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# **THE CRITERIA OF COPYRIGHTABILITY USED IN RUSSIAN JUDICIAL PRACTICE**

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## **THE CRITERIA OF COPYRIGHTABILITY USED IN RUSSIAN JUDICIAL PRACTICE<sup>2</sup>**

This article addresses the problem of identifying criteria for copyrightability and non-copyrightability in the Russian legal system, especially in judicial practice. An analysis of court rulings issued over the past few years warrant the conclusion that there is a trend towards setting looser standards of originality and creativity. The article also describes a trend in Russian judicial practice to grant copyright protection to works of low authorship and goes into problems and contradictions that this entails. It compares principles that evolved in Russian law with similar principles used abroad, mainly in Germany.

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## Introduction

The presence of a creative component in a work has usually been prescribed as the main criterion for copyrightability by both Soviet-era and post-Soviet Russian legislation. The Law on Copyright and Related Rights from July 9, 1993,<sup>3</sup> which has since been repealed, offered copyright protection to any creative work of science, scholarship, literature, or art, regardless of the purpose, standards, and means of expression that it employed (Article 6).

Today's Part Four of the Civil Code,<sup>4</sup> does not directly establish that creativity must be the main criterion of copyrightability. For instance, Article 1259, "Copyrightable Works", merely lays the basis for a broader use of copyright protection than before, without the standards or purpose of works of science, scholarship, literature, or art, or the means of expression used in them being taken into account in deciding whether they are copyrightable. This article lists copyrightable types of works (Clause 1), and prescribes an objective form of a work's existence – written, oral, such as a public readings or other public performances, a graphic or three-dimensional representation, an audio or video recording, and so forth (Clause 3) – as a requirement for its copyrightability.

Nevertheless, Article 1257 and Clause 1 of Article 1258 of the Civil Code do imply that the creative component is an essential criterion of copyrightability. Article 1257 confers authorship rights for a work of science, scholarship, literature, or art to the individual who has *created* this work.<sup>5</sup> Under Article 1258, two or more individuals who have *jointly created* such a work are to be considered its co-authors. However, the law fails to clarify what is meant by the creative component of a work and sets no standards for it. Consequently, questions that this gives rise to are answered through doctrine and judicial practice records.

Let us analyze the standards of copyrightability used in the judicial practice of resolving disputes over whether a work is creative and therefore copyrightable.

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<sup>3</sup> Published in *Rossiyskaya Gazeta*, No. 147, August 3, 1993.

<sup>4</sup> Published in *Rossiyskaya Gazeta*, No. 289, December 22, 2006.

<sup>5</sup> *Kommentariy k chasti chetvertoy Grazhdanskogo kodeksa Rossiyskoï Federatsii (poglavniy) (Chapter-by-Chapter Commentary on Part Four of the Civil Code of the Russian Federation)*, Edited by A. L. Makovsky, Moscow, 2008, P. 387.

## I. Earlier Practice

The judicial practice that had existed before Part Four of the Russian Civil Code came into force on the whole complied with the dominant doctrinal principle and stressed a high standard for the creative component as the main criterion of copyrightability.<sup>6</sup> Namely, a work primarily had to simultaneously meet originality, novelty, and uniqueness criteria to be considered copyrightable, while no unequivocal interpretation was put on those criteria.<sup>7</sup> It was insufficient to prove that a work was the result of the author's independent efforts, namely that it had not been borrowed or copied from someone else's work.

In the practice of higher courts, this principle was confirmed in Ruling No. 537-O of the Constitutional Court of the Russian Federation, dated December 12, 2005,<sup>8</sup> Clause 21 of Resolution No. 15 of the Plenary Session of the Supreme Court of the Russian Federation from June 19, 2006, entitled "Issues That Have Arisen in Courts of Law in the Consideration of Civil Cases Involving the Application of Copyright Law and Legislation on Related Rights"<sup>9</sup> (the clause confirms the originality criterion), and Clauses 1 and 2 of Resolution No. 47 of the Presidium of the Russian Supreme Court of Arbitration from September 29, 1999, entitled "Review of the Practice of Disputes over the Use of the Law of the Russian Federation 'On Copyright and Related Rights'".<sup>10</sup>

On the whole, the distribution of the burden of proof that had taken shape by that time was arguably in line with the standards set for the creative component of a work. In effect, the court did not expect a claimant to produce any specific evidence of the originality, novelty, or uniqueness of a work, if the latter fell into the traditional category, and it was the defendant who had to prove the opposite to win the litigation. If there was a reason to question the creative

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<sup>6</sup> The substance of Russian-language debates on this subject is somewhat difficult to convey in English, as the terms "originality" and "creativity" have many meanings in American literature and the corresponding Russian terms in Russian law, judicial practice, and legal doctrine have rather blurred meanings.

