Editorial

Today, the legal community no longer doubts that digitalization is a factor that will invariably determine the agenda of legislators, courts, and scholars. Even 'digital' skeptics have to reckon with this. The editorial department of the Digital Law Journal discusses the politics of civil law (and not only) with Anton Aleksandrovich Ivanov.

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INTERVIEW

ARS BONI ET AEQUI IN THE DIGITAL AGE

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– Professor Ivanov, in your opinion, what areas of research in the field of digital law are the most promising today?

– I first went online in 1995. Since then, I have seen the different stages of development of the digital environment. I think we can start with the most general questions. Some time ago, there was discussion in the literature about the coming of the *Web 3.0* Age[5], but now it is possible to have discussions about the *Web 4.0* Age. Of course, law is not the flagship of the development in this area, but only follows the corresponding changes.

The era of *Web 3.0* implies the existence of property relations on the Web, which are to become automated through blockchain technology. However, the desired automation was not achieved. No matter how we understand blockchain technology, network automation is one thing, and factual property relations is another. They are somewhat divided into two parts. On the one hand, there is a digital environment in which everything happens quite quickly, where contracts are concluded and performed, but on the other, these phenomena do not affect the main parameters of property relations. This is a kind of game outside of ordinary life. As soon as attempts are made to actually transfer property relations to a digital format, both the government and large private companies are opposed.

Take, for example, the evolution of cryptocurrencies in foreign countries. In the United States, one digital currency is banned, then another. It is quite difficult to identify any logic in such prohibitions since what is allowed is no less risky than what was prohibited. And, probably, the government here operates according to the principle: "He may be a bastard, but he's our bastard."

In Russia, it seems to me that the government generally views cryptocurrency as a hostile element. We completely ignore the transfer of property relations into a special, virtual environment because it cannot be controlled. This, in turn, encourages entities to leave the Russian market. So, it turns out

[5] A web-centric vision articulated by Netscape.com CEO Jason Calacanis as a continuation of Tim O'Reilly's *Web 2.0* vision. Its essence is that *Web 2.0* (which, in turn, is a rethinking of *Web 1.0*) implies user-oriented Internet, and *Web 3.0* will provide understanding of data by computer algorithms and interactions between them.

that the people are physically located in our country, but the business is carried out abroad. This gap has not yet been bridged. *One of the promising areas is precisely the comprehension of the transfer of property relations to the digital environment.*

I would like to note that the changes that were made to the Civil Code of the Russian Federation [Art. 141.1] did not make any impression on me. In my opinion, they are of a passing nature and will not provide anything lasting.

At the same time, the government seeks to transfer many of its functions to the digital environment. Moreover, this desire is directly proportional to whether it is possible to restrict specific individuals' freedom of choice. In other words, if such freedom can be limited, then this is a great option for digitalization. On the other hand, if there is a possibility of choice as a result of digitalization, then the government loses interest. Therefore, registries are currently being converted to digital formats. But as I've already noted, the goal of these processes is to limit the freedom of choice of subjects. Therefore, *the second promising direction is the study of government functions in the digital environment.*

The third aspect is *the problem of the segmentation of the World Wide Web,* as different countries have recently been trying to divide it into separate pieces. Nevertheless, it is clear that it can only develop effectively as a single network. In addition to reducing the technical capabilities of specific countries, the division into national segments slows down the development of the Web as a whole. Suppose various measures are taken to nationalize the Internet. This would lead to a decrease in speed and lack of access to some new types of hardware and software. It seems to me that the problem of World Wide Web segmentation also requires an understanding of the science involved.

– In your opinion, is the role of the government changing in the digital age? Does the new information revolution mean a transition to a 'laissez faire' ideology or should we expect the establishment of total state control?

– The fact is, there are different methods of public administration. One is to give maximum freedom to individual entities. These, in turn, develop rapidly and some begin to dominate. It isn't necessary to restrict these because, having acquired a dominant position and belonging to a particular jurisdiction in one way or another, they do not disappear anywhere and, on the contrary, only strengthen the dominance of the government. I mean, of course, the American method.

