



RIGHT OF REPRODUCTION AND RIGHT OF MAKING AVAILABLE TO THE PUBLIC IN THE EU-UKRAINE ASSOCIATION AGREEMENT*

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The article deals with the analysis of two specific exclusive economic rights: the right of reproduction and the right of making available of works to the public in such a way that members of the public may access these works from a place and at a time individually chosen by them and compares them under the domestic Ukrainian legislation and under the EU-Ukraine Association agreement. The concepts of «reproduction» and of «communication to the public» are considered.

It is concluded that the right of reproduction is the most basic right since it forms the basis of most forms of exploitation of a work. Reproduction is, in reality, the copying of a work in any manner or form. At the same time, it remains uncertain in Ukraine at the legislative level that the right to reproduction of work includes direct or indirect reproduction and reproduction in whole or in part. These issues are up to the court to decide.

It is concluded that the approach when the right of making available of works to the public is included in the broader «right of communication to the public» is applied in the EU Member States (Articles 3 and 4 of Directive 2001/29 /EC) and is reflected in Art. 174 Association Agreement. In addition, the concept of communication to the public in the EU must be construed broadly, as referring to any transmission of the protected works, irrespective of the technical means or process used, this concept includes two cumulative criteria, namely, an 'act of communication' of a work and the communication of that work to a 'public'. This approach should be implemented in the Ukrainian legislation.

Keywords: reproduction, communication to the public, making available, Association Agreement

On September 01, 2017, after a lengthy ratification process, the Association Agreement between Ukraine and the European Union and the European Atomic Energy Community and their member states had finally entered into force in full scope and become a part of domestic legislation.

According to part 2, Art. 19 Law of Ukraine «On International Treaties of

Ukraine» in case if the international treaty of Ukraine, which came into force in order, rules other than those which provided for in the relevant act of the legislation of Ukraine, then the rules of the international treaty apply» [1].

Supreme Court of Ukraine has already stated several rulings concerning the direct of the EU-Ukraine Association Agree-

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ment: it confirmed the primacy of Art. 198 of the Agreement, referred to cancellation of trademarks for non-use, over similar provisions of Ukrainian legislation [2; 3]. There has been no case-law in Ukraine regarding copyright issues with the application of the Association Agreement yet.

As one of the obligations of Ukraine is to bring copyright law in line with European legislation, it is necessary to examine the distinctions between the Ukrainian legislation and the European standards and how these distinctions should be used.

The Berne Convention, as the basic international copyright treaty, refers to various economic rights. These give the rights holder power in particular over:

1. making a collection of speeches, addresses and or other similar works (article 2*bis*(3));
2. translation (article 8);
3. reproduction in any manner or form (article 9(1));
4. public performance of dramatic, dramatico-musical and musical works by any manner or means (article 11(1)(i));
5. communication to the public of performances (article 11(1)(ii));
6. broadcasting and any communication to the public by any means of wireless diffusion of signs, sounds or images (article 11*bis*(1)(i));
7. communication to the public by wire of broadcasts and rebroadcasts (article 11*bis*(1)(ii));
8. public communication of broadcasts by loudspeakers or other analogous instruments (article 11*bis*(1)(iii));
9. public recitation of literary works (article 11*ter*(1)(i));
10. public communication of recitations of literary works (article 11*ter*(1)(ii));
11. public recitation and public communication of translations of literary works (Article 11*ter*(2));
12. adaptation, arrangement and other alterations (Article 12);
13. cinematographic adaptation (Article 14(1)(i));
14. distribution of cinematographic adaptations and reproductions of works (article 14(1)(i));
15. public performance and communication to the public by wire of cinematographic adaptations and reproductions (article 14(1)(ii));
16. the resale right (*droit de suite*) in original works of art and original manuscripts of writers and composers (article 14*ter*)[4].

