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TÍTULO: Derechos intelectuales en Rusia: el problema de la analogía de los derechos de propiedad y la introducción de la buena fe subjetiva.

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RESUMEN: La negativa a tener en cuenta la buena fe subjetiva en la formación de regímenes legales es definida por los autores como posible, concluyendo que en ausencia de un establecimiento directo de una ley sobre la contabilidad de la buena fe subjetiva como un elemento del régimen legal, un agente de la ley utiliza "sustitutos" normativos para lograr resultados comparables al uso de la buena fe subjetiva. Luego, al contar con herramientas suficientes para garantizar el buen funcionamiento de la buena fe subjetiva en el régimen legal de los derechos exclusivos, los autores emiten un juicio sobre la inevitabilidad de tal evento con la definición de la analogía de la ley o la analogía de la ley como los medios permisibles de tal evento.

PALABRAS CLAVES: analogía de la ley, derecho exclusivo, derecho de propiedad, buena fe subjetiva, acuerdo de licencia.

TITLE: Intellectual Rights in Russia: The Problem of analogy of property rights and the introduction of Subjective Good Faith.

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ABSTRACT: The refusal to take into account subjective good faith in the formation of legal regimes is defined by the authors as possible, concluding that in the absence of a direct establishment of a law on accounting for subjective good faith as an element of the legal regime of an exclusive right, a law enforcer uses normative "surrogates" to achieve results comparable to the use of subjective good faith. Then, the presence of sufficient tools to ensure the proper functioning of subjective good faith in the legal regime of exclusive rights, the authors make a judgment about the inevitability of such an event with the definition of the analogy of the law or the analogy of law as the permissible means of such an event.

KEY WORDS: law analogy, exclusive right, property right, subjective good faith, license agreement, lease agreement.

INTRODUCTION.

Subjective good faith in Russian law.

Subjective good faith in Russian law is a person's ignorance of certain circumstances, the presence of which the law considers it possible to associate certain legal consequences. The meaning of the category of subjective conscientiousness is to empower the subject, acting reasonably and prudently, with rights that under normal conditions should not have arisen with him.

An approximate correspondence of legal terms: "subjective good faith" in Russian is bona fide in Latin, good faith in English and guter Glaube in German.

Accounting for subjective good faith in the establishment and circulation of intellectual property rights by the Russian legal order, as well as by the overwhelming majority of foreign jurisdictions, is not directly recognized. Cautious attempts to borrow this construction in the traditional

methodology that has become for Russia from the rules on the establishment and protection of property rights face a direct prohibition set by the legislator in paragraph 3 of Art. 1227 of the Civil Code of the Russian Federation (Vershinina et al, 2014): “the provisions on the right of ownership and other property rights do not apply to intellectual property rights”. It seems that the regulatory load of this rule is misunderstood, but let's talk about this a little later.

Despite the fact that the turnover of intellectual property rights in Russia is still only at the initial stage of its formation, in the total volume of economic transactions is negligible[1]; however, the law enforcer faces legal conflicts, the fair resolution of which is simply impossible without taking into account subjective good faith, which leads to the resolution of decisions based on other rules of the law, which are used as certain surrogates of subjective good faith, allowing to achieve generally comparable results or even to the resolution of decisions in a format contra legem. Let us demonstrate the judgments with examples.

DEVELOPMENT.

1. Subjective good faith in the field of intellectual property rights: Russian judicial practice.

The licensee placed an order for the production of tangible media for an audiovisual work on the basis of a contract with the manufacturer. A year and a half after the placement and execution of the order, the license agreement was disqualified by the arbitration court in a dispute between the owner of the exclusive right and the licensee.

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[1] For 2018, in Russia in respect of exclusive rights to inventions, utility models, industrial designs, only 1193 administrative acts were committed, i.e. for the entire 2018, the turnover of exclusive rights to industrial property objects amounted to one thousand one hundred ninety-three transactions. Security transactions in respect of the same objects were made 8 (eight) pieces. (Annual Report of Rospatent for 2018, p. 163, [Electronic resource] // URL: https://rupto.ru/ru/about/reports (appeal date 08/04/2019)). For comparison: in 2018, 12 840 460 applications for state registration of rights were submitted to the body authorized in the field of state registration of rights; It was made exactly this number of administrative transactions. (Information on the activities of the Federal Service for State Registration, Cadastre and Cartography on State Cadastral Accounting and State Registration of Rights for 2018 (summary report on the Russian Federation) service / statistika-i-analitika / statisticheskaya-otchetnost / (appeal date 08/04/2019)). Comments are superfluous.

The rightholder applied for a joint recovery of compensation under Art. 1301 of the Civil Code of the Russian Federation, from the failed licensee and the manufacturer, while the manufacturer was imputed to a violation of Subp. 1 p. 2 Art. 1270 of the Civil Code of the Russian Federation (production of one or more copies of the work in the form of a video). The claim for compensation to the manufacturer was denied, and the rationale is doubtful from the point of view of the literal content of the applicable law: the arbitration courts of the appellate and cassation instances concluded that the manufacturer's actions were legitimate and there was no fault as sufficient grounds for refusing the claim. These are strange conclusions, given the fact that the very fact of making copies of the work was established, requirements for the failed licensee were satisfied.

Actually, the conclusion about the absence of guilt as the basis of adding responsibility is in direct contradiction with the legal position set forth in paragraph 23 of the Resolution of the Plenum of the Supreme Court of the Russian Federation No. 5, of the Plenum of the Supreme Arbitration Court of the Russian Federation No. 29 of 26.03.2009 "On some issues arising in connection with the introduction of the fourth part of the Civil Code", referring to the rules of Art. 401 of the Civil Code of the Russian Federation, which contains an unequivocal indication that the responsibility of professional merchants comes on the basis of causing[2] (Sarbash, 2007). In substantiating the questionable, from the point of view of a literal perception of positive prescriptions, the arbitration court of cassation consistently relied on a number of circumstances:

A) The fundamental legitimacy of the activities of the producer as a whole in the production of copies of an audiovisual work.

B) Subjective ignorance of the manufacturer about the incompetence of the counterparty (retrospectively failed to the licensor - the copyright holder).

[2] **All judicial acts are quoted, unless otherwise indicated, on the reference system "Consultant Plus" (http://www.consultant.ru/online/).**

C) The exculpatory nature of the producer's lack of information about entering into a contractual relationship with an unauthorized person, and this conclusion was made on the basis that when concluding an agreement for the production of an audiovisual work, the manufacturer was satisfied with the rights of the customer by requesting and reviewing copies of the license agreement and the original materials transfer act.

