The Specter of Digital Rights

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ABSTRACT
In the article, the author examines the problem of the impact of technological changes on the legal regulation of public relations, namely the development of digital technologies, how significant such an impact turned out to be and whether, in this regard, significant changes in the principles and mechanisms of legal regulation are required. It is asserted in the article that the problem how to adapt existing legal forms in order to address inevitable changes in public relationships (does not matter what the cause of these changes is: the so called "digitalization" or something else) may be relatively easily resolved. What we need to do is to segregate those aspects of the factual side of relationships in question that should have legal consequences from the rest, that is from those aspects that may be ignored by law. In order to illustrate this thesis the author considers two examples: the semiconductor chip protection and the electronic signature as a way to identify an entity who expressed a will. The author comes to the conclusion that the existing legal instruments for regulating the emerging new factual relations are sufficient, but they must be used correctly. The author gives examples of such law enforcement within the framework of the article.
Keywords: possession vs. property, legal fact, semiconductor chip protection, electronic signature

Even some years ago, while discussing the issue of possible changes in law, which can be needed taking into account the changes in actual relations because of new technologies, the lawyers supposed confidently, that these changes could be significant. At the conference, taking place in North-West Institute of Management RANEPA on April the 28th 2021 "The Law and the State of the new informational Epoch: new challenges and new opportunities" you could notice, that "the pendulum made a swung in the other direction". The most participants doubted in necessity of significant changes. Although the representatives of the most radical point of view claimed, that all the necessary legal forms for new actual relations have already existed, their more conservative supporters believed that local changes would be enough.

However, as a rule, firstly — all the extremes are false and secondly –the question of the scale of changes isn"t considered to be so interesting. If the changes must have only local character, they have not to be exercised by intuition, but to be based on a methodological foundation. Unfortunately, this foundation hadn"t been discussed on the conference (if we don"t consider such a foundation as the problem of adaptation the law to the changing public relationship to be made up).

Rather interesting and in many ways consolatory reasoning of the law"s theory representatives about the opinion, that the fundamental and significant features of law could be "corroded" because of so called "digital transformation" of public relationships, cannot be considered as this foundation as well. The answer to the question "What will not change" says nothing about "how to change" things, which must be changed. However, there are no doubts that the new legal relationships must appear from the judicial facts, because there are no other basis for appearing (changing, termination) of legal relationships except of judicial facts.

From all said at the conference (precisely speaking, heard by the author of the article), the most interesting thing from the point of finding approaches, which could be used while "modernization" of the legal form of changing of legal relationships, is the observation by V.F. Popondopulo. The main idea is, that at the discussing of "digital transformation" of public relationships by lawyers, the practical side of the issue is being more precisely described as their legal side.

Eighteen centuries before Popondopulo, Ulpian said some similar ideas, when he took attention to the fact that possession hasn"t much in common with ownership[1]. Let us make more definite statement: we have to give up comparing practical issues with legal things, and so we"ll manage not only the digital, but also more other transformations, which can emerge in practical relationships.

But before to demonstrate how to use this thesis while regulation of rather new practical relationships, let"s check if we are really following this thesis at regulating the well-known relationships. Let"s consider two examples.

The Article 66.1 of Russian Federation Civil Code (further –CC RF)[2] states the property which can be passed by the founder into the authorized capital of the business entity. Tis article lists, what mandatory, intellectual and corporative rights can be such property and mentions along with them... the items. But from legal point of view, what mean the passing

[1] I.A.Pokrovsky. The History of Roman Law. Paragraph 58 [Electronic resource] URL: https://civil.consultant.ru/elib/books/25/page_40.html#86 (data of access 03.07.21).
[2] Civil Code of the Russian Federation. 1994. No.32. Article 3301 (Part first); CC RF, 1996. No.5. Article 410 (part second).

of a thing, an item? There are a lot of answers to this question. When you are passing your shoes into repairing workshop, you are actually passing an item as well, but it is obvious that the Article 66.1 means something other. Moreover, the precisely knowing of this article let us consider that from all the rights, which can exist according to an item, the ownership only can be passed. And despite this, we use the concept "item" or "thing" instead of the concept "ownership".