In this paper we are going to describe two specific exclusive economic rights: the right of reproduction and the right of making available of works to the public in such a way that members of the public may access these works from a place and at a time individually chosen by them and to compare them under the domestic Ukrainian legislation and under the EU-Ukraine Association Agreement.

Right of reproduction

This is the most basic right since it forms the basis of most forms of exploitation of a work. Reproduction is, in reality, the copying of a work **in any manner or form** (Article 9(1) of the Berne Convention). Whether the reproduction of a work is in a material form or not is irrelevant.

However, the text of the Berne Convention, neither WCT nor the EU-Ukraine Association agreement do not contain any complete and explicit definition of «reproduction».

From the viewpoint of the concept of «reproduction» and the coverage of the right of reproduction should be noted that: (i) the method, manner, and form of the reproduction are irrelevant; (ii) it is irrelevant whether the copy of the work may be perceived directly or only through a device; (iii) it is irrelevant whether or not the copy is embodied in a tangible object that may be distributed; (iv) it is irrelevant whether the reproduction is made directly (for example, on the basis of a tangible copy) or indirectly (for example, off-air from a broadcast program); and (v) the duration of the fixation (including the storage in an electronic memory) — whether it is permanent or



temporary — is irrelevant (as long as, on the basis of the [new] fixation, the work may be perceived, reproduced or communicated)[5].

The Directive 2001/29/EC on the harmonization of certain aspects of copyright and related rights in the information society in Article 2 provides that:

The Member States shall provide for the exclusive right to authorize or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part:

(a) for authors of their works [...] [6].

This article was completely transmitted to Article 173 of the EU-Ukraine association agreement:

The Parties shall provide for the exclusive right to authorize or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part:

(a) for authors, of their works [...] [7];

So, there are no rules in this provision that would differ from the EU Directive.

According to the Article 1 of Law of Ukraine «On copyright and related rights» reproduction means manufacturing of one or more **specimens** of a work, videogram, phonogram in any material form, as well as recording thereof for temporary or permanent storage in electronic (including digital), optical or other computer-readable form [8];

It shall be noted that According to the Article 1 of the law of Ukraine «On copyright and related rights» the specimen of work means only a copy of a work produced in **any material form**;

The law of Ukraine is acquainted with the concept of «copy of a work», and the material form (copy) is only one of the types of existence of such a copy, which cannot be placed on the Internet, since a copy of a work made in material and not digital form is recognized as a copy of the work. At the same time, «the digital copy of the work remains in principle identical to the original record since the original, and the copy is made up of the same combination of binary signs» [9, p. 5].

On the other hand, the Civil Code of Ukraine, as the central act of civil legislation, in Art. 441 contains no reference to the specimen of a work, thus the approach of the Ukrainian legislator on the use of the reproduction right to works expressed in digital form is fully harmonized with the established world practice, especial with the Agreed statements concerning Article 1 (4) of the WIPO Copyright Treaty (WCT): the reproduction right, as set out in Article 9 of the Berne Convention, and the exceptions permitted thereunder, fully apply in the digital environment, in particular to the use of works in digital form. It is understood that the storage of a protected work in digital form in an electronic medium constitutes a reproduction within the meaning of Article 9 of the Berne Convention [10].

At the same time, it remains uncertain in Ukraine at the legislative level that the right to reproduction of work includes direct or indirect reproduction and reproduction in whole or in part. These issues are up to the court to decide.

The right of making available of works to the public in such a way that members of the public may access these works from a place and at a time individually chosen by them was introduced first time in the provisions of the WIPO Copyright Treaty (1996) in the article 8 as the essential **part of more broad right of Communication to the Public**. (Although for the first time this term is used in Article 7 (2) and (3) of the Berne Convention on the terms of protection of cinematographic (and other audiovisual) works and of anonymous or pseudonymous works, respectively.)