D) Qualifications for the loss of the legal basis on which the licensee could place an order for the production of copies of an audiovisual work, as being outside the control of the manufacturer: (literally from the text of the resolution): *"In the manufacture of the circulation of a controversial film .... I could not know that after a year and a half ... a license agreement ... will be declared unconcluded"*.

In order to strengthen their own judgments, the arbitration court of cassation, contrary to the provisions of Art. 16 of the Arbitration Procedure Code of the Russian Federation (hereinafter - APC RF), without examining the actual circumstances related to the disqualification of the license agreement as an unconcluded, stated that the defendant-manufacturer is not bound by the conclusions of the arbitration court in another case solely because participated, in effect declaring the license agreement in force for one of the defendants[3].

It seems obvious that the arbitration court of cassation actually described the composition of the application of subjective good faith in relation to the result of intellectual activity: in relation to the defendant-manufacturer. The decision to refuse to meet the requirements was made only on the grounds that at the time of using the result of intellectual activity he did not know and could not

[3] It is obvious that in this case the legal position stated in item is applicable. 4 Decisions of the Plenum of the Supreme Court of the Russian Federation № 10, Plenum of the Supreme arbitration court of the Russian Federation № 22 dated 29.04.2010 "On some issues arising in judicial practice in the resolution of disputes related to the protection of property rights and other real rights", which introduces a mechanism to overcome the principle of General validity of judicial acts, however, the reasons and circumstances for which was disqualified as a binding act in another case in the content of the decision of the arbitration court of cassation instance are not found, as well as the procedural activities of the parties and courts, aimed at finding the grounds for such application of the rules on the binding nature of judicial acts.

know that he was making such use on the basis of a contract with an unauthorized person[4] (Fallon, 2017; Berg, 2014; Martinez Pallares, 2018).

The arguments of arbitration courts, cited in support of the refusal, almost literally reproduce the legal position set forth in paragraph 12 of the Resolution of the Plenum of the Supreme Arbitration Court of the Russian Federation of 17.11.2011 No. 73 "On certain issues of the practice of applying the rules of the Civil Code of the Russian Federation on the lease agreement", which as one of the rationale hypotheses obviously has the category of subjective good faith, which, taking into account the qualification of the license agreement as a kind of close in its legal nature to the contractual structure of the lease agreement[5], allows us to conclude that we are talking about the direct application of the rules on subjective good faith in the relations of circulation of rights to the results of intellectual activity and equated to them means of individualization (Golubtsov, 2016; Tepedino, 2016).

When considering another case for recovery of compensation for the unlawful use of a trademark in the same methodology, the Court for Intellectual Property Rights came to comparable conclusions[6]. The rightholder of the trademark requested that the defendant be held accountable in the form of compensation in the amount of double the value of the goods for the unlawful, in the opinion of the claimant, use of the trademark. In the circumstances of the case, the defendant used the trademark under a license agreement concluded with the copyright holder, the basis of which exclusive right was refuted in the prescribed manner: the agreement to acquire the exclusive right to the trademark

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[4] See Court Decision on Intellectual Property Rights No. C01-815 / 2015 dated 10/01/2015 in case No. A40-190488, 2014 [Electronic resource] URL: http://kad.arbitr.ru/PdfDocument/e2219d92-9bc9-4b20-9ff9-b9588ca7fae/A40-190488-2014_20151001_Reshenija%20i%20postanovlenija.pdf (appeal date 08/04/2019).

[5] See Resolution of the Presidium of the Supreme Arbitration Court of the Russian Federation of 05.11.2013 No. on case No. A40-92833 / 11-110-768 // SAC RF Herald, 2014, No. 3. Literally from the text of the resolution: "Since the licensing agreement is the same as the lease agreement is an agreement on granting the object of civil rights to use, this position may also be extended to license agreements".

[6] See Court Decision on Intellectual Property Rights No. C01-339 / 2015 of July 28, 2015 on Case No. A05-9476, 2014. [Electronic resource]. (appeal date 05/28/2017). URL: http://kad.arbitr.ru/PdfDocument/9b25e808-6d0a-40a5-a030-d470cb7deb34/A05-9476-2014_20150728_Reshenija%20i%20postanovlenija.pdf

was declared invalid on the grounds established by the insolvency law (bankruptcy). The invalidity of the contract for the acquisition of an exclusive right to a trademark resulted in the invalidation of the license agreement concluded with the defendant, resulting in the latter qualified by the plaintiff as using the claimant's trademark in the absence of a statutory and contractual basis, which became the basis for filing claims compensation on the grounds provided (Art. 1515 of the Civil Code of the Russian Federation).

The claims were denied; however, as seen from the content of the decision of the arbitration court of cassation, such a basis, as in the previously described plot, was the conclusion about the legality of the actions and the absence of the defendant's guilt: «*actions of defendants on the use of a trademark prior to the recognition of contracts as invalid, do not constitute a guilty violation of the claimant's exclusive right to a trademark*».

It is obvious that the arbitration courts of three instances ignored not only abstract explanations regarding the absence of the necessity of accounting for guilt in the consideration of cases on recovery of compensation. Moreover, the questionable conclusion about guilt as the basis of liability was reinforced by another equally doubtful conclusion: in the opinion of the arbitration court of cassation, the behavior of the trademark user was legitimate only on the grounds that he acquired such a right and established his right in the state register of trademarks. At the same time, assessing the behavior of the defendant, the arbitral tribunal drew attention to the fact that the ground for invalidity could not be or was largely outside the control of the licensee-defendant.

Abstracting from the actual circumstances of both cases, it can be concluded that the arbitration courts supported the person who used or acquired the right to use the object of intellectual property rights and means of individualization from the person whose right was based on a credible attribute (contract) or was established in the public register, while the ability to verify the competence of the counterparty was absent. Under normal circumstances, such judgments are qualified as determining

the legal consequences of civil transactions in the light of subjective good faith (McMeel, 2017; Ponta, 2016).

Obviously, the above decisions are taken in the contra legem model, they directly contradict the provisions of paragraph 3 of Art. 1250 of the Civil Code of the Russian Federation in the part in which responsibility is incurred regardless of guilt, and Art. 167 of the Civil Code of the Russian Federation, according to which an invalid transaction does not entail any consequences from the moment of its conclusion.

It is hard to believe that the compositions of arbitration courts are not aware of the grounds for the liability of professional traders or of the consequences of qualifying a transaction as invalid. It seems that when considering specific cases, faced with the unfair consequences of applying positive prescriptions, the courts have no other option than to make decisions that are questionable from the point of view of the law, but true from the point of view of justice.

Such behaviors of the courts are not the only methodological methods of evading the assessment of the behavior of participants in civil turnover, with or without subjective good faith, with the resolution of fair judicial acts. Other methods are the refusal to discuss the relevant issue with the discovery of a tool to achieve the desired result in the content of other standards or the use of the least negative consequences in relation to the flawlessly acting defendant (Ajallooeian et al, 2015; Shirvani et al, 2015).