There is another method employed by Western European countries, which, on the contrary, limits the development of Internet giants, mainly American ones. The concept of human rights is employed for these purposes: "it is necessary to protect personal data, the right to privacy," etc.

It is also worth noting the Chinese version of net regulation. It seems that China has managed to create Internet giants, but only in its own market, which is closed. The only exception is, perhaps, TikTok. And look at the obstacles TikTok has met when promoting it in the US market!

It seems to me that Russia is following the Chinese model, since we also have Internet giants whose activities are mainly focused on the national market.

As long as nation-states persist, there will continue to be different approaches to managing the Web. The question is, will it be possible to ensure the growth of the digital sector under such conditions? I have no confidence in this. I think that a state of uncertainty will prevail for quite some time.

In my opinion, a radical transformation will occur through the creation of an instant universal translator that will completely overcome language barriers. At the moment, there is no such translator, but there are prospects for its appearance, especially with progress in developing artificial intelligence. Imagine a situation where each of us can communicate with any other person with no difficulty. It will be a new reality that will come very soon. This is where I see the *Web 4.0* era. After all, thoughts, ideas, and opinions will begin to circulate freely among all people. In this case, what will the nation-states do that build their policy on the language barrier to some extent? Education will also change: why learn foreign languages if you can be well translated? In general, many questions remain whose answers will need to be found in the near future.

– In your opinion, how do the legal regimes for traditional types of intellectual property and non-fungible tokens (NFT) correlate? To what extent is it necessary to extend the application of part four of Russia's Civil Code to legal relations related to NFTs?

– You know, for me, this question is mainly connected with the fact that 'digits', as a type of information, tend to be replicated, distributed, and the amount of replication is not limited, i.e. it is distributed as something that is constantly multiplied, duplicated, transmitted, in many cases freely, while the law requires the fixation of a certain number or volume of specific objects in a number of situations. It turns out that the law concerning various digital objects acts as a special limit on this duplication and constant multiplication, turning such objects into individually defined ones. I'm not talking about property now. We assign a certain quantity to them in law. And although it can potentially be multiplied in any way, we say: "You can't multiply." There can only be a fixed number of copies or a single original. This is the problem with NFTs because, based on the nature of digital information, they must constantly circulate and multiply, but the law limits this possibility.

There is a theory that links law, including property law, with limited resources**.** With regard to the 'digit', such a theory, a priori, could not have arisen because the 'digit', information as a resource, is unlimited. Therefore, the law produces artificial restrictions. Hence, NFTs and intellectual property are similar in this sense. After all, we also restrict the replication of intellectual property without the consent of the copyright holder, but the problem is that many objects have properties that do not allow them to be replicated in one form or another, for example, the Mona Lisa. It is unique, there is none other like it. Its technical properties make it a unique object, a unique thing, but the conversion of any such object into a 'digit' turns it into a manifold multiplied, copied, and replicated object. And the question of conflict immediately arises: on the one hand, in relation to an object that is digital and artificially recognized as individually defined, and on the other, in relation to the actually existing unique object. This circumstance causes a conflict in the field of intellectual property. It turns out that digitalization has made it possible to freely replicate previously unique items.

The question immediately arises: on what basis does such replication take place? It is worth noting that this question has arisen before, in relation to non-digital copying. It was solved more or less simply, but it still arose. And in the end, it was resolved.

From this analogy, one can understand why tokens were considered a controversial object in the field of intellectual property. Suppose you are the owner of a wonderful museum that has the Mona Lisa on permanent display. However, another person has a digital copy of the Mona Lisa. Of

course, as the owner of the museum, you want to have an exclusive and unique digital copy of his masterpiece that seems to be quite natural. Therefore, you won't give a unique digital copy like this to another person.