The development of information technology services has contributed to a significant change in the right of distribution of works because when work is downloaded from the Internet, end-user create new copy of the work, rather than moving existing one that remains on the website (or other user's hardware); and in the right of broadcasting by air or by cables, as the role of end-users has changed from passive



recipients of signals to active participants in legal relationships. Such users can interact with the information they receive (for example, to access the work individually at any time convenient for them and from anywhere). This right takes on far more importance in the digital age. Furthermore, it is made clear that, for example, video and/or television on-demand services, whereby the user initiates contact and gets access to the work at a place and time chosen by him, are covered by this exclusive economic right.

In WCT, there were two separate rights: the Right of Distribution in Art. 6, which, according to the agreed statement to this article, refer exclusively to fixed copies that can be put into circulation as tangible objects to which the right of ownership can be transferred and right of Communication to the Public, that includes the right of making available of works to the public.

The approach when the right of making available of works to the public is included in the broader «right of communication to the public» is applied in the EU Member States (Articles 3 and 4 of Directive 2001/29 /EC) and is reflected in Art. 174 Association Agreement:

1. The Parties shall provide authors with the exclusive right to authorize or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.
2. The Parties shall provide for the exclusive right to authorize or prohibit the making available of works to the public, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them, namely:
 - (a) for performers, of fixations of their performances;
 [...]

3. Both Parties agree that the rights referred to in paragraphs 1 and 2 shall not be exhausted by any act of communication to the public or making them available to the public as set out in this Article [7].

Contrary to this, the provisions of current version of the Art.1 of law of Ukraine «On copyright and related rights» refers the right of making available to the right of distribution: «distribution of objects of copyright and (or) related rights — any action whereby objects of copyright and (or) related rights are offered to the public directly or indirectly, including notification of the public of these objects in such a manner that its representatives can access these objects at any place and at any time at their own discretion» [8]. This approach should be changed.

In addition, the concept of communication to the public in the EU must be construed broadly, as referring to any transmission of the protected works, irrespective of the technical means or process used[11], this concept includes two cumulative criteria, namely, an 'act of communication' of a work and the communication of that work to a 'public'.

The European Union legislature intended that each transmission or retransmission of a work that uses a specific technical means must, as a rule, be individually authorized by the author of the work in question. Given that the making of works available through the retransmission of a terrestrial television broadcast over the internet uses a specific technical means different from that of the original communication, that retransmission must be considered to be a 'communication' within the meaning of Article 3(1) of Directive 2001/29. Consequently, such retransmission cannot be exempt from authorization by the authors of the retransmitted works when these are communicated to the public. A mere technical means to ensure or improve reception of the original transmission in its catchment area does not constitute a 'communication' within the meaning of Article 3(1) of Directive 2001/29.



The second element should be noted as follows. The law of Ukraine does not contain an interpretation of the concept of «public», but in relation to other competencies, namely «public performance», «public demonstration» and «public display» uses the design of persons not belonging to members of a family or close acquaintances of this family. In contrast, in the EU, the criterion of 'a fairly large number of people,' this is intended to indicate that the concept of public encompasses a certain de minimis threshold, which excludes from the concept groups of persons which are too small, or insignificant [13]. It is irrelevant whether the potential recipients access the communicated works through a one-to-one connection. That technique does not prevent a large number of persons having access to the same work at the same time [12].

It shall also be noted that in the EU, the essential part of soft - legislation relies on the Court of Justice of the European Union (CJEU).

According to Article 267 of the Treaty on the Functioning of the European Union

The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:

- (a) the interpretation of the Treaties;
- (b) the validity and **interpretation of acts of the institutions, bodies, offices or agencies of the Union;**

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, **if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.**

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.

If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in

custody, the Court of Justice of the European Union shall act with the minimum of delay [14].

The CJEU adopts new copyright judgments very frequently, and its interpretations are binding on all courts in all EU Member States.

For example, as of August 2019, The CJEU has already issued five preliminary rulings that correspond the right of reproduction [15] and 23 preliminary rulings that correspond the right of communication to the public [16]:

Right of reproduction:

The judgment of 16 Jul 2009, C-5/08 (Infopaq).