For this reason, the term "creativity" is used in this article as a general designation for the creative component of a work as a criterion of copyrightability that may have various interpretations, as independent creation ("originality" in American doctrine) and as a reflection of the unique identity of the author ("originality" in continental Europe's *droit moral* tradition), and hence should not be seen as identical in meaning to the homonymous American term (See *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340, 361 (1991)). Practically The same holds true for the use of the term "originality" in this article – the corresponding Russian term has various meanings in Russian jurisprudence.

<sup>7</sup> See, e.g., Resolution No. A56-16934/0 of the Federal Court of Arbitration of the Northwestern District, December 10, 2001; Resolution No. A56-4615/2005 of the Federal Court of Arbitration of the Northwestern District, January 27, 2006; Resolution No. A13-14361/2005-20 of the Federal Court of Arbitration of the Northwestern District, July 5, 2006; Resolution of the Federal Court of Arbitration of the Northwestern District on Case No. A05-6902/04-16, October 24, 2006; Ruling of the Court of Arbitration of the City of Moscow on Case No. A40-7353/04-26-41.

<sup>8</sup> The document was not published officially. Hereinafter court rulings whose sources of official publication are untraceable are cited from the ConsultantPlus legal reference system.

<sup>9</sup> Published in *Rossiyskaya Gazeta* No. 137, June 28, 2006, and in *Byulleten Verkhovnogo Suda Rossiyskoi Federatsii* (Bulletin of the Supreme Court of the Russian Federation) No. 8, 2006.

<sup>10</sup> Published in *Rossiyskaya Gazeta* (Vedomstvennoye Prilozheniye [Agency Supplement]) No. 221, November 6, 1999, and *Vestnik Vysshego Arbitrazhnogo Suda Rossoyuskoj Federatsii* (Bulletin of the Supreme Court of Arbitration of the Russian Federation) No. 11, 1999.

nature of a disputed work – which is the case if a work is of low authorship – the copyright seeker might have had their suit thrown out due to insufficient evidence of the originality of the work.<sup>11</sup> It needs to be noted that making it the responsibility of a defendant to prove the creative nature of any work without exception would have meant the copyright protection of vast numbers of works of low authorship.

## II. Resolution 5/29

After Part Four of the Russian Civil Code came into force, Russian judicial practice has, on the one hand, shown insensibility to the debates on criteria of copyrightability in legal literature<sup>12</sup> and, on the other, being forced to react to specific practical problems and contradictions, has been evolved balanced positions on key aspects of copyrightability criteria, on creativity standards, and on the distribution of the burden of proof.

Judicial practice has been seriously affected by a joint resolution of plenary sessions of the Russian Supreme Court and the Supreme Court of Arbitration issued on March 26, 2009, entitled “On Some Issues Caused by the Entry into Force of Part Four of the Civil Code of the Russian Federation” (Resolution No. 5/29).<sup>13</sup> Clause 28 of the resolution says that “a lack of novelty, uniqueness, and/or originality as a result of intellectual activity cannot *per se* be evidence that such a result is not the result of creative work and consequently is not copyrightable”, and that “it must be borne in mind that a result of intellectual activity shall be presumed to be the result of creative work, unless proved otherwise”. These points unambiguously prescribe the use by courts of independent creation criterion, which means that non-deliberate copying is also acceptable, and introduce the principle of a work’s presumed creative nature.

It needs to be noted that neither the interpretation of the creativity criterion made in the resolution nor, even less, the above-mentioned presumed creativity principle directly follows

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<sup>11</sup> See, e.g., Resolution No. A56-16934/0 of the Federal Court of Arbitration of the Northwestern District, December 10, 2001.

<sup>12</sup> See, e.g., M. V. Chizhenok, *Kritika ob`ektivnoy novizni* (Criticism of Objective Novelty), *Patenty i Litsenzii* (Patents and Licences), No. 6, 2004, p. 41 and ff.; M. V. Labzin, *Original`nost` ob`ektov avtorskogo prava* (Originality of Copyrightable Works), *Patenty i Litsenzii* (Patents and Licences), Nos. 7 and 8, 2007; M. V. Labzin, *Esche raz ob original`nosti ob`ekta avtorskogo prava* (Once Again on the Originality of Copyrightable Works), *Patenty i Litsenzii* (Patents and Licences), No. 4, 2008; V. A. Korneyev, *Programmi dlya EVM, bazi danih i topologii integral`nih mikroshem kak ob`ekti intellektual`nih prav* (Computer, Databases and Integrated Circuit Topologies as Copyrightable Works), Statut, Moscow, 2010, p. 37; A. I. Savelyev, *Litsenzirovaniye programmogo obespecheniya v Rossii. Zakonodatel`stvo i Praktika* (Licensing of Software in Russia. Legislation and Practice), Moscow, 2012, § 3, Chapter 1; E. P. Gavrilov, *Original`nost` kak kriteriy ohrani ob`ektov avtorskih prav* (Originality as a Criterion of Copyrightability), a paper written for ConsultantPlus System, 2005.