Another problem associated with owning NFTs is the volatility of the NFT market, which is not based on intellectual property. Let's say you take a picture of something and put it on the market, and someone buys an NFT of it. And then the buyer realizes what they've bought. After all, they could also photograph something and clothe it in digital form. On the contrary, when it comes to intellectual property, the right gives certain guarantees, and you get a kind of bonus: income. In turn, due to the fact that a certain object has become scarce, it becomes valuable. But the question remains: is it necessary to extend the application of the norms of part four of the Civil Code of the Russian Federation to relations with NFTs? I don't think a special extension is required. However, in certain cases, releasing an NFT may involve a violation of the rules of part four, and this circumstance entails the possibility of holding the violator liable, as established in part four of the Civil Code of the Russian Federation.

– In one of his works, the founder of Internet law, L. Lessig, determines the following sources of Internet law: (1) law in the naive positivist's view, (2) social norms, (3) markets, and (4) architecture (technical rules). What do you think is the importance of positive law in the digital environment? Is it possible to argue that technical rules are becoming increasingly important as sources of law? Won't this lead to the absolute mechanization of law in the future?

– It seems to me that one can speak about the rules of law only in the context of positive law. Social rules, or rather, ethics, can exist on the Internet. For example, when exchanging messages, you can't put a period at the end — is this a custom? There are quite a lot of such customary rules, especially in social networks.

Social norms can eventually become legal customs. Such a process is not ruled out; this development should continue.

The list refers to the laws of the market and competition. In my opinion, this has nothing to do with the law. With regard to technical rules, it is traditionally believed here that technical rules are not legal rules. Instructions for use or assembly can hardly be considered a source of law because they characterize the features of an object, but, fortunately or unfortunately, technical and social aspects are all mixed together on the Web, and therefore many technical rules acquire legal significance by nature. Let's say there's an identification and authentication process that is associated with the use of different technical procedures. Can we say that these rules have nothing to do with law? I don't think so, because this is, in fact, about identifying whether there was an expression of will or not. To answer this question, technical characteristics cannot be dispensed with.

Another example: the technical rules for automated license plate recognition. If we do not recognize their normative properties, then it turns out that it is impossible to challenge a traffic violation based on automated license plate recognition. Meanwhile, practice today suggests the opposite: from time-to-time people, dispute such violations for various reasons. Of course, this is difficult, and the likelihood of success is very low. It turns out that, unlike in ordinary life, the connection between technical and legal rules on the Internet is stronger, so I do not exclude that some technical rules will gain legal significance.

– What do you think about the corporate rules developed by Internet giants, let's say Facebook, which creates rules and standards of behavior for its social networks? Doesn't this, in fact, create some kind of normative matrix of behavior for all major users?

– Such rules are hardly official norms subject to enforcement. Of course, any social network will try to enforce them, but there is nothing to stop them from being challenged. It's just that it's very difficult to get to them abolished. There are a lot of obstacles, but I would call these rules local acts. I would draw an analogy between them and local acts at a company, for example, internal labor regulations, which may be illegal. They can be contested: if the court finds them illegal, it will abolish them. The same goes for social media rules.

Another issue is that, the degree of distribution of social media has increased so much and, at the same time, so many actions take place, challenging these rules makes less and less practical sense. By the time you reach the court with specific considerations, everything has already changed within the network ten times, and you will still be suing in an attempt to achieve the truth. And you may achieve that, but it will not give you the satisfaction you need. This is a feature of social networks, I'm afraid: such rules are not legal rules.

As for technical rules, the mechanization of law will extend primarily to them. The reasoning is that rules that are closer to instructions will be mechanized first, while abstract rules are rather difficult to mechanize.

As an illustration, we can cite the regulation established by the Tax Code of the Russian Federation, which does not formulate abstract rules. These are the more technical rules that will be mechanized.

– In a well-known publication on ethics in the digital environment[6], you make a rather disappointing forecast about the future division of society into two categories: digital adepts and digital objectors The former will share the ideas of digitalization in every possible way, as well as actively use technologies, while the latter will try to abandon them. How, in your opinion, should the protection of digital objectors' rights be organized? How should it be expressed? Won't such protection lead to social conflict due to the exacerbation of social divisions, given the fact that there is less and less room for 'analogue' activities in modern society?