An act occurring during a data capture process, which consists of storing an extract of a protected work comprising 11 words and printing out that extract, is such as to come within the concept of reproduction in part within the meaning of Article 2 of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, if the elements thus reproduced are the expression of the intellectual creation of their author; it is for the national court to make this determination [17].

The judgment of 4 Oct 2011, C-403/08 (Premier League).

Article 2 (a) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society must be interpreted as meaning that the reproduction right extends to transient fragments of the works within the memory of a satellite decoder and on a television screen, provided that those fragments contain elements which are the expression of the authors' own intellectual creation, and the unit composed of the fragments reproduced simultaneously must be examined in order to determine whether it contains such elements [11].

The judgment of 2 May 2012, C-406/10 (SAS Institute).



Article 2 (a) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society must be interpreted as meaning that the reproduction, in a computer program or a user manual for that program, of certain elements described in the user manual for another computer program protected by copyright is capable of constituting an infringement of the copyright in the latter manual if – this being a matter for the national court to ascertain – that reproduction constitutes the expression of the intellectual creation of the author of the user manual for the computer program protected by copyright[18].

The judgment of 16 Nov 2016, C-301/15 (Soulier and Doke).

Article 2 (a) and Article 3 (1) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society must be interpreted as precluding national legislation, such as that at issue in the main proceedings, that gives an approved collecting society the right to authorise the reproduction and communication to the public in digital form of 'out-of-print' books, namely, books published in France before 1 January 2001 which are no longer commercially distributed by a publisher and are not currently published in print or in digital form, while allowing the authors of those books, or their successors in title, to oppose or put an end to that practice, on the conditions that that legislation lays down[19].

The judgment of 29 Jul 2019, C-476/17 (Pelham and Others).

Article 2(c) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, must, in the light of the Charter of Fundamental Rights of the European Union, be interpreted as meaning that the phonogram producer's exclusive right under that pro-

vision to reproduce and distribute his or her phonogram allows him to prevent another person from taking a sound sample, even if very short, of his or her phonogram for the purposes of including that sample in another phonogram, unless that sample is included in the phonogram in a modified form unrecognizable to the ear.

A Member State cannot, in its national law, lay down an exception or limitation, other than those provided for in Article 5 of Directive 2001/29, to the phonogram producer's right provided for in Article 2 (c) of that directive.

Article 2 (c) of Directive 2001/29 must be interpreted as constituting a measure of full harmonization of the corresponding substantive law [20].

Right of communication to the public:

The judgment of 7 Dec 2006, C-306/05 (SGAE).

While the mere provision of physical facilities does not as such amount to communication within the meaning of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of copyright and related rights in the information society, the distribution of a signal by means of television sets by a hotel to customers staying in its rooms, whatever technique is used to transmit the signal, constitutes communication to the public within the meaning of Article 3 (1) of that directive.

The private nature of hotel rooms does not preclude the communication of a work by means of television sets from constituting communication to the public within the meaning of Article 3(1) of Directive 2001/29[21].

Order of 18 Mar 2010, C-136/09 (Sillogikis).

The hotelier, by installing televisions in his hotel rooms and by connecting them to the central antenna of the hotel, thereby, and without more, carries out an act of communication to the public within the meaning of Article 3 (1) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the



harmonisation of certain aspects of copyright and related rights in the information society [22].

The judgment of 22 Dec 2010, C-393/09 (BSA).

Television broadcasting of a graphic user interface does not constitute communication to the public of a work protected by copyright within the meaning of Article 3(1) of Directive 2001/29[23].

Judgment of 4 Oct 2011, C-403/08 (Premier League).

'Communication to the public' within the meaning of Article 3(1) of Directive 2001/29 must be interpreted as covering the transmission of the broadcast works, via a television screen and speakers, to the customers present in a public house [11].