Considering the creation of legal entity, we can consider its liquidation. According to the Article 419 CC RF the obligation ends by the liquidation of a legal entity (debtor or lender), except of the cases when all the obligations of the legal entity are assigned by law or by other legal acts on another entity. Taking examples of some "cases", when the obligation doesn"t end through liquidation of legal entity, we can remember, first of all, requirements of compensation for harm to life and health (part 2 Article 1093 CC RF); or contract of gratuitous use (part 2 Article 700 CC RF). At the same time we don"t have to see statistics to state, that among liquidated legal entities the part of entities, who are obliged for compensation for harm to life and health is less than the part of entities, who have non-cash on bank accounts. And there are some reasons to presume, that this money however passes to somebody after liquidation. At this point if we remember that from legal point of view non-cash is considered to be an obligation of the right, there is a rhetorical question: why neither legislation, nor the Supreme Court of RF[3], nor the most commentators of the Article 419 CC RF remember it?

These considered examples are enough to understand, that the reproach by V.F. Popondopulo could be addressed to the whole legal system of us: regular mixing of practical and legal is its typical feature. While it is about the regulation of relationships according to usual objects, it could be done as if there makes no problems. But when instead of things and items we consider for instance cryptocurrency, it becomes much more difficult.

Now, let"s consider two other examples. There will be the examples of norms, which belong to regulation of relationships with usage of new technologies. At the same time, we will see, that while formulation of these norms was successfully managed to realize the first-year-student"s task from the faculty of laws; so, to detect among a lot of obligations these circumstances, which really has judicial and legal meaning and to endow them with the role of legal facts. And after that, to determine the consequences of these facts, specifying, which rights and obligations compile the content of law relationships, emerged from these facts.

Article 74 CC RF is devoted to semiconductor chips" protection. An semiconductor chip is several layers, and special areas are applied on every layer using specific templates. In other words, the result of the intellectual activity called "Topology of semiconductor chip" is the answer to the question, which areas have to be applied where for getting certain functionality. Persons trying to use the results of the intellectual efforts of the others, do the following: they acquire the needed chip, remove the layers one by one, do images of every layer and according to these images the templates they need. It"s easy to understand, that the described procedure of copying of chip"s layer by layer replicates the copying if a book page by page.

The describing of the practical side of relationship, described in the previous paragraph, let's form a notion: what are the interests of the creators of topology of semiconductor chip, and what are the ways of encroachment for these interests. As a result can be concluded, that content of the Article 74 CC RF (describing of legal side of these relationships) can be similar to the Article 70 CC RF, "Copyright". Indeed, getting to know the Article 74 CC RF, you"ll make sure that despite some differences, there are nothing there beyond copyright and common clauses if civil right. One significant difference is worth being mentioned: in the Article 74 CC RF regulates the situation of independent creation of equal topologies; and the copyright considers that there are no independent created but equal works.

The second example is norms, devoted to a competent digital signature. Like in the previous example, there wasn"t any reference into the physical chemistry, and in this example we don"t speak about advanced mathematics. The technology used here is based on a couple of unique interrelated keys: digital signatures key and digital signature verification key. Every of them can be considered as a sequence of symbols (although these are very big numbers). Using special means, a digital document and a digital signature key, one more unique sequence is possible to be created: a digital signature, which is impossible to create without a digital signatures key. Getting a digital document, a digital signature and the digital signature verifications key, you can check with some special means, if this signature have been created after signing a document with the digital signatures key, forming a pair with this key, or not.

According to the Paragraph 2 part 1 Art.160 CC RF, the requirement of having a digital signature is considered to be fulfilled, if any way have been used, which lets reliably identify the person expressed the will. The described in the previous paragraph method can be used for reliably identification of such a person, by compliance with two conditions: a) one person only can own a certain digital signatures key; b)every person, having got the certain digital signatures verification key, must have an opportunity to identify reliably the owner of the key.

In the Federal Law "About a digital signature" all mentioned circumstances have been reflected: availability of special means, having preset characteristics (Art. 12), the mentioned time aspect (Art. 11), the necessity to keep the digital signatures key secret (Part 1 Art. 10) , and the way of preventing the substitution of the digital signature verifications key (Part 2.1 Art. 15).If these requirements are compiled, have legal consequences, stated in part 1 Article 6 of the same

[3] See paragraph 41 Resolution of Plenum of the RF Supreme Court from 11.06.2020 No.6 "About any issues of applying clauses of Civil Code of Russian Federation about determination of circumstances". Bulletin of Supreme Court. 2020. No.8.

law: the information in digital form signed with digital signature is admitted to be a digital document and is equal to the document in paper form and signed with a handwritten signature, and can be applied in any legal relationships according to the legislature of RF, except of the case if the federal law or compiled with it legal acts states the requirement of necessity of forming a document in paper form only.

In such a way can be handled by regulating other relationships, in which new technologies are used. And first of all attention must be paid to the concept "legal fact", serving usually as binging element between practical and legal sides of relationships and at the same time an obstacle to their mixing.

References

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