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DIGITAL TRANSFORMATION AND TRANSFORMATION OF OWNERSHIP

Elena Simatova (a)*, Kristina Belgisova (a), Olesya Grabchak (a), Igor Petrov (a), Olga Shapoval (a)
*Corresponding author

(a) Southern Institute of Management, 216, Stavropolskaya Str., Stavropol, Krasnodar, 350040, Russia
e-simatova@yandex.ru, +7861+2338859

Abstract

Gradual transition from the ownership to the intellectual property license generates the need for legal regulation of these relations. The digital transformation of things generates more questions than answers, needs legal regulation of digital transactions. The lack of forms of contracts causes regulatory uncertainty. Companies providing digital services regulate these relations in their own favor. There are various definitions of the legal nature of agreements combining several types of independent civil law contracts. The public offer does not imply changes in contractual terms according to the will of the user. However, some provisions violate the basic principles of contractual relations. In particular, it is inadmissibility of a unilateral change in the price, quality and legal liability. The principle of autonomy of the will of the parties to choose legal rules can be constrained by the imperative norms of the consumer law of the Russian Federation. The article aims to study the legal aspect of digital transformation. The purpose of the study is to determine the legal nature of agreements on provision of access to databases, identify problems of concluding and executing contracts and developing proposals for their elimination through the lens of consumer rights protection.

Keywords: Digital transformation, databases, intellectual property.

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1. Introduction

Transition from the ownership to the intellectual property licensing covering more and more spheres are realities of our life.

To gain access to the database is more profitable than to be the owner of the objects. The user is not burdened with obligations of the owner to care for and maintain the object, does not bear damage risks. The same object can be simultaneously used by an unlimited number of users, while the owner can be only one. The license can be granted immediately, sometimes without simultaneous payment.

The owner can change and control applications of the object. The license does not provide this right, however, it provides for the right to improvement, personalization, and sharing services.

There are five digital transformation technologies:

1) artificial intelligence is a group of technologies that can imitate human activity;

2) robotic programs and machines are a group of technologies that can replace human communication operations;

3) cross-analytical systems are a group of technologies that establish links between unrelated areas of human activities: if a person likes playing chess, he prefers a certain type of sexual stimulation in family life;

4) universal mobility is a group of technologies that allow any actions to be carried out using a mobile phone;

5) instant adaptability is the ability to restructure daily activities daily by updating and changing functions of mobile devices.

When we conclude public contracts, three issues can arise:

1) Who offers to conclude the contract? In most cases, it is either artificial intelligence serving any interactive interfaces of the organization or robotic programs and machines, cross-analytical systems based on open data. The key question is to what extent the organization - the owner of the program – is really a subject of legal relations;

2) What is the subject of the contract if the service is part of the “body” of the robot that concludes this contract? Can the “hand” be subject to a contract of services. It seems that it cannot. The Italian law has a rule of the “right hand” according to which, people known for their strong blows, were forbidden to strike with their right hand. In other words, when we enter into a contract to get access to books, when the books are stored as a digital code, the person who deciphers the code is a representative of the book reading service, if the books are stored in such a way that they cannot be read;

3) Who is a party to the contract if you can "hire" a computer program that will read the text of the book, while not referring to the text of the book itself, but dealing with a digital algorithm that stores the text of the book on the hard disk? Is the text code of a book a product of the author?

Thus, the digital transformation of things gives rise to a lot of questions and needs legal regulation.

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2. Problem Statement

Despite the development of technologies and emergence of new communication proposals, the legal form of social relations between users and providers has not yet been determined. As a result, there are various types of contracts concluded to ger access to the required information.

This legal uncertainty leads to the monopoly of the service provider to establish rules for using the services. The user provides detailed information about himself, pays for services, but cannot make any demands on his counterparty, since the contract provisions (public offer) are formulated so that the provider is not responsible for the accuracy of data, traffic stability, and quality of the services. Although these contracts are public in nature. Therefore, the users belong to the category of consumers that fall under the relevant legislation.

All of the above emphasizes the need to determine the legal nature of these contracts.

3. Research Questions

The research subject is the following contracts: Adobe's user license contract, Yandex' license contract (as part of the Yandex.Music service), MTS' license contract (as part of the MTS.Book service) and Storytel's license contract (as part of the Storytel service).

Despite some common provisions, the legal forms of these contracts are different even taking into account the use of constructions of the civil legislation of the Russian Federation.