The judgment of 24 Nov 2011, C-283/10 (Circul Globus).

Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society and, more specifically, Article 3(1) thereof, must be interpreted as referring only to communication to a public which is not present at the place where the communication originates, to the exclusion of any communication of a work which is carried out directly in a place open to the public using any means of public performance or direct presentation of the work [24].

The judgment of 9 Feb 2012, C-277/10 (Luksan).

Articles 1 and 2 of Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, and Articles 2 and 3 of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society in conjunction with Articles 2 and 3 of Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights re-

lated to copyright in the field of intellectual property and with Article 2 of Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights, must be interpreted as meaning that rights to exploit a cinematographic work such as those at issue in the main proceedings (reproduction right, satellite broadcasting right and any other right of communication to the public through the making available to the public) vest by operation of law, directly and originally, in the principal director. Consequently, those provisions must be interpreted as precluding national legislation which allocates those exploitation rights by operation of law exclusively to the producer of the work in question[25].

The judgment of 15 Mar 2012, C-135/10 (SCF).

The provisions of the Agreement on Trade-Related Aspects of Intellectual Property Rights, which constitutes Annex 1C to the Agreement establishing the World Trade Organisation (WTO) signed at Marrakesh on 15 April 1994 and approved by Council Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994) and of the World Intellectual Property Organisation (WIPO) Performances and Phonograms Treaty of 20 December 1996 are applicable in the legal order of the European Union. As the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations, adopted at Rome on 26 October 1961, does not form part of the legal order of the European Union it is not applicable there; however, it has indirect effects within the European Union. Individuals may not rely directly either on that convention or on the agreement or the treaty mentioned above. The concept of 'communication to the public' which appears in Council Directive



92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property and Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society must be interpreted in the light of the equivalent concepts contained in the convention, the agreement and the treaty mentioned above and in such a way that it is compatible with those agreements, taking account of the context in which those concepts are found and the purpose of the relevant provisions of the agreements as regards intellectual property.

The concept of 'communication to the public' for the purposes of Article 8(2) of Directive 92/100 must be interpreted as meaning that it does not cover the broadcasting, free of charge, of phonograms within private dental practices engaged in professional economic activity, such as the one at issue in the main proceedings, for the benefit of patients of those practices and enjoyed by them without any active choice on their part. Therefore such an act of transmission does not entitle the phonogram producers to the payment of remuneration [13].

The judgment of 7 Mar 2013, C-607/11 (ITV Broadcasting).

The concept of 'communication to the public', within the meaning of Article 3(1) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, must be interpreted as meaning that it covers a retransmission of the works included in a terrestrial television broadcast — where the retransmission is made by an organization other than the original broadcaster, — by means of an internet stream made available to the subscribers of that other organisation who may receive that retransmission by logging on to its server, — even though those subscribers are within the area of recep-

tion of that terrestrial television broadcast and may lawfully receive the broadcast on a television receiver.

The answer to Question 1 is not influenced by the fact that a retransmission, such as that at issue in the main proceedings, is funded by advertising and is therefore of a profit-making nature.

The answer to Question 1 is not influenced by the fact that a retransmission, such as that at issue in the main proceedings, is made by an organization which is acting in direct competition with the original broadcaster[12].

The judgment of 13 Feb 2014, C-466/12 (Svensson).

1. Article 3(1) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, must be interpreted as meaning that the provision on a website of clickable links to works freely available on another website does not constitute an 'act of communication to the public', as referred to in that provision.
2. Article 3(1) of Directive 2001/29 must be interpreted as precluding a Member State from giving wider protection to copyright holders by laying down that the concept of communication to the public includes a wider range of activities than those referred to in that provision.

Article 3 (1) of Directive 2001/29 must be interpreted as precluding a Member State from giving wider protection to copyright holders by laying down that the concept of communication to the public includes a wider range of activities than those referred to in that provision[26].

The judgment of 27 Feb 2014, C-351/12 (OSA).