<sup>13</sup> The document was published in *Rossiyskaya Gazeta* No. 70, April 22, 2009, *Byulleten Verkhovnogo Suda Rossiyskoi Federatsii* (Bulletin of the Supreme Court of the Russian Federation) No. 6, 2009, and *Vestnik Vysshego Arbitrazhnogo Suda Rossiyskoi Federatsii* (Bulletin of the Supreme Court of Arbitration of the Russian Federation) No. 6, 2009.

from the above-cited sections of Articles 1257-1259 of the Civil Code: The product of creative work is a concept that can have various interpretations while presumed authorship does not automatically imply the presumption of the creative nature of a work. In this sense, explanations by supreme courts aimed at efficient regulation clearly go further than making interpretations of legislation.

Moreover, these points are in patent contradiction to Ruling No. 537-O of the Constitutional Court from December 20, 2005, which remains in force and says that “copyright, while protecting an original result of creation, shall not protect parallel achievements, i.e. achievements by persons who have worked independently of each other”, hence de facto prescribing the use of the uniqueness criterion.

Let us analyze how much use lower courts and the supreme courts themselves make of Resolution 5/29 in dealing with specific disputes, namely what standards of creativity and criteria of copyrightability they use, whether they grant simultaneous protection to mutually duplicating works, and what their principles are for the distribution of the burden of proof.

Let us point out immediately that, in spite of the unambiguous wording in the above-mentioned clause of Resolution 5/29, court rulings in specific cases far from always comply with this clause.

### **III. Latest Judicial Practice**

#### **1. Criteria of Copyrightability**

The most common method of dealing with a copyrightability dispute is the use of Clause 1 of Article 1259 of the Civil Code, which lists types of copyrightable works.<sup>14</sup> Methods used for putting a work under one of these types extremely rarely involve any substantial discussion on whether a work in question meets the criteria of copyrightability and are normally used if the

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<sup>14</sup> See, e.g., Ruling No. VAS-100/12 of the Supreme Court of Arbitration of the Russian Federation, February 8, 2012; Ruling No. VAS-13931/11 of the Supreme Court of Arbitration of the Russian Federation, December 5, 2011; Resolution of the Federal Court of Arbitration of the Volga-Vyatka District on Case No. A31-4368/2011, March 19, 2012, Resolution of the Federal Court of Arbitration of the Volga-Vyatka District on Case No. A17-4872/2010, September 26, 2010; Resolution No. of the Federal Court of Arbitration of the Volga-Vyatka District on Case No. A17-4829-5892/2009, August 13, 2010; Resolution of the Federal Court of Arbitration of the Volga-Vyatka District on Case No. A43-40479/2009, June 16, 2010; Resolution of the Federal Court of Arbitration of the Moscow District on Case No. A41-44971/10, November 3, 2011; Resolution of the Federal Court of Arbitration of the Moscow District on Case No. KG-A40/6477-11-1,2, July 20, 2011; Resolution of the Federal Court of Arbitration of the Northwestern District on Case No. A56-14726/2010, February 24, 2011; Resolution of the Federal Court of Arbitration of the Northwestern District on Case No. A56-13796/2010, February 16, 2011; Resolution No. F09-203/12 of the Federal Court of Arbitration of the Ural District, March 15, 2012; Resolution No. F09-121/12 of the Federal Court of Arbitration of the Ural District, March 13, 2012; Resolution of the Federal Court of Arbitration of the Volga-Vyatka District on Case No. A11-7400/2010, November 15, 2011; Resolution No. 09AII-6425/2010-GK of the Ninth Arbitration Court of Appeal, April 27, 2010 r. Ruling of the Moscow City Court on Case No. 33-1686, February 8, 2011.

defendant raises no objections to the work being ruled non-copyrightable, or if the court finds no reason to question the copyrightability of the work while assessing evidence.

This corroborates the thesis that methods used for putting a work under any of these types are based on absolutely different principles – especially non-legal conventional concepts of works – than those used in determining whether a work meets the general criteria of copyrightability.<sup>15</sup> For this reason, a judgment's inclusion of a reference to the type of the work in question may represent a court's usage of any criterion of copyrightability and any standards of creativity.