One such example is an arbitration case, which fell into the evaluation orbit of the Supreme Court of the Russian Federation, in which the subject of consideration was claims for the restoration of exclusive rights to trademarks against the copyright holder, who acquired such on the basis of a number of consecutive transactions. From the content of judicial acts in the case it is clearly seen that the plaintiff was authentically aware (or at least feared) that when resolving his claims a legal

position would be applied, abstracted from the peculiarities of the legal regime of things[7]. This legal position boils down to the fact that the recognition of a transaction as void by itself does not entail automatic restoration of rights, and the application of the consequences of invalidity or the declaration of a different requirement, which will be a tool for restoration of rights, in particular, the requirement to restore the right in kind, which in relation to things referred to as vindication. At the same time, without a doubt, the claimant realized that in his case the application of the consequences of invalidity was an unsuitable method of restoration of rights, since it was a personal demand and possible only against the party to the transaction (Kozhabergenova et al, 2018).

In the case considered by the Supreme Court of the Russian Federation, it was not possible to apply Art. 167 of the Civil Code of the Russian Federation against the defendant, since the latter was not a party to the transaction with the plaintiff, the plaintiff did not carry out a transaction for the transfer of the exclusive right to the trademark to the defendant.

The Supreme Court of the Russian Federation granted the plaintiff's claims with reference to paragraph 2 of Art. 1488 of the Civil Code of the Russian Federation, at the same time resolving two issues: on the basis of the invalidity of the transaction and on the principal possibility of preserving the exclusive right to a trademark for the defendant. The reason for the disqualification of the transaction, and apparently, the exclusive right of the defendant, in the version of the Supreme Court of the Russian Federation, was the interest of third parties (or public interest that in the context of

[7] The legal position set forth in the content of the Resolution of the Constitutional Court of the Russian Federation of April 21, 2003 No. 6-P "On the case of verifying the constitutionality of the provisions of paragraphs 1 and 2 of Article 167 of the Civil Code of the Russian Federation in connection with the complaints of O.M. Marinicheva, A.V. Nemirovskaya, Z.A. Sklyanova, R.M. Sklyanova and V.M. Shiryaeva "and p. 52 of the Resolution of the Plenum of the Supreme Court of the Russian Federation No. 10, the Plenum of the Supreme Arbitration Court of the Russian Federation No. 22 of April 29, 2010" On some issues arising in judicial practice in resolving disputes relating to the protection of property rights and other real rights".

the case is almost identical), which could be misled regarding the manufacturer of retention of exclusive rights for the defendant[8].

Public interest (interests of third parties) served as the basis for restoring the rights of the plaintiff and at the same time using judicial "evasion" from resolving issues of applying the consequences of invalidity and silencing the possibility of adjusting the registry of intellectual property rights in the absence of a corresponding conclusion in the resolution part of the judicial act. The question of how the exclusive right to trademarks was restored to the plaintiff remained unanswered[9]. Apparently, the Supreme Court of the Russian Federation believed that the decision it passed was implicit, somewhere in the depth of its content, contains an indication to the authorized state body to make adjustments in the well-known registry, which he did.

Resolution of decisions in favor of the right holders in the format of "Pyrrhic victory" is a different way of avoiding the resolution of disputes in accordance with the actual economic content of such. In consideration of one of the cases concerning the recovery of compensation for copyright infringement on a photo, the Supreme Arbitration Court of the Russian Federation, having established that the defendant could not under any circumstances prevent the violation of exclusive rights while the plaintiff's questionable conduct was canceled, canceled the court proceedings and created all the conditions for the application of measures of responsibility to the flawlessly acting person to be minimal. This led to the arbitration court of first instance deciding to satisfy the claimant's claims in an amount that did not even compensate for the costs of the proceedings[10].

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[8] See Definition of the Supreme Court of the Russian Federation No. 305-ЭС15-4129 dated February 10, 2017 in case No. A40-48196 / 2013 [Electronic resource] // URL: http://kad.arbitr.ru/PdfDocument/09075e31-3303-4646-9656-f07fe595ced6/A40-48196-2013_20170210_Opredelenie.pdf (appeal date 08/04/2019).

[9] According to data that can be found in open resources (http://www1.fips.ru/wps/portal/Registers), currently the copyright holder is the plaintiff in the case.

[10] See Resolution of the Presidium of the Supreme Arbitration Court of the Russian Federation No. 8953/12 of November 20, 2012 on case No. A40-82533 / 11-12-680 [Electronic resource] (appeal date 08/04/2019). URL: http://www.arbitr.ru/bras.net/f.aspx?id_casedoc=1_1_38e9ccf9-3d9b-411b-83a3-0a1e3051ec82

At the same time, it seems obvious that sooner or later the dynamics of civil turnover will create a plot in which tricks and saving rationales will not allow to avoid the resolution of substantive issues related to the application of the rules of subjective good faith with the definition of appropriate legal consequences of the conflict depending on the function of subjective good faith.

Subjective good faith in the field of intellectual property rights: doctrinal analysis.

Are there any significant obstacles to the application of the rules on taking into account subjective integrity in relations related to the circulation of rights to the results of intellectual activity and equated to them means of individualization? According to the author, such obstacles are rather far-fetched, illusory, the real problem is only a tool of such an application in the conditions of indifference of the legislator.

It is important that the implementation of the rules on subjective good faith in the context of the acquisition of an exclusive right from an unmanaged alienator is the most popular subject of discussion, but not more than a special case of such use. In fact, taking into account the rules of subjective good faith are not limited to this hypothesis, but extends to other possible models of conflict situations. It so happened that in the private law doctrine, this issue is discussed mainly in the context of a “bona fide acquirer of exclusive right”, and the very discussion itself, with a small number of participants, is localized around the possibility of using the rules of art. 302 of the Civil Code of the Russian Federation. Well, in a sense, let's join this "club of interests".

Obstacles, which are traditionally designated as excluding the consideration of subjective good faith in the turnover of exclusive rights, are declared:

- The prohibition established by paragraph 3 of Art. 1227 of the Civil Code of the Russian Federation (“provisions on the right of ownership and other real rights are not applied to intellectual property rights”).

- Qualified silence of the legislator (conscious refusal to establish rules).

- Absence of a sign of publicity of the exclusive right as a necessary tool for taking into account subjective good faith, in particular, the legal nature of registers of results of intellectual activity as registers of objects, but not rights, and absence of a sign of public reliability.

It seems that the above obstacles are nothing more than fiction, the real motives are different, as we will say later.