Article 3 (1) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society must be interpreted as precluding national legisla-



tion which excludes the right of authors to authorise or prohibit the communication of their works, by a spa establishment which is a business, through the intentional distribution of a signal by means of television or radio sets in the bedrooms of the establishment's patients. Article 5 (2)(e), (3) (b), and (5) of that directive is not such as to affect that interpretation.

Article 3(1) of Directive 2001/29 must be interpreted as meaning that it cannot be relied on by a copyright collecting society in a dispute between individuals for the purpose of setting aside national legislation contrary to that provision. However, the national court hearing such a case is required to interpret that legislation, so far as possible, in the light of the wording and purpose of the directive in order to achieve an outcome consistent with the objective pursued by the directive[27].

Order of 21 Oct 2014, C-348/13 (Best-Water International).

The mere fact that a protected work, freely available on an internet site, is inserted into another internet site by means of a link using the 'framing' technique, such as that used in the case in the main proceedings, cannot be classified as 'communication to the public' within the meaning of Article 3(1) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society since the work at issue is not transmitted to a new public or communicated a specific technical method different from that of the original communication[28].

The judgment of 26 Mar 2015, C-279/13 (C More).

Article 3 (2) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society must be interpreted as not precluding national legislation extending the exclusive right of the broadcasting organisations referred to in Article 3(2)(d) as regards acts of communication to the public which broadcasts of

sporting fixtures made live on internet, such as those at issue in the main proceedings, may constitute, provided that such an extension does not undermine the protection of copyright[29].

Order of 14 Jul 2015, C-151/15 (Sociedade Portuguesa de Autores).

The concept of 'communication to the public' within the meaning of Article 3(1) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society must be interpreted as meaning that it covers the transmission, by operators of a café-restaurant, of music-literary works broadcast by a radio broadcasting station, by means of a radio apparatus connected to loudspeakers and/or amplifiers, to the customers present in that establishment[30].

The judgment of 19 Nov 2015, C-325/14 (SBS Belgium).

Article 3(1) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, must be interpreted as meaning that a broadcasting organization does not carry out an act of communication to the public, within the meaning of that provision, when it transmits its program-carrying signals exclusively to signal distributors without those signals being accessible to the public during, and as a result of that transmission, those distributors then sending those signals to their respective subscribers so that they may watch those programmes, unless the intervention of the distributors in question is just a technical means, which it is for the national court to ascertain[31].

The judgment of 31 May 2016, C-117/15 (Reha Training).

In a case such as that in the main proceedings, in which it is alleged that the broadcast of television programmes by means of television sets that the operator of a rehabilitation centre has installed in its premises affects the copyright and related rights of a large number of interested



parties, in particular, composers, songwriters and music publishers, but also performers, phonogram producers and authors of literary works and their publishers, it must be determined whether such a situation constitutes a 'communication to the public', within the meaning of both Article 3(1) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society and Article 8(2) of Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property and in accordance with the same interpretive criteria. Furthermore, those two provisions must be interpreted as meaning that such a broadcast constitutes an act of 'communication to the public'[32].

The judgment of 8 Sep 2016, C-160/15 (GS Media).

Article 3(1) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society must be interpreted as meaning that, in order to establish whether the fact of posting, on a website, hyperlinks to protected works, which are freely available on another website without the consent of the copyright holder, constitutes a 'communication to the public' within the meaning of that provision, it is to be determined whether those links are provided without the pursuit of financial gain by a person who did not know or could not reasonably have known the illegal nature of the publication of those works on that other website or whether, on the contrary, those links are provided for such a purpose, a situation in which that knowledge must be presumed[33].

The judgment of 16 Nov 2016, C-301/15 (Soulier and Doke).