It is in fact a distinguishing mark of this method that it means use of indefinite notions of a work that do not involve determining whether the work in question meets copyrightability criteria.

Therefore, in trying to gather what standards for copyrightability a specific court has used from any such court rulings – rulings that do not contain direct references to copyrightability criteria – one has to assume that, regardless of the formulae and declarations that are used, the main indicator of the use of the independent creation criterion (as distinct from the novelty criterion) is the court's stance on cases of parallel mutually independent instances of creation: If the court rules that each of the mutually duplicating works is copyrightable, and if it generally accepts evidence offered for the independent creation of each work, it will be fair to assume that the court has used the former of the two above-mentioned criteria.

If, on the other hand, the court has not considered the possibility of parallel independent creation and evidence offered by the defendant is rejected for reasons that have nothing to do with proving that independent creation has been the case, and if the coincidence between the two works that are the source of the dispute is seen as the reason for the conclusion that one of the works is a borrowing or derivative of the other, and hence that a copyright violation has taken place, one may assert that the court has used the novelty criterion.

Finally, the use of the uniqueness criterion at the very least rules out the possibility of works that are not new being declared copyrightable, and, in fact, rights disputes should involve debates on the possibility of independent creation of identical works, including on factors that make such creation possible.

An analysis of a large number of rulings issued at various tiers of the judiciary shows that, besides the use of the categorization method, it has been a dominant trend in recent years to

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<sup>15</sup> See A. V. Kashanin, *Razvitiye mehanizma demarkatsii v avtorskom prave kontinental'noy Evropi (Development of the Demarcation Mechanism in Copyright in Continental Europe)*, *Vestnik Grazhdanskogo Prava (Civil Law Bulletin)*, No. 3, 2011.

directly use the principle of the presumed creative nature of a work as prescribed by Resolution 5/29, as well as of the thesis that neither novelty nor originality is a significant criterion.<sup>16</sup>

However, this usually happens in fairly straightforward cases centered on traditional works with a prominent creative aspect, such as large works of literature<sup>17</sup> and audio-visual productions,<sup>18</sup> or cases of indisputable copying, such as the reprinting of more than 130 photographs<sup>19</sup>. Although relatively seldom, one also comes across the use of the independent creation criterion and the presumed creativity principle – which cannot be refuted by citing a lack of novelty or originality – for works of low authorship, which may include small parts that are highly likely to be reproducing elements of the public domain<sup>20</sup>. This is usually the case when the defendant does not dispute the creative nature of the work in question or adduces no evidence to back up his or her position.

This happens no less frequently in difficult cases where works of low authorship are dealt with that courts directly disregard Clause 28 of Resolution 5/29 and find a reason to throw out a suit. In some cases of this kind, courts cite Clause 5, Subclause 4 of Clause 6, and Clause 7 of Article 1259 of the Civil Code.<sup>21</sup> In others, courts merely argue that the work in question fails to satisfy the novelty, originality, and uniqueness criteria.<sup>22</sup>

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<sup>16</sup> Resolution No. KG-A40/2047-11-4 of the Federal Court of Arbitration of the Moscow District, March 28, 2011; Ruling of the Moscow City Court on Case No. 4g/1-7255, August 17, 2011; Resolutions No. 09AP-27804/2011-GK and No. 09AP-27909/2011-GK of the Ninth Arbitration Court of Appeal, November 14, 2011; Resolution No. 09AP-19512/2011-GK of the Ninth Arbitration Court of Appeal, September 7, 2011; Resolution No. F09-1009/12 of the Federal Court of Arbitration of the Ural District, March 19, 2012; Resolution of the Federal Court of Arbitration of the Volga-Vyatka District on Case No. A31-4368/2011, March 19, 2012; Resolutions No. 09AP-27804/2011-GK and No. 09AP-27909/2011-GK of the Ninth Arbitration Court of Appeal, November 14, 2011.

<sup>17</sup> Ruling of the Moscow City Court on Case No. 4g/1-7255, August 17, 2011.

<sup>18</sup> Ruling No. VAS-13931/11 of the Supreme Court of Arbitration of the Russian Federation, December 5, 2011; Resolution of the Federal Court of Arbitration of the Volga-Vyatka District on Case No. A31-4368/2011, March 19, 2012.

<sup>19</sup> Ruling No. VAS-100/12 of the Supreme Court of Arbitration of the Russian Federation, February 8, 2012.