Again, for unnamed reasons, the consideration of subjective good faith in the organization of relations of turnover of the results of intellectual activity and equated to them means of individualization is unduly reduced to resolve the issue of acquisition of exclusive rights from the unmanaged alienator. The discourse in this part habitually, almost reflexively, rolls into a discussion about the possibility of applying the relevant rules of Chapter 20 of the Civil Code of the Russian Federation on the basis of clause 1, Article. 6 of the Civil Code (analogy of law and justice), and here, the researcher encounters the rule of paragraph 3 of Art. 1227 of the Civil Code of the Russian Federation, containing a communique on the non-application of the rules on real rights to intellectual property rights.

It seems that there is no deep meaning in the designated positive prescription, and the rule of the law itself is an act of combating ignorance, the text of a textbook on civil law, which for unnamed reasons fell into the text of the Code and most likely is a consequence of a defect in the perception of the term “intellectual property", which is no property at all, and besides, it is not always intellectual. What will happen if the legislator without explanation will exclude the third paragraph from the content of Art. 1227 of the Civil Code? The answer is obvious – nothing. If we assume that paragraph 3 of Art. 1227 of the Civil Code of the Russian Federation really has at least some regulatory load, decides a question that requires the intervention of the legislator, the latter should be consistent in his delusions and provide the text of the Code with articles "intellectual rights and corporate rights",

"intellectual rights and non-property rights", "intellectual and securities rights, etc. with the establishment of similar prohibitions.

In general, the legislator should indicate that the rules and other legal regimes are also not applicable when determining the legal regime of intellectual rights. Actually, the idea of prohibiting the analogy of the law, found in the provisions of paragraph 3 of Art. 1227 of the Civil Code of the Russian Federation, as a way to fill in the gaps in private law, which does not claim to be an exhaustive regulation of relations, is seen as very doubtful.

Private law, initially based on the fundamental principle of autonomy of the will of participants in civil relations, has the statement: “there are no complete laws” as a basic motto, and there can be no other way, and the main issue is only reduced to filling these gaps. In any case, the discovery of the prohibition to apply the rules by analogy of the law should be meaningful and have good reasons. By itself, the argument about the prohibition of the application of rules on things to relations about objects of intellectual rights and equated means of individualization can simply be ignored by appealing to other, comparable rules of accounting for subjective good faith, for example, in the turnover of corporate rights (paragraph 3 of article 65.2. Civil code of the Russian Federation or item 17 of Art. 21 of the Federal law of 08.02.1998 No. 14-FL "About limited liability companies»). Accordingly, it seems that the rule of paragraph 3 of article 1227 of the Civil Code is a legislative misunderstanding, the argument is far-fetched and quite surmountable.

The thesis about the qualified silence of the legislator is also unlikely to be supported. The historical retrospective of the legalization of certain phenomena of civil turnover as objects of civil rights reliably shows that the legislator is always “silent” and such silence is rather “unqualified”. When forming legal regimes of newly legalized objects of civil rights, the legislator pursues, first of all, the goal of putting such into civilian circulation, and only later, having established the existence of a problem, in the same way in all cases, with the application of the law enforcer, introduces rules

about taking into account subjective good faith. In this part, it is significant that, in addition to the results of intellectual activity and equal means of individualization, the only civil rights object from among those sanctioned by law, in the legal regime of which there is no consideration of subjective conscientiousness, are intangible benefits that, in any case, at present, are outside of the turnover relationship. It seems that the qualified silence of the legislator is always a meaningful act, is a consequence of some thought process or discussion.

The retrospective of the process of adopting legislation on intellectual rights (in its latest version in the form of a codified act) does not reveal such a discussion. In this context, it is noteworthy that when authorizing to participate in the circulation of so-called digital rights, the legislator, being in an obvious hurry, did not think about the tools to protect such rights at all and was limited only to a declarative statement on the recognition of such rights by law (by including them in the list of objects of civil rights)[11].

The qualified silence of the legislator could really take place on the basis of the results of an in-depth analysis: the reconstruction of the most probable justification for the conscious refusal to take into account subjective good faith in the regulation of relations concerning intellectual rights could be based on the extreme importance of such for society as a whole, the assessment, comparison of the divergent interests of different groups of participants in civil turnover; for example, in order to stimulate inventive activity, the legislator could consciously declare as a basic principle of the relevant legal regime the unconditional priority of the restoration of the rights of inventors, in this connection, and determine all, without exception, ways to protect the rights of the right holder by measures of protection of rights that are applied per se. Such a method of determining the legal consequences of certain pre-emptive actions is used by the Russian legislator; for example, it seems

[11] Federal Law of March 18, 2019 No. 34-FL "On Amendments to Parts One, Two, and Article 1124 of Part Three of the Civil Code of the Russian Federation".

obvious that in determining the grounds and consequences of invalidity of incapable transactions, the legislator deliberately refused to take into account the subjective good faith of the counterparty of the incapable party in the conditions of impossibility of recognizing such a state on the basis of external signs of the incapable person.

The grounds for such qualified silence of the legislator can be found in the moral principles of private law, which imply increased protection of persons with disabilities from the nature of opportunities, a small quantitative and qualitative indicator of such transactions in civil turnover as a whole. The legislator, as it were, says to the turnover: "please, be patient, if we will have such an insignificant transaction, humbly accept the consequences, such persons deserve a high degree of care, the legislator's paternalism".

Are there any such motives with regard to intellectual property rights? Apparently not. In any case, it seems appropriate to make a substantive assessment of the application of such, without doubt, privileged treatment in respect of each type of intellectual property and means of individualization. Even a very superficial analysis allows us to conclude that the means of individualization hardly deserve such care, because globally they do not give anything to society, except for the simplification of consumption.

The world of trade, in which there are no trademarks, will be very difficult for the consumer, however, the complexity of the choice of goods in the broad sense of the word, especially since the above thesis hides the interests of merchants, is unlikely to be the same interest that deserves paternalism, super-protection, especially at the expense of other participants in civil turnover. It is possible that inventions, and not all, but those that can claim the high title of scientific discoveries, deserve such protection, but this question requires a separate study.

The last bastion of protection against taking into account subjective good faith in this area is uncertainty about the legal nature of the registers of intellectual property as a necessary tool for

qualifying the behavior of participants in relevant relationships. Note that this problem should be looked somewhat wider. The problem is largely far-fetched, consists not so much in the qualification of the registers of the results of intellectual activity as registers of objects, not of rights, but in identifying the sign of publicity of intellectual rights and the methods of its realization. The publicity of intellectual rights is realized with respect to different objects of such rights in different ways.

The study of this issue deserves a separate detailed study; however, it is appropriate to note that publicity is an inevitable element of the legal nature of any absolute right, the question is only in the method of establishing and how to detect the existence of such rights. Anyway, there are no "secret" absolute rights and cannot be.

