spread in the society of the original state monopoly on information and thereby, thanks to the Internet and social networks, the ability of society to influence politics. **All three transitions have occurred against a backdrop of globalization caused by the digital imperative.**

➤ Another systemic problem is associated with the generation of colossal data sets taking into account the "Internet of things" and implies the existence of such ones that fall outside the traditional categories of the IP system. Therefore, for their protection, they often resort to **commercial secret**.

As Francis Gurry notes, "major online platforms like Facebook and YouTube are creating vast quantities of valuable data from their activities. This gives them, and indeed all those who hold such data stores, a significant

economic opportunity. There are, however, many complex **questions coming to the fore about the ownership** (in the traditional sense) of those data. These **questions also touch on privacy and security issues**. For example, who owns a person's data, or the data generated by a person's existence? Do we need to redefine ownership in relation to these data, and the rights and obligations that attach to them?" In the opinion of F.Gurry, "**while some redefinition of property rights in relation to classes of data that fall outside classical IP categories appears inevitable**, any recasting of existing IP rights will depend on what policymakers want to achieve." Indeed, "if the goal is to encourage the collection and exploitation of data to enhance understanding of human health, policymakers will need to consider a range of questions. Do existing IP arrangements provide the right set of incentives to encourage this? Are additional incentives required? Does the behavior of "data collectors" need to be regulated? Laws governing trade secrets cover some of these questions, but our thinking really needs to develop around these evolving issues."

- Thus, the technologies that are creating these seismic shifts are **cross-disciplinary** – they touch on IP, ethics, privacy, security, and so on. Therefore, their implications for managing the international IP system are related to the fact that in the future they will dictate the form of the international architecture of IP and its management
- One of the systemic problems is the new business models of creating added value in the digital environment that provide reward to rights holders will encourage legal online trading. These models are developed within the framework of the concept of restoring the balance in the system of "Internet openness – copyright enforcement", which is now on the user side. In other words, legal trading or licensing should be carried out as simply as illegal use. In addition, as long as there is a discrepancy between the legal forms of content consumption and the expectations of Internet users, piracy will be aggravated, because these expectations are easier to satisfy with illegal than legal means. It is important to remember that it is impossible to reverse the technological advantages of one of the parties and the

changes generated by them, and therefore it is necessary to recognize the inevitability of the event, not to resist them, but to achieve intellectual interaction with them. **The choice is one - or the copyright system will adapt to the natural advantages received by Internet users, or it will die.**

- The essence of the new approach, according to many experts, is to re-think exclusive rights and replace the prohibition function with a positive function of free use, i.e. the use of content on the Internet becomes free, and restrictions on free use are removed. Such models are the open licenses of Creative Commons (CC), applied already in 54 countries of the world and, thus, prove their worth. Another variety of new approaches is also associated with free use, but with payment of a fee, i.e. with a compulsory (in relation to the right holder) license. These models are characterized by a difference in sources and rules of fee collection or compensation for rights holders. This position also corresponds to the purpose of copyright, which should not affect the technological possibilities for creative expression, and the resulting business models,

nor does it seek to preserve business models created on the base of obsolete and dying technologies. The purpose of copyright in cooperation with any and all technologies associated with the creation and dissemination of works in order to benefit from the cultural exchange generated by these technologies. "Copyright should be about promoting cultural dynamism, not preserving or promoting vested business interests", as said Dr. F. Garry, Director General of WIPO.

- We emphasize that this approach will be effective provided that at least a combination of law, infrastructure, accounting for changes in the sphere of culture and the best business models.