<sup>20</sup> Resolution No. KG-A40/2047-11-4 of the Federal Court of Arbitration of the Moscow District, March 28, 2011; Resolution of the Federal Court of Arbitration of the Moscow District on Case No. A40-7067/11-110-57, October 31, 2011; Resolutions No. 09AP-27804/2011-GK and No. 09AP-27909/2011-GK of the Ninth Arbitration Court of Appeal, November 14, 2011; Resolution No. F09-1009/12 of the Federal Court of Arbitration of the Ural District, March 19, 2012.

<sup>21</sup> Under Clause 5 of Article 1259 of the Russian Civil Code, ideas, concepts, principles, methods, processes, systems, solutions to technical, organizational and other problems, discoveries, facts and programming languages are not copyrightable. Under Subclause 4 of Clause 6 of Article 1259, reports on events or facts whose sole purpose is information (e.g. reports on current political events, lists of television programmes in magazines, or train timetables) are not copyrightable either. Under Clause 7 of the same article, part of a work, its title and the description of a character in a literary work are copyrightable if they are accepted as results of the author's creative work.

<sup>22</sup> In such cases there remains a tendency for the simultaneous use of these criteria, which, strictly speaking, are based on incompatible theoretical tenets, as not all that is new can be considered unique, while anything that is original, such as anything in which the author's individuality manifests itself, and anything that is unique is new by definition, and hence the use of the novelty criterion is redundant. See Resolution No. F09-4849/08-S6 of the Federal Court of Arbitration of the Ural District on Case No. A07-8108/2006, July 11, 2008, which was left in force by Ruling No. 12879/08 of the Supreme Court of Arbitration of the Russian Federation, October 17, 2008; Resolution of the Federal Court of Arbitration of the Moscow District on Case No. A40-133968/09-27-952, March 28, 2012; Resolution No. 09AP-27014/2011-GK of the Ninth Arbitration Court of Appeal, November 7, 2011; Resolution No. 09AP-5916/2008-GK of the Ninth Arbitration Court of Appeal, November 18, 2010 (repealed afterwards); Resolution No. 09AP-31934/2011-GK of the Ninth Arbitration Court of Appeal, December 27, 2011; Ruling No. VAS-5413/10 of the Supreme Court of Arbitration of the Russian Federation, June 15, 2010; Resolution No. KG-A41/13081-09 of the Federal Court of Appeal of the Moscow District, January 19, 2010; Resolution of the Federal Court of Arbitration of the Northwestern District on Case No. A56-35168/2009, July 6, 2010; Ruling No. 33-36846 of the Moscow City Court, November 26, 2010; Resolution No. 09AP-13024/2009 of the Ninth Arbitration Court of Appeal, September 8, 2009.



Apparently the reason for this state of affairs is that, in the absence of effective means to define the public domain, the independent creation criterion can be painlessly applied to traditional kinds of works of high authorship. Works of low authorship or works – or, relatively small parts of other works, are to a greater extent based on the public domain. This means that unconditionally declaring such works to be copyrightable will entail the monopolization of parts of the public domain (this even applies to the recognition of parallel creation as copyrightable). Courts feel that this is unacceptable and for this reason they make use of available arsenals to reject copyright claims on such works. If, for whatever reason, the above-cited provisions of the Civil Code prove inapplicable – for example, if a work in question is on the whole banal or trivial or reproduces what is part of the public domain – then courts, in the absence of other means, have to raise their copyrightability standards and make it the responsibility of the claimant to prove that the work is creative in its nature.

The attitude in judicial practice to *parallel creation* that is an indication of the application of the independent creation or novelty criterion is practically unambiguous. In the vast majority of disputes over works of low authorship – such as cases where there is no sufficient evidence of copying or that the defendant has created the disputable work independently – the coincidence or similarity between the works created by the claimant and defendant is seen as a sufficient reason to assume that illegitimate borrowing and violation of the rights of the claimant is the case.<sup>23</sup> As a rule, parallel creation does not even come into consideration.<sup>24</sup> A principle used in foreign, particularly German, law, which suggests that copying a work is acceptable provided the author of the later work has had access to the original if the latter has been published before,<sup>25</sup> is not used in Russian judicial practice. Nor does Russian practice make provision for any specific procedure for verifying whether a work that duplicates or is similar to another is the product of independent creation.