With regard to intellectual rights, the discussion is localized around the definition of the legal nature of registers of intellectual property rights, and this discussion is inspired by the uncertain position of judicial practice. In paragraph 3 Of the resolution of the Plenum of the Supreme Court of the Russian Federation dated 23.06.2015 № 25 "On the application of certain provisions of section I of part one of the Civil Code of the Russian Federation" were not mentioned registers of results of intellectual activity as falling under article 8.1 of the Civil Code (principles of state registration of property rights). Examples of registries subject to the rules of art. 8.1 of the Code, in obscurantist tactics set out an open list with the completion of the notorious "and others". It is noteworthy that the initial draft of the said resolution contained an indication of the registers of intellectual activity results, however, the reference was excluded from the final version. Most likely, the legal position of the Supreme Court of the Russian Federation should be qualified as uncertain, in any case, it is not worth extracting from the latter as a valid conclusion about the non-application of the rules of art. 8.1. Of the Civil Code of the Russian Federation to the specified registers.

Apparently, the content of the legal position of the Supreme Court of the Russian Federation is inspired by the opinion of the Court of Intellectual Property Rights[12], the essence of which is reduced to the thesis that the rules of art. 8.1 of the Civil Code of the Russian Federation to the registers of results of intellectual activity, since, in the version of the Court of Intellectual Property Rights, such registries are registries of objects.

Meanwhile, the stated judgment of the Court on intellectual rights is obviously based on significantly different motives than those declared by the Court itself. Referring to certain norms of the Civil Code of the Russian Federation (Article 1232 of the Civil Code of the Russian Federation), which, in the opinion of this Court, allow us to conclude that we are talking about the registration of the property itself, it is seen very, very doubtful as a proper basis for such a conclusion, because it is refuted by numerous rules of the same Code in which we are talking about the registration of rights (for example, clause 2 of article 1231, para. 2 of paragraph 2 of article 1234, para. 2 of paragraph 2 of article 1235 of the Civil Code of the Russian Federation, etc.).

There is no doubt that the composition of the Court of Intellectual Rights is aware of the existence of such rules, and the most likely rational motive can be found in the fundamental disagreement of the Court on intellectual rights with the rule of exclusively judicial challenge to registered rights established by paragraph 6 of Art. 8.1. Of the Civil Code of the Russian Federation, while in accordance with the applicable legislation on intellectual rights, challenging is carried out in an administrative procedure. Perhaps it was in the indicated contradiction that a problem was discovered that was solved in this way.

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[12] Certificate of the Court of Intellectual Property Rights "On the Relationship of Article 8.1 of the Civil Code of the Russian Federation with the provisions of Section VII of the Civil Code of the Russian Federation Rights to the results of intellectual activity and means of individualization", approved. Resolution of the Presidium of the Court for Intellectual Property Rights dated August 22, 2014 No. 21/10 [Electronic resource] // URL: http://ipcmagazine.ru/official-cronicle/the-ratio-of-article-8-1-of-the-civil-code-of-the-rf-with-the-provisions-of-title-vii-of-the-civil-code-of-the-rf (appeal date 08/04/2019).

Obviously, the registration of objects and the registration of rights are quite phenomena capable of simultaneous coexistence; the implementation of one registration does not at all exclude the possibility of doing another, which in particular, is the case for immovables[13].

It seems that with the adoption of the Resolution of the Constitutional Court of the Russian Federation of 03.07.2018 No. 28-P[14] the issue of the legal nature of registers of intellectual property rights should be considered actually resolved, such are not only registries of objects, but also registries of rights, and the above-mentioned Intellectual Property Reference Rights lost any meaning.

The Constitutional Court of the Russian Federation did not consider the issue of the legal nature of registries of objects of intellectual rights as controversial in principle, with certainty regarding those as constitutive: «*In the system of current legal regulation, state registration is mandatory for the recognition of newly introduced trademarks as independent objects of civil rights, including the exclusive right to them of the respective legal entities or individual entrepreneurs, i.e. has a legal meaning...*»; «*Due to the legal position expressed and repeatedly confirmed by the Constitutional Court of the Russian Federation concerning state registration of rights to real estate and applicable to the exclusive right…*».

The Constitutional Court of the Russian Federation without any alternative predetermined the purpose of registers: «*…ensuring publicity and accuracy of information entered into the State Register of Trademarks, state registration of trademarks is aimed at protecting the rights of their owners and other persons and, therefore, ensures the sustainability of civilian traffic in general*»,

[13] See Part 6, Art. 72 of the Federal Law of July 13, 2015 No. 218-FZ "On State Registration of Real Estate".

[14] See Resolution of the Constitutional Court of the Russian Federation of 03.07.2018 No. 28-P in the case on the verification of the constitutionality of clause 6 of Article 1232 of the Civil Code of the Russian Federation in connection with the request of the Intellectual Property Court.

while in their arguments the Court directly relied on the content of Art. 8.1 of the Civil Code of the Russian Federation.

Accordingly, what are the conceivable obstacles to the consideration of subjective good faith in the regulation of relations regarding the circulation of exclusive rights? Lack of regulatory binding? Perhaps, but such a state of civil law is quite normal, initially the Civil Code of the Russian Federation in Art. 6 actually declared an axiom: *private law laws are not complete, there have always been and there will be gaps that need to be filled by means of tools - the analogy of the law and the analogy of the right*.

The earlier retrospective of introducing rules for taking into account subjective good faith in relation to other objects of civil rights clearly shows that until a significant amount of economic relations is formed, an increase in the volume of transactions there is no need to take good faith into account in the subjective version. And only with an avalanche-like increase in transactions, the law-enforcer is forced to "save" the turnover by qualifying the absence of rules about taking into account subjective good faith as a gap in the law and applying the appropriate tool for filling the gap. As previous experience shows, such a tool can be either an analogy of the jus or an analogy of law.

It is advisable to re-quote the legal position expressed by the Supreme Economic Court in the Decree of the Presidium of the Supreme Arbitration Court of the Russian Federation No. 1394409 dated February 9, 2010 in case No. A56-31255/2008: «*since the legislation allows such type of property as a share in the ownership of an indivisible thing, if the right to this type of property is violated, its owner must be protected. At the same time, the protection of the violated right means not only the possibility of going to court, but also the possibility of achieving a legal result in court*». In this case, by the analogy of the law, the rules on vindication were applied, and the legislative gap was a sufficient reason for the application of those. Obviously, the rules on vindication are applied in full, including taking into account the protection of the legal position of the acquirer of the right from an

unauthorized transfer, which is a special case of accounting for subjective good faith. Being interpreted in an abstract form, the cited legal position allows us to conclude that the existence of any type of property presupposes the existence of an appropriate way to protect the rights to such an object. Moreover, such a method is a borrowing not only of a tool for restoring law in kind, but also of the mechanisms accompanying it. Thus, in the above decision, the Supreme Arbitration Court of the Russian Federation concluded: «*based on the nature and consequences of the violation, the courts of the first and appellate instances lawfully considered the claim filed by the company as a claim for the restoration of the right to share with the application of the rules of articles 301, 302 of the civil code, which ensure the stability of civil turnover and guarantee to all parties to the dispute in respect of such property equal to all other owners and purchasers of the right to protection*».