Article 2(a) and Article 3(1) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the

harmonisation of certain aspects of copyright and related rights in the information society must be interpreted as precluding national legislation, such as that at issue in the main proceedings, that gives an approved collecting society the right to authorise the reproduction and communication to the public in digital form of 'out-of-print' books, namely, books published in France before 1 January 2001 which are no longer commercially distributed by a publisher and are not currently published in print or in digital form, while allowing the authors of those books, or their successors in title, to oppose or put an end to that practice, on the conditions that that legislation lays down[34].

The judgment of 1 Mar 2017, C-275/15 (ITV Broadcasting).

Article 9 of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society, and specifically the concept of 'access to cable of broadcasting services', must be interpreted as not covering, and not permitting, national legislation which provides that copyright is not infringed in the case of the immediate retransmission by cable, including, where relevant, via the internet, in the area of initial broadcast, of works broadcast on television channels subject to public service obligations[35].

The judgment of 16 Mar 2017, C-138/16 (AKM).

Article 3 (1) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society and Article 11bis of the Berne Convention for the Protection of Literary and Artistic Works, in the version resulting from the Paris Act of 24 July 1971, as amended on 28 September 1979, must be interpreted as not precluding national legislation, such as that at issue in the main proceedings, which provides that the simultaneous, full and unaltered transmission of programmes broadcast by the national



broadcasting corporation, by means of cables on national territory, is not subject, under the exclusive right of communication to the public, to the requirement that authorization be obtained from the author, provided that it is merely a technical means of communication and was taken into account by the author of the work when the latter authorized the original communication, this being a matter for the national court to ascertain.

Article 5 of Directive 2001/29, in particular paragraph 3(o) thereof, must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which provides that a broadcast made by means of a communal antenna installation, when the number of subscribers connected to the antenna is no more than 500, is not subject, under the exclusive right of communication to the public, to the requirement that authorization be obtained from the author, and as meaning that that legislation must, therefore, be applied consistently with Article 3(1) of that directive, this being a matter for the national court to ascertain [36].

The judgment of 26 Apr 2017, C-527/15 (Stichting Brein).

1. The concept of ‘communication to the public’, within the meaning of Article 3(1) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, must be interpreted as covering the sale of a multimedia player, such as that at issue in the main proceedings, on which there are pre-installed additions, available on the internet, containing hyperlinks to websites — that are freely accessible to the public — on which copyright-protected works have been made available to the public without the consent of the right holders.
2. Article 5(1) and (5) of Directive 2001/29 must be interpreted as meaning that acts of temporary reproduction, on a multimedia player,

such as that at issue in the main proceedings, of a copyright-protected work obtained by streaming from a website belonging to a third party offering that work without the consent of the copyright holder does not satisfy the conditions set out in those provisions [37].

The judgment of 14 Jun 2017, C-610/15 (Stichting Brein).

The concept of ‘communication to the public’, within the meaning of Article 3(1) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, must be interpreted as covering, in circumstances such as those at issue in the main proceedings, the making available and management, on the internet, of a sharing platform which, by means of indexation of metadata relating to protected works and the provision of a search engine, allows users of that platform to locate those works and to share them in the context of a peer-to-peer network [38].

The judgment of 29 Nov 2017, C-265/16 (VCAST).

Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, in particular Article 5 (2) (b) thereof, must be interpreted as precluding national legislation which permits a commercial undertaking to provide private individuals with a cloud service for the remote recording of private copies of works protected by copyright, by means of a computer system, by actively involving itself in the recording, without the rightholder’s consent [39].

The judgment of 7 Aug 2018, C-161/17 (Renckhoff).

The concept of ‘communication to the public’, within the meaning of Article 3 (1) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related



rights in the information society, must be interpreted as meaning that it covers the posting on one website of a photograph previously posted, without any restriction preventing it from being downloaded and with the consent of the copyright holder, on another website [40].

Unfortunately, the provisions of the Chapter 9 «Intellectual property» of the EU-Ukraine association agreement, unlike the provisions of the Chapter 10 «Industrial and enterprise policy» (Art. 264), do not contain any interpretation provisions with references to, including the relevant jurisprudence of the Court of Justice of the European Union.