Despite the use of different terms, such as: "user agreement", "license agreement" and "general conditions for using services", all the contracts are a public offer, i.e. "the proposal, containing all the essential terms of the contract showing the will of the person who is making the proposal, to conclude the contract on the terms, indicated in the proposal, with any responding person" (paragraph 2, Article 437 of the Civil Code). An offer is a message about the will to enter into a contract. From its terms, it is clear that the message will bind the offeror only if the person to whom the offer is addressed, will accept it (Petrov, Simatova, Romanova, & Shapoval, 2014).

The resulting legal relations which are commutative are contractual obligations. However, the choice of a specific type of contract is difficult.

Despite the fact that the main goal of these legal relations is obvious – to provide / obtain access to the relevant database, the wording of their subject varies significantly.

In the Adobe's user agreement, the subject is services including the use of the company's website, customer support services and Creative Cloud services and software.

In the Storytel's agreement, the subject is an electronic subscription service for downloading audiobooks and e-books.

The subject of the MTS' agreement is an access to content (books, other text works) by means of a set of client programs and technical and technological solutions using company's network resources.

The subject of the Yandex' user agreement is the use of the Yandex.Music program for mobile devices (phonograms, lyrics artwork, music album covers, etc.).

The following conclusions can be drawn:

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1) these are services since we are talking about the obligation to perform certain actions or carry out certain activities (Shapoval & Romanova, 2018) to provide access to the database, technical support;

2) services can be provided only with the use of special software transferred to the user under the license (Boldyrev, 2015);

3) services are provided and used through the Internet. Access to the Internet is provided by the third parties and by the company itself (MTS).

Thus, there is a mixed contract combining elements of paid services and a license agreement, which implies the use of the rules of chapter 39 (and 37) of the second part of the Civil Code of the Russian Federation, as well as chapters 69 of the fourth part of the Civil Code of the Russian Federation. It is necessary to develop a contract for providing access to databases.

4. Purpose of the Study

The article aims to study the legal aspect of digital transformation. The purpose of the study is to determine the legal nature of agreements on provision of access to databases, identify problems of concluding and executing contracts and developing proposals for their elimination through the lens of consumer rights protection.

5. Research Methods

The problem of digital transformation and transformation of property rights requires the use of a wide range of approaches and methods. They are aggregate (for collecting data), casual (for analysis of unique, rare, atypical phenomena), interpretative (for developing a unified approach to the rights, duties and responsibilities of participants), and comparative (for local, chronological and discursive comparisons) methods.

6. Findings

The compensated nature of the agreements implies the obligation to pay for the services provided (the of software, access to the Interne). Possible free access to the database is of advertising and informational nature.

The cost of the services can be changed by the company unilaterally without the consent of the user who is notified about the changes. This provision violates the provisions of paragraph 1 of Article 310 of the Civil Code of the Russian Federation, which states that “the unilateral refusal to discharge the obligation and the unilateral amendment of its terms is not admitted”. Moreover, clause 2 of this article states that “the unilateral refusal to discharge the obligation, connected with its parties' performing the business activity, and the unilateral amendment of the terms of such an obligation shall also be admissible in the cases, stipulated by the contract, unless otherwise following from the law or from the substance of the obligation.

The user has to refrain from copying, modifying, posting, sublicensing or reselling services or software. The user is obliged to protect the company from any claims for compensation for loss or damage related to the use of services.

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These obligations seem to be rather one-sided. The companies do not undertake any obligations related to the quality of services and software

Let us cite some extracts from the agreements.

The license agreement of Yandex.Music: “The Rights Holder does not provide any guarantees regarding the error-free and uninterrupted operation of the Program or its individual components and / or functions, compliance of the Program with specific goals and expectations of the User, does not guarantee accuracy, completeness and timeliness of the Data, as well as does not provide any other guarantees not expressly stated in this License.”

The MTS.Books’ user agreement: “Under no circumstances shall the Operator be liable to the Subscriber or any third parties for any direct, indirect, unintentional damage, including lost profits or lost data, damage to honor, dignity or business reputation caused by connection with the provision of the Content service or the use of the results of intellectual activity posted on the Resource (Service), Content”.

The Adobe’s User Agreement: “To the maximum extent permitted by law, we disclaim any warranties, express or implied, including the implied warranties of non-infringement, merchantability and compliance with a specific purpose.”

It is necessary to mention one more important characteristic of these legal relations - they are “consumer contracts”, i.e. contracts with participation of the consumer – a citizen who orders or purchases goods and services for personal, family, home and other needs not related to business activities (Makarov, 2018). The regulation of these legal relations by the Law of the Russian Federation “On Protection of Consumer Rights” of 07.02.1992 No. 2300-1 and Chapter 39 of the Civil Code of the Russian Federation causes generates contradictions.