– Some people simply don't want to change anything in their lives — this is the first category. Others believe that digitalization leads to the creation of a 'digital concentration camp' and oppose it on principle. Some people won't accept digitalization for religious reasons. The reasons for refusing to digitize can vary. At the same time, it is obvious that digitalization brings many benefits to society: an increase in the speed of relations, savings, convenience, etc. Therefore, of course, this process cannot be stopped.

The question is, what should we do with those who do not want digitalization? In my opinion, such people should be given the right to refuse digitalization, and this refusal should be realistically ensured and not burdensome.

However, a system of incentives should be developed to make it more profitable for individuals to accept digitalization. Otherwise, we will not get the savings effect. It is possible to think of such a solution to this problem: in situations where people choose to refuse digitalization, they should bear the costs associated with this refusal. However, this should not be

[6] Ivanov, A. A. (2021). Tsifrovaya etika i pravo [Digital ethics and law]. *Zakon [The Law]*, (4), 67–73.

prohibitively expensive. This is the task of the government — to ensure that refusing is not too burdensome.

If the right to opt out of digitalization is not secured, I'm afraid this will lead to digital luddism[7]. If we ignore the interests of the 'objectors', we will immediately receive accusations that we are creating a 'digital concentration camp'. On the one hand, progress cannot be stopped, on the other, fundamental rights cannot be infringed upon.

– The last question is related to the civil law regime pertaining to digital rights. The fact is that the doctrine expresses polar opposite points of view: from the possibility of extending the regime of property rights to digital property to recognizing digital property as a special object. In your opinion, how should this issue be resolved?

– From a conservative point of view, it is impossible to extend the regime of property rights concerning real objects to digital property. In this sense, the Department of Civil Law of the Law Faculty of Lomonosov Moscow State University takes a conservative position.

Other colleagues are less categorical. And they argue approximately as follows: if this or that object is called a 'thing', then this implies the fundamental possibility of proprietary legal remedies. That is, the very thing that someone has lost for some reason can be returned. The main thing here is the interest in getting the same thing back. Therefore, if it is possible to satisfy this interest (to return the very thing), there are no problems in determining the legal nature of the object. On the other hand, if the interest in having the same property returned is not satisfied, and, for example, it is proposed that compensation be made for damages, then it is impossible to speak of a proprietary nature.

It seems to me that with regard to digital property, it is necessary to provide the same guarantees that exist with respect to property rights. Strictly speaking, let's return them in the same form in which they were. To do this, you can reconfigure the corresponding claims in a certain way: not to return the value of the object (current or past), but to replace it with another object at the expense of the defendant. After all, such an attempt has been made with corporate rights related to shares — claims for the restoration of corporate control. Now such remedies are forgotten. But the problem hasn't gone away. I think that the *restoration of digital control* is what will make it possible to avoid discussions about digital property as things or non-things. You just need to protect it as much as you protect things.

For digital objects, you need to provide proper protections that allow you to return exactly what was lost. Then there will be no problems. Alas, claims for damages will not solve this problem.

As for the nature of digital rights, the question should be moved from the division of rights into property and contractual rights to a scale from absolute to relative. I would like to note that we are not talking about a rigid dichotomy of 'absolute or relative' rights. I talked about this not so long ago using the example of purchasing movies and music in the Apple application: there are many 'shades of gray' between absolute and relative rights. And the task is to determine the place of digital rights in this spectrum.

After all, large companies that sell digital products tend to mix two consumer experiences: a feeling of certainty when you buy a thing permanently, and a feeling of uncertainty when you buy

[7] Luddism is a struggle against the achievements of innovative technologies, against machines.

an indefinite object for a short time. Of course, in the first case, from a philistine point of view, you get something reliable, and in the second, something less attractive. It turns out that all companies play on this internal contradiction, thus misleading consumers. One can try to apply the Law of the Russian Federation "On the Protection of Consumer Rights" to these relations, but it seems to me that it is necessary to develop some kind of general civil regulation.

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