Accordingly, it should be assumed that the consideration of subjective good faith is a necessary immanent element of the legal regime of the object of property rights, but the absence of such should be a conscious act of legislative regulation, which has noteworthy motives.

Discussion.

Is there any reason to conclude that the refusal to take into account the subjective good faith in the formation of the legal regime of intellectual property rights is a conscious act of legislative regulation? It seems that there are no such grounds.

As can be seen from the retrospectives cited earlier, the previous experience in the formation of legal regimes of objects of property rights, the “forgetfulness of the legislator” is a common practice of rule-making, a repeated mistake that is corrected every time by the law enforcer. The only objects of civil rights that reasonably do not contain in their legal regime the rules on accounting for subjective good faith, in addition to the objects of intellectual rights, are now and I want to believe that they will always remain so – intangible benefits. Such a legislative establishment is perhaps not entirely conscious, but nonetheless an unavoidable rule, at least for two reasons: the lack of a

turnover relationship (there is actually a presumption of prohibition) and nature of such objects as attributable to the person, and accordingly, in all cases, naturally restored when rights are violated.

The legal regime of intellectual property rights under the assumption that the refusal to take into account subjective good faith is conscious should be defined as practically no different from the legal regime of intangible goods from the point of view of a model for building ways to protect and take into account the interests of third parties (here they are, because turnover is not only allowed, but also strongly encouraged by the rule of law). Otherwise, it must be stated that the holder of intellectual property rights, for unnamed reasons, has been granted absolute over-protection against any third parties, regardless of the qualification of the latter's behavior when entering into economic transactions regarding such rights, a certain hyperbolic version of the legal regime provided with nothing at all limited to the rule, denoted as property rule in version à la russe (Karapetov, 2014).

It is not possible to reliably determine the causes and circumstances under which among all objects of civil property rights, the legislator could distinguish the results of intellectual activity and equated means of individualization, and it is with respect to the latter, regardless of the type of object, that the possibility of taking into account subjective good faith is supposedly excluded.

The reasons for such paternalism of the legislator, especially in the model "to provide an unlimited opportunity to protect the rights of all", remained unexplained, and the choice itself (if it was) is clearly irrational or has completely doubtful motives. Perhaps the right holders and property rights attributed to them by the legal order are very vulnerable, the usefulness of intellectual property to society is extremely high, the price of the issue is the survival of civilization. Perhaps. However, such a judgment was relevant and reliable about 200 years ago, i.e. at the moment when the rightholders were insignificant in quantity, they were indeed weak participants in civil circulation, most often represented by brilliant creators of works, inventors.

Probably 200 years ago, talk about the need for maximum preferences for such a group was necessary, but not at the present time. Currently, right holders are represented by major transnational corporations; art, craft turned into serial, conveyor production; the “quality” of inventions in the total stream of law enforcement confessions through the provision of protection has decreased significantly; well, the most active group of “victims” - the right holders of the means of individualization, which do little to society in exchange for exaggerated interests. The Russian legal order with its inherent predilection for the use of public tools to achieve positive results in the field of civil turnover, in the context of intellectual property, in the wake of the WTO requirements, has turned the legal regime of the results of intellectual activity and equated means of individualization into a tool for suppressing entrepreneurial initiative.

It should be assumed that the existence of such a legal regime, which is extremely unfriendly with respect to the rights of third parties, does not have a valid political and legal basis. In its essence, an exclusive right is a special legal form of appropriation of a property object of civil rights, it is an instrument through which the rule of law determines the legal position of the owner of such an object of rights and organizes civil circulation of rights to such an object. In essence, such a legal structure is no more than a kind of other similar legal structures, such as the right of ownership and other forms of property separation of participants in civil turnover, rights to securities, corporate rights, etc.

In view of the above circumstances, it is conceivable to raise the issue of compliance with the principle of equality before the law. Are there any honorable motives to ensure that in respect of all ways of assigning objects of property of civil rights has applied the rules on accounting for subjective good faith, without exception, all participants of civil turnover in the exercise of their rights must coordinate their actions with the rights of third parties and in fact are required to treat the interests of third parties with the necessary degree of respect, to endure the negative consequences associated

with owning the relevant object of property rights, to exercise the appropriate degree of care when exercising their rights, bear the costs associated with the establishment and support of their rights, while the allocation of a certain privileged caste – the subjects of an exclusive right that such obligations are not related. It seems that such segregation, at least in the absence of proper justification from the political and legal positions and the applicable rules of the paragraph 2 item 2 of Art. 1 of the Civil Code of the Russian Federation, is inadmissible and represents the act of aggressive deviation from the general legal principle of equality which assumes inadmissible various treatment of the persons who are in identical or similar situations[15].

The inevitability of accounting subjective good faith in the field of intellectual rights.

The rule of law, following the human need, awarded it with the construction of an absolute right as a tool for appropriating various kinds of objects of civil property rights. Being created in the model of erga omnes with the unlimited power of the holder of absolute rights, based on considerations of expediency, the arbitrariness of the holder of such a right was opposed to a tool to protect the rights of third parties, and this tool was the subjective good faith. It ensures the viability of the civil turnover, makes it so that, for example, contracts are made not only with the original purchasers of the title to the object of property civil rights, i.e. with persons who did not have legal successors who could question the "power" over the object of property civil rights, but also with derivative rights holders.

Subjective good faith in this sense is one of the greatest inventions of the world civilization, and this tool for unknown reasons is not found in the erga omnes exclusive right. For understandable reasons, by virtue of the positive prescriptions, all holders of absolute rights, without exception, are

[15] See, for example, the Definitions of the Supreme Court of the Russian Federation dated 02.24.2015 No. 305-ЭС14-1186; No. 305-ЭС15-3617 dated September 15, 2015: "The principle of equality (Article 19 of the Constitution of the Russian Federation) means, among other things, the impermissibility of imposing restrictions on the rights of persons belonging to the same category without an objective and reasonable justification in the same or similar situations)".

constrained by their power, and third parties, according to the specifics of the settings for overcoming such a power, agree on their actions in civil circulation. As a result, economic life is in full swing. A similar plot is not found in relations in connection with the circulation of exclusive rights.

The participants of civil turnover do not have the opportunity in any way to determine the methodology of their behavior, to coordinate it with a certain regulatory model of expected behavior in order to exclude negative consequences in their property sphere. In fact, there is a situation in which there is discrimination of participants of civil turnover on the basis of participation in a particular commodity market. The persons participating in the product market of exclusive rights, both the right holders and the counterparties of those, are in a state of over-protection and over-uncertainty, respectively. At the same time, all other commodity markets operate according to different rules: the absolute right subjects cannot access the option of unconditional restoration of rights to their property, they incur costs related to turnover interests, in turn, the counterparties of such persons consume the privilege of supporting their legal positions civil property rights, subject to some accepted standard of conduct. Let us repeat: such segregation of participants of civil turnover is a violation of the principle of equality before the law, declared as in the constitutional law[16] with its broad understanding of the term property, and in its more special version – in private law[17].

[16] The definition of the content of the principle of equality in acts of abstract constitutional control is distinguished by the unity of content; the essence of such a principle can be found, for example, in paragraph 4.2. of the reasoning part of the Resolution of the Constitutional Court of the Russian Federation No. 12-P dated May 28, 2010 "On the case of verifying the constitutionality of Parts 2, 3 and 5 of Article 16 of the Federal Law" On the Implementation of the Housing Code of the Russian Federation ", Parts 1 and 2 of Article 36 of the Housing Code of the Russian Federation, clause 3 of Article 3 and clause 5 of Article 36 of the Land Code of the Russian Federation in connection with complaints of citizens E.Yu. Dugenets, V.P. Minina and E.A. Plekhanov.

[17] The essence of the principle of equality is reproduced almost verbatim with the administration of justice and the application of such ad hoc: "As the Constitutional Court of the Russian Federation has repeatedly pointed out, the constitutional principle of equality (Art. 19 of the Constitution of the Russian Federation) means, among other things, the impermissibility of imposing the rights of persons without objective and reasonable justification belonging to the same category (prohibition of different treatment of persons in the same or similar situations)". See, for example, the Definitions of the Supreme Court of the Russian Federation of 02.24.2015 No. 305-ЭС14-1186; №305-ЭС15-3617 of 09/15/2015.

Without exception, all subjects of rights make a concession to turnover and suffer negative consequences associated with the possibility of losing their rights due to the acquisition of such a bona fide purchaser (p. 3 of article 65, article 148, article 302 of the Civil Code of the Russian Federation, etc.). The right holders of the results of intellectual activity are not subject to such restriction. Such discrimination has no reasonable justification and, no doubt, was not conceived by the legislator.

And yet, there is one directly provided case in the law for taking into account subjective good faith when regulating the turnover of exclusive rights. In its quest for the development of credit relations, the legislator provided for such in the regulation of collateral relations. The rule of paragraph 2 of Art. 335 of the Civil Code of the Russian Federation on the fair acquisition of a pledge right by virtue of paragraph 3 of Art. 358.18 of the Civil Code shall be applied to the pledge of exclusive rights. This is a case expressly provided for in the law.

The additional argument of a politico-legal nature seems to be justified in support of the thesis advocated: for what reasons, creditors, first of all, professional creditors, whose interests the pledge right reform was inspired, such a tool is available, and all others - not. It would be strange to assume that this approach of the legislator is meaningful.

Objections against such a judgment about the existence of a directly envisaged case of taking into account subjective good faith when regulating relations regarding the circulation of an exclusive right, even if it is positivistic, are unmotivated; for example, one of the authors in the interpretation the ratio of the rules of paragraph 2 of article 335 and paragraph 3 of article 358.18 of the civil code concluded that the first does not apply to relations connected to the establishment of the pledge of exclusive rights: «*…this provision is also not applicable to the exclusive right, given its proprietary nature and connection with the material object. In the event that a person who is not the copyright holder, but, posing as such, acts under the contract as a mortgagor, despite the good faith of the*

mortgagee, these circumstances should not be reflected in the legal status of the true holder of the exclusive right. The mortgagee is entitled to recover, as a general rule, from the mortgagor acting in bad faith, the losses incurred» (Vershinina et al, 2014).

Unfortunately, the author, in his rationale, limited himself to a reference to the *"proprietary and legal nature and connection with a material object",* without revealing how such a character and connection impede the consideration of subjective good faith. Apparently, the author had in mind the absence of a sign of publicity in the possession of an exclusive right, and, surely, in the absence of such a sign, the refusal to apply the rules of subjective good faith is a correct conclusion. Perhaps, this conclusion is valid only in the application of its exclusive rights, which are established in respect of the intellectual activities that the law did not create a credible tool for publishing the position of an authorized person and under conditions of the illusion of the objective, publicly unreliable nature of state registries of objects of intellectual rights.

The first condition requires independent research and is not obvious, including in respect of copyright objects. With regard to the second condition, doubts seem to be dispelled by the previously mentioned Decision of the Constitutional Court of the Russian Federation, issued at the request of the Court of intellectual rights. Accordingly, it is hardly conceivable to say that there is no positive consolidation in this area.

Rightholders are actively exploiting the "weapon of mass destruction" that happened to be in their hands. This problem is part of another global problem – the questionable justification for the indiscriminate establishment of massive legal preferences to right holders indiscriminately type, variety and quality of such in the vast majority of cases due to the turnover as a whole (through infringement of the interests of third parties with the establishment of the latter quite tangible negative consequences of property nature). The privileges and liberties established by law for holders of rights to the results of intellectual and other activities cannot be calculated:

- The principle of publicity of absolute rights is exercised at the discretion of the subject of exclusive rights (Art. 1271 of the Civil Code of the Russian Federation), and even recently with respect to “registered objects of intellectual property”.

- Without exception, all subjects of rights make a concession to turnover and suffer negative consequences associated with taking into account subjective good faith, in particular, the possibility of losing their right due to the acquisition of such a bona fide acquirer (p. 3, Art. 65, Art. 148, Art. 302 of the Civil Code and etc.).

- Despite the “hidden nature” of the right of ownership and the right holder, the responsibility most often comes on the basis of the cause without the guilty offender.

- All known interpretational presumptions established by the general provisions of the contract are set forth in the intellectual property right of 180°, act against the turnover, against the counterparty of the subject of rights to the results of intellectual activity (par. 2 p. 3 Art. 1234, par. 2 p. 1 and par. 2 p. 5 Art. 1235, sub. 1 p. 39 of the Resolution of the Plenum of the Supreme Court of the Russian Federation of June 19, 2006 No. 15 “On the issues that have arisen before the courts when considering civil cases involving the application of copyright and related rights legislation”).

- Proving the size of the damages - some option of the victim, carried out at the discretion of the latter, and the principle of “compensatory nature of responsibility” is seriously questioned.

- Restriction of an exclusive right in principle, a kind of fantasy expression, from the point of view of literal reading of the law, the exclusive right cannot be removed for public use, nationalized, and the very pronouncement of the phrase “compulsory license” causes a flow of negative objections of a deconstructive nature.

No single subject of absolute rights has such a volume of preferences. In particular, this kind of privileges are not available to the owner, it would seem, the main until recently participant of the turnover, whose position has always been supported by the rule of law: his rights, by virtue of the

law, are necessarily “publicized”, the objects themselves require every kind of custody on pain of losing the title to a thing due to the possibility of transforming the illusion of a third party title into the legal possibility of an effective transfer; the possibility of substitution or the simultaneous application of different legal regimes with respect to a single object is excluded, in every possible way suppressed by the rule of law; in the case of injury, considerable effort is required to prove damages; contracts should be formed with special diligence in case they are misinterpreted (not in the interests of the owner). Similar judgments with some amendments to the peculiarities of the object of rights may be made in respect of creditors, shareholders, holders of securities.

CONCLUSIONS.

Unfortunately, the mentioned problems, which include consideration of subjective good faith in the organization of turnover of exclusive rights, remain without attention of both the science of private law and the law enforcement officer, as well as the legislator.

Much of the research seems to be inspired by a hyperbolized and largely false thesis about the weakness of the legal position, the insecurity of the rightholder, who is almost attested to the status of the Messiah, who is able to save the world.

A significant part of representatives of legal science, the sphere of legislation, law enforcement, most likely, being fascinated by the slogan about the priority of the so-called innovative development, remaining on the wave of the fulfillment of Russia's obligations in connection with WTO accession, consider the designated subject mainly in terms of the need to strengthen the owner’s position; however, it appears that the Russian legal order in the "protection of intellectual property" created one of the most aggressive legal regimes in the world. It seems that the time has come to stop, to reflect on the rights of third parties, at the expense of which and against which the rightholder’s position is strengthened.

If the rule of law intends to create some kind of special caste of participants in civil turnover, then such an elevation of some free persons over the will of other free individuals can be carried out only if there are some exalted motives and grounds, and in the absence of such, at the expense of the rule of law and only infringement of property interests of participants in the turnover in general.

It is obvious that rightholders – an extremely strong, cohesive social group – are extremely unprofitable to attack a legal position in any form, and they will aggressively resist the introduction of the rules of subjective good faith, since such rules are directed against them and their purpose is to protect the turnover in general and the interests of third parties. No doubt, many supporters will join this movement "in defense of the interests of right holders", who will be ready to selflessly give their time, thoughts, ideas and stand up for the created world of righteousness.

The virus of "innovation development" has so deeply impressed the consciousness of the modern world that many will be ready to recognize in the rightholder the Messiah, the savior and selflessly follow him. Meanwhile, it is necessary to think about whether all rightholders deserve this kind of encouragement.

Without a doubt, Mikhail Afanasyevich Bulgakov, Nikolai Ivanovich Vavilov, Sir Alexander Fleming deserve the maximum level of preferences, if somewhere there is an idea of real intellectual property - then we are talking about such right holders, it is the activities of such people that make up the content of the well-known exalted idea. There is no certainty that the same privileges can be attributed, in particular, to the copyright holders of the means of individualization (in any case, it is not clear why they were suddenly equated).

Modern civilian traffic is the turnover of goods, each of which contains a particular object of intellectual rights. The most obvious, purely commodity object, equal to the results of intellectual activity, is the means of individualization. 278 758 trademarks and service marks were registered in

Russia for the period 2014-2018[18]. If we assume that at the same time all right holders will start exercising their rights and begin to control the legal means available to them the turnover of goods, the plot of the case of society "Crossroads", described earlier, will be multiplied, the lack of subjective good faith as an element of the legal regime of intellectual rights will lead to the collapse of civil turnover. In 2011, this trend in the development of the legal regime of intellectual property rights was designated as "universal duty"[19], which can destroy civil turnover.

Unfortunately, the tactics of exercising intellectual rights by not the most worthy copyright holders leaves much to be desired, which can be found in the so-called “serial cases”: rightholders do not have the desire to really stop violating their rights, destroy the source, the original creator of counterfeit products monotonous, mass demands on the final violators, and deliberately electing weak procedural opponents[20].

The enforcement and tactics of exercising procedural rights by such right holders would change, if they would put forth an exception to take into account subjective good faith in the rule model of paragraph 12 of the Resolution of the Plenum of the Supreme Arbitration Court of the Russian Federation of November 17, 2011 No. 73 "On certain issues of practice of the rules of the Civil code of the Russian Federation on the lease agreement", and the right holder was forced to prove the amount of damages.

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[18] Annual Report of Rospatent for 2018, p. 142, [Electronic resource] // URL: https://rupto.ru/ru/about/reports (appeal date 08/04/2019).

[19] “If the boundaries of any subjective rights of anyone cannot be clearly defined when the upper limit of the right is“ only heaven ”(Chancellor Mathur), then such rights may cease to be such, transforming into levers of economic and legal inequality and suppression . Exclusive rights can be in spite of their inner essence, not only reduced to the simplest form of goods, but also under the action of a system of administrative tools and special public escort to turn, in fact, into a general property obligation, very similar to imposing authority. To protect intellectual property from boundless commercialization, to preserve a civilized, humane essence in intellectual rights is a daily and arduous task of modern civil law. Final Communiqué of the II International Symposium "Civil Law and Economics 2020. Prospects for the development and harmonization of international economic and trade legislation", April 7-8, 2011, University of Costa Rica, San Jose City (Universidad de Costa Rica Sede "Rodrigo Facio Brenes" Montes de Oca, San José Costa Rica Codigo Postal 2060 San José).

[20] The archetype of the defendant in such cases is an individual, an individual entrepreneur, often from a small provincial city, who does not have access to quality legal assistance for a variety of reasons.

The likely risk of rejecting claims with reference to the consideration of subjective good faith, and sometimes the inevitability of rejecting such claims, as well as the conscious degree of effort to prove damages, would stimulate the right holders to address the requirements to the actual violator, and not to the above-mentioned archetype of the defendant, which would not only lead to the destruction of the source of the offense, but, oddly enough, would contribute to the achievement of public-legal goals – reducing the burden on the judicial system as a whole.

Accordingly, it should be assumed that taking into account subjective good faith in organizing the turnover of intellectual property rights is not a matter of choosing a legislator or a law enforcer, it is a necessity. The presence or absence of rules on taking into account subjective good faith in the legal regime of the results of intellectual activity and equated to them means of individualization is no more than an annoying omission of the rule of law, the elimination of which is only a matter of time.

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