This absence makes such decisions not a source of intellectual property law in Ukraine, but the legal positions outlined in them are extremely important in order to gain the best international experience and to further adapt and harmonize Ukrainian copyright law with EU standards.

Conclusion. Right of reproduction of works and right of making available of

works to the public in such a way that members of the public may access these works from a place and at a time individually chosen by them have been transmitted into the Association Agreement from Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society; i.e., there are no rules in these provisions that would be new to the EU. A substantial part of these provisions are already inscribed in the Law of Ukraine «On Copyright and Related Rights», but at the same time, some of them differ from the EU. In order to gain the best international experience and to further adapt and harmonize Ukrainian copyright law with EU standards, the relevant practice of the Court of Justice of the European Union should be taken into account. ♦

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Надійшла до редакції 13.09.2019 року

Зеров К. Право на воспроизведение и доведение произведения до всеобщего сведения в Соглашении об ассоциации между ЕС и Украиной. Стаття посвящена дослідженню двох имущественных авторских прав, а именно права на воспроизведение и права на доведение произведения до всеобщего сведения таким образом, что любое лицо может получить доступ к произведению из любого места и в любое время по собственному выбору, а также сравнительному анализу их правового регулирования в соответствии с нормами национального законодательства Украины и нормами Соглашения об ассоциации между Украиной и ЕС. Рассмотрены концепции «воспроизведения» и «публичного сообщения».

Ключевые слова: воспроизведение, публичное сообщение, доступность, доведение произведения до всеобщего сведения, Соглашение об ассоциации.

Зеров К. Право на відтворення та подання творів до загального відома публіки в Угоді про асоціацію між ЄС та Україною. Стаття присвячена дослідженню двох майнових авторських прав, а саме права на відтворення та права на подання творів до загального відома публіки таким чином, щоб її представники могли отримувати доступ до творів з будь-якого місця і у будь-який час за їх власним вибором, а також порівняльному аналізу їх правового регулювання відповідно до норм національного законодавства України та норм Угоди про асоціацію між Україною та ЄС. Розглянуто концепції «відтворення» та «публічне сповіщення».

Зроблено висновок, що право на відтворення є основним правом, оскільки воно є основою більшості форм використання твору. Відтворення можливе будь-яким способом чи формою. Але згідно зі статтею 1 Закону України «Про авторське право та суміжні права» відтворення означає виготовлення одного чи декількох примірників твору, відеограми, фонограми в будь-якій матеріальній формі, а також їх запис для тимчасового або постійного зберігання в електронному вигляді (включаючи цифрову), оптичну або іншу читабельну на комп'ютері форму. А відповідно до статті вказаного закону, примірник твору означає лише копію твору, виготовлену в будь-якій матеріальній формі;

Разом з тим, в Україні на законодавчому рівні залишається невизначеним, що право на відтворення твору включає пряме чи опосередковане відтворення та відтворення повністю або частково. Ці питання вирішуватиме суд.

Зроблено висновок, що підхід, за яким право на подання творів до загального відома публіки таким чином, щоб її представники могли отримувати доступ до творів з будь-якого місця і у будь-який час за їх власним вибором, включається до більш широкого «права на публічне сповіщення», застосовується у державах-членах ЄС (статті 3 та 4 Директиви 2001/29 / ЄС) і відображено у ст. 174 Угода про асоціацію. Крім того, концепція права публічного сповіщення в ЄС повинна тлумачитися в широкому розумінні, оскільки стосується будь-якої передачі охоронюваних творів, незалежно від технічних засобів чи використання технологій, ця концепція включає два сукупні критерії, а саме: «акт сповіщення твору» та «сповіщення цього твору публіці». Вказаний підхід має бути впроваджено в законодавство України.

Ключові слова: відтворення, публічне сповіщення, доступність, подання творів до загального відома публіки, Угода про асоціацію