One of the fundamental consumer rights stipulated by the Civil Code of the Russian Federation and the Law of the Russian Federation “On Consumer Rights Protection” is the consumer’s right to the quality of goods, works, services, which corresponds to the corresponding duty of his counterparty to ensure and incur legal liability for non-fulfillment or improper fulfillment of the obligation.

Even we assume that the inclusion of this provision in the texts of the agreements is due to the technical nature of these services and current international practice, these conditions should not violate basic consumer rights, endangering sustainability of civilian traffic and generally accepted principles of consumer protection as the weakest and most vulnerable link in the chain of emerging relationships.

The quality of the services provided and software should be presumed, except for certain cases, which should be exhaustively stated in the text of the agreement. For example, we can talk about force majeure, in particular, natural disasters that may affect the quality of the Internet and software.

In addition, the quality of a product, work, service may imply compliance with the specific goals of their acquisition by the user. To deprive the latter of such an opportunity is contrary to the basic principles of consumer protection.

In the Russian legislation, the grounds and limits of responsibility of telecommunication companies are ambiguous due to legal uncertainty in choosing legal structures for establishing contractual relationships in order to provide relevant services (Kuznetsova, 2018).

The license agreement contains a provision on the intellectual property right protection. Companies declare exclusive rights to the software used and emphasize that the ownership does not transfer to the user.

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The database and its constituent objects are also intellectual property protected by the current legislation.

In all the above agreements, the applicable law is determined by virtue of the principle of autonomy of the will of the parties which is a basic principle for resolving conflicts (Simatova, 2015). However, many researchers say that restrictions on the autonomy of the parties in choosing the applicable law are need to achieve the golden mean in the legal regulation of relations complicated by a foreign element (Mandzhiev, 2017; Strigunova, 2018).

In the agreements under study, the reference is made to the right of the country to which the company belongs (MTS, Yandex, Storitel) or the place of residence of the owner.

Let us cite the Adobe's User Agreement: "If you live in North America (including the USA, Canada and Mexico), you enter into business relationships with Adobe Systems Incorporated regulated by the Californian legislation. If you do not reside in North America, you enter into business relationships with Adobe Systems Software Ireland Limited which are regulated by the Irish law. For customers from Australia, Adobe Systems Software Ireland Limited acts as an authorized agent of Adobe Australia Trading Pty Ltd. and concludes this contract as an agent for Adobe Australia Trading Pty Ltd. You may have additional rights under the law. We do not intend to restrict these rights in cases where it is prohibited by law".

It is appropriate to refer to the provisions of paragraph 1 of Article 1192 of the Civil Code of the Russian Federation which ensure priority of those mandatory laws of the Russian Federation which regulate the relevant relationships regardless of the applicable law (the rules of direct application). These are imperative norms of consumer protection legislation.

In order to protect the rights of participants in cross-border relations and expand international cooperation, the states limit their sovereignty by recognizing and enforcing foreign judicial and arbitral decisions (Ogneva, 2018).

All the agreements provide for an obligatory pre-trial (claim) procedure in case of disputes. If these measures did not resolve the conflict, the conflict of jurisdiction is resolved by the court local to the company. Let us cite the Adobe's User Agreement: "If you live in America, your claim will be handled by the court of arbitration and mediation in Santa Clara (California) in accordance with its Comprehensive Arbitration Rules and Procedures. If you live in Australia, New Zealand, Japan, Mainland China, Hong Kong SAR, Macau SAR, Taiwan, South Korea, India, Republic of Sri Lanka, Bangladesh, Nepal, or in a member state of the Association of Southeast Asian Nations (ASEAN), your claim will be handled by Singapore International Arbitration Center (SIAC) in accordance with its arbitration rules. In all other cases, your claim will be handled by London Court of International Arbitration (LSMA) in London in accordance with the LCIA arbitration rules".

7. Conclusion

The study identified the need for further work of the legislator in the field of legal regulation of intellectual property relations. The gap in the domestic legislation indicates the obsolescence of the general concept of the development of civil legislation and inconsistency with global practice and current trends in the private and information law.

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The lack of unambiguous imperative rules aimed at protecting the rights of the user is used by companies in their own interests, providing for one-sided conditions that flagrantly violate the basic rights of the consumer. Striving to protect their own interests, regulate relations in their own favor, without providing any serious guarantees of quality fulfillment of their obligations and without bearing liability for non-fulfillment or improper fulfillment of their obligations.

The state can and should regulate these legal relations in order to ensure sustainability of civil turnover and protection of the rights of users of intellectual property.

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