Hence, it is obvious that, despite direct references to Clause 28 of Resolution 5/29, courts give the determining significance to the novelty criterion in the majority of difficult disputes over works of low authorship, although there do occur individual cases where each of the

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<sup>23</sup> Resolution No. F09-4849/08-S6 of the Federal Court of Arbitration of the Ural District on Case No. A07-8108/2006, July 11, 2008, left in force by Ruling of the Supreme Court of Arbitration No. 12879/08, October 17, 2008; Resolution No. 09AP-13024/2009 of the Ninth Arbitration Court of Appeal, September 8, 2009; Resolution No. F09-5444/11 of the Federal Court of Arbitration of the Ural District, September 1, 2011; Resolution of the Federal Court of Arbitration of the Volga-Vyatka District on Case No. A43-4663/2008-7-119, October 20, 2008.

<sup>24</sup> Resolution No. 09AP-27014/2011 of the Ninth Arbitration Court of Appeal, November 7, 2011; Ruling No. VAS-2851/124 of the Supreme Court of Arbitration of the Russian Federation, March 19, 2012; Resolution No. F09-8434/11 of the Federal Court of Arbitration of the Ural District, December 26, 2011.

<sup>25</sup> See T. Dreier, G. Schulze, *Urheberrechtsgesetz Kommentar*, Verlag C.H.Beck, München, 2004, § 2, Rn. 17, S. 51; C. Berking, *Die Unterscheidung von Form und Inhalt im Urheberrecht*, Baden-Baden, 2002, S. 83-84. For similar instruments in U.S. judicial practice see M. Nimmer, D. Nimmer, *Nimmer on Copyright*, LexisNexis, 2004, § 13.03.

mutually duplicating works is granted independent copyright protection,<sup>26</sup> which means that the independent creation criterion has been used for each of them. In some cases, courts directly use the novelty, originality, and uniqueness set of criteria for disputable works.

## 2. Standards of Creativity

An analysis of standards used by courts in evaluating the creative nature of works produces a contradictory picture.

On the one hand, it is a fair conclusion that, in effect, the use of Clause 28 of Resolution 5/29 leads to lower standards in many cases since the presumption of the creative nature of a work and refusal to verify that such a work meets the novelty, originality, and uniqueness criteria lays the basis for works of low authorship, even if they are banal or trivial, to be recognized as copyrightable.<sup>27</sup> Moreover, courts extremely seldom raise the issue of reproducing elements of the public domain, which is one more factor behind the wide-scale use of copyrightability.

Yet on the other hand, in numerous cases, especially where defendants raise objections amounting to allegations that the disputed work is non-creative, courts explicitly use higher standards, primarily standards based on the novelty, originality, and uniqueness criteria, sometimes putting the burden of proof on the claimant (which will be discussed below), and argue that a copyrightable work cannot be a mere technical manual or source of reference or be a reproduction of ideas that form part of the public domain.<sup>28</sup>

Cases where courts use specific standards of creativity are comparatively rare, and so usually one has to use indirect evidence in making conclusions as to what standards have been used, such as the nature of the work, criteria that have been used, instruments used in recourse to the public domain, and other circumstances.

Nevertheless, let us analyze such standards as applied to specific types of works.

First of all, it needs to be pointed out that courts extremely rarely use any special copyrightability standards for works that normally have a prominent creative component, such as works of literature and visual art, audiovisual works, and pieces of music: as a rule, there is no

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<sup>26</sup> This is not normally done offhand, and sometimes interpretations of court rulings are required to underlie such conclusions. See Resolution No. F09-6166/10-S6 of the Federal Court of Arbitration of the Ural District, September 1, 2010; Resolution No. F09-9135/11 of the Federal Court of Arbitration of the Ural District, January 26, 2012; Resolution No. KG-A40/1594-09 of the Federal Court of Arbitration of the Moscow District, May 25, 2009.

<sup>27</sup> Resolution No. KG-A40/2047-11-4 of the Federal Court of Arbitration of the Moscow District, March 28, 2011; Resolution of the Federal Court of Arbitration of the Moscow District on Case No. A40-7067/11-110-57, October 31, 2011; Resolutions No. 09AP-27804/2011-GK and No. 09AP-27909/2011-GK of the Ninth Arbitration Court of Appeal, November 14, 2011; Resolution No. F09-1009/12 of the Federal Court of Arbitration of the Ural District, March 19, 2012.

<sup>28</sup> Incidentally, there have been cases where courts insisted on lower standards, despite proof from the defendant that the disputed work was mainly based on standard elements. See Resolution No. 09AP-13024/2009 of the Ninth Arbitration Court of Appeal, September 8, 2009.

need to prove the creative nature of such works.<sup>29</sup> Quite often, courts directly argue that it is inappropriate to use any special creativity standards for such works.<sup>30</sup>

However, in some cases, higher copyrightability standards are used for works of this kind. This usually happens if they have a significant non-creative component, which entails a risk of monopolizing part of the public domain.

For instance, a work of literature will not be copyrightable if it uses information from a manufacturing company put in ordinary form (e.g. booklets advertising a heated floor),<sup>31</sup> if it depends on external circumstances (e.g. chronology or season repertoires), is based on common concepts or is intended for pragmatic use, borrows its main underlying concept and structure from an earlier edition, uses a standard layout (like theatre programmes),<sup>32</sup> has fragments that coincide with specialist terms or classifications, schemes or business models, or uses information from generally accessible sources such as the Internet.<sup>33</sup>

A claimant seeking copyrightability for a short phrase such as the title of a work or an advert slogan will also have to offer substantial reasons for its copyright protection – they will need to prove its creative nature,<sup>34</sup> novelty, originality and individuality,<sup>35</sup> and to prove that it cannot be considered a phrase in common use.<sup>36</sup>

There have been cases where proof of creativity, originality, and uniqueness was expected from seekers of copyright protection for computer graphics.<sup>37</sup>

Much more often, special standards of creativity are used for works whose authors have used considerations of functionality, various kinds of technical standards, elements of the public domain, and other non-creative factors. Computer programs may be seen as an exception to this rule that courts have had to deal with, possibly because these mainly concern cases of suspected

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<sup>29</sup> Resolution of the Federal Court of Arbitration of the Volga-Vyatka District on Case No. A31-4368/2011, March 19, 2012; Resolution of the Federal Court of Arbitration of the Volga-Vyatka District on Case No. A17-4872/2010, September 26, 2011; Resolution No. F09-121/12 of the Federal Court of Arbitration of the Ural District, March 13, 2012; Resolution of the Federal Court of Arbitration of the Volga-Vyatka District on Case No. A29-5892/2009, August 13, 2010; Resolution No. 09AP-24568/2009-GK of the Ninth Arbitration Court of Appeal, March 1, 2010; Resolution of the Federal Court of Arbitration of the Volga-Vyatka District on Case No. A43-27386/2010, October 12, 2011; Ruling of the Moscow City Court on Case No. 4g/1-7255, August 17, 2011.

<sup>30</sup> Resolution No. 09AP-24568/2009-GK of the Ninth Arbitration Court of Appeal, March 1, 2010.

<sup>31</sup> Ruling No. VAS-2305/11 of the Supreme Court of Arbitration of the Russian Federation, March 11, 2011; Resolution No. Ф03-8505/2010 of the Federal Court of Arbitration of the Far Eastern District, December 20, 2010.

<sup>32</sup> Resolution No. 09AP-27014/2011-GK of the Ninth Arbitration Court of Appeal, November 7, 2011; Resolution of the Federal Court of Arbitration of the Moscow District on Case No. A40-133968/09-27-952, March 28, 2012.

<sup>33</sup> Resolution No. KG-A40/1795-10 of the Federal Court of Arbitration of the Moscow District, April 5, 2010; Ruling of the Court of Arbitration of the City of Moscow on Case No. A40-17182/09-51-199, November 24, 2009.

<sup>34</sup> Ruling of the Moscow City Court on Case No. 33-10009/2011, April 8, 2011.

<sup>35</sup> Ruling No. VAS-5413/10 of the Supreme Court of Arbitration of the Russian Federation, June 15, 2010; Resolution No. KG-A41/13081-09 of the Federal Court of Arbitration of the Moscow District, January 19, 2010.

<sup>36</sup> Ruling of the Moscow City Court on Case No. 33-36846, November 26, 2010.

<sup>37</sup> Resolution No. 09AP-31934/2011-GK of the Ninth Arbitration Court of Appeal, December 27, 2011.

piracy, such as the copying of an entire program that did not involve its revision or use of individual elements thereof.<sup>38</sup>

The practice of dealing with similar results of intellectual work – such as works of industrial and architectural design, maps, or photographs – remains inconsistent. Courts have gradually been developing a practice of denying copyrightability to works, or elements of works, that have a significant non-creative aspect to them. However, whereas in some cases recognition of the role of such factors in the creation of a work leads to higher copyrightability standards being set for it, especially where the author is required to prove novelty, originality, and uniqueness, in other cases courts actually set lower copyrightability standards.

For instance, in some cases it was enough for a court to declare a work of design copyrightable if a special selection or combination of available and standard means and resources had been used by its creator (like cake design)<sup>39</sup>, if there were differences between disputed works (like the cover designs of books)<sup>40</sup>, if there were distinctions that ruled out the duplication of an entire set of artistic images (designs for Internet portals)<sup>41</sup>, or if there were differences in the details of a newspaper design<sup>42</sup>, while the general concept of the design was qualified as non-copyrightable.

Conversely, in other cases distinctions between non-complicated works of design were ignored, and a court assumed that similarities between two works (for example, designs of bread packaging)<sup>43</sup> were a sufficient reason to deny copyrightability to one of them and did not attempt to find out whether there were any external factors behind such similarities.

There have been cases where courts directly tested such works against the originality and uniqueness criteria<sup>44</sup>, or verified the copyrightable status of such works (e.g. advertisement modules),<sup>45</sup> which de facto meant special discussion for their creative standards.

Standards set for photographs are equally inconsistent.

In some cases, courts unconditionally assume photos to be copyrightable and disregard the external factors behind their creation.<sup>46</sup> An author's ability to choose his or her specific

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<sup>38</sup> Ruling of the Federal Court of Arbitration of the Volga-Vyatka District on Case No. A11-7400/2010, November 15, 2011.

<sup>39</sup> Resolution No. 09AP-13024/2009 of the Ninth Arbitration Court of Appeal, September 8, 2009.

<sup>40</sup> Resolution No F09-9135/11 of the Federal Court of Arbitration of the Ural District, January 26, 2012.

<sup>41</sup> Resolution of the Federal Court of Arbitration of the North Caucasus District on Case No. A32-46580/200, December 6, 2010.

<sup>42</sup> Ruling of the Moscow City Court on Case No. 33-16364, May 30, 2011.

<sup>43</sup> Resolution No. F09-5444/11 of the Federal Court of Arbitration of the Ural District, September 1, 2011.

<sup>44</sup> Resolution of the Federal Court of Arbitration of the Moscow District on Case No. A40-133968/09-27-952, March 28, 2012.

<sup>45</sup> Resolution of the Federal Court of Arbitration of the Central District on Case No. A64-5347/2010, July 27, 2011.

<sup>46</sup> Resolutions No. 09AP-27804/2011-GK and 09AP-27909/2011-GK of the Ninth Arbitration Court of Appeal, November 14, 2011; Resolutions No. 09AP-13192/2011-GK, 09AP-13193/2011-GK of the Ninth Arbitration Court of Appeal, June 30, 2011.

manner of photography (such as photographing a conveyor belt at a factory)<sup>47</sup> is per se deemed to represent the creative nature of a photograph.

On the other hand, there have been non-copyrightability rulings on photographs in the society sections of newspapers (their sources of information were used as the formal reason to deny copyrightability to them),<sup>48</sup> “handheld” pictures (pictures that the author had been able to choose the angle for<sup>49</sup>), or pictures taken automatically (not to be confused with the non-copyrightability of CCTV footage).<sup>50</sup>

The copyright practice in cartography has been more consistent. There is a clear trend to set minimal standards of creativity for them, and in no case do such standards involve uniqueness verification. Maps are usually recognized a priori as copyrightable.<sup>51</sup> Even if a court brings up the issue of original or individual style, the design of a map that is chosen by its author and affects its accuracy, informativeness, clarity, and convenience of use will normally meet this criterion.<sup>52</sup> A court will argue that, while two different maps may have the same basis, they may significantly differ from each other in their details such as volumes of information, graphic means, and use of certain elements. It is these characteristics that represent the author’s distinctive style and make a map copyrightable. It is impossible to single out any of the elements of the map, such as the font, any of the colours, or street names, as the map as a whole is copyrightable.<sup>53</sup> In effect, it may be said that the independent creation criterion is used there. In dealing with map copyright cases today, courts use none of the stricter criteria of creativity that the Presidium of the Supreme Court of Arbitration prescribes in Clause 1 of Review No. 122, dated December 13, 2007, the least strict of which involves taking account of external factors, such as generally accessible information or generally known facts.

On the other hand, there is no consistent practice of assessing the copyrightability of architectural and other technical designs. In some instances, courts recognize such designs as creative without trying to find out in what the supposed creative nature of a design manifests itself.<sup>54</sup> More often, however, courts take into account that such designs are based on

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<sup>47</sup> Resolution No. F09-1153/09-S6 of the Federal Court of Arbitration of the Ural District, September 16, 2009.

<sup>48</sup> Resolution No. 09AP-19024/2011-GK of the Ninth Arbitration Court of Appeal, August 22, 2011.

<sup>49</sup> Ruling of the Moscow City Court on Case No. 33-1800, January 24, 2012.

<sup>50</sup> Resolution No. 09AP-2257/2011 of the Ninth Arbitration Court of Appeal, April 20, 2011.

<sup>51</sup> Resolution No. 09AP-6425/2010-GK of the Ninth Arbitration Court of Appeal, April 27, 2010; Resolution of the Federal Arbitration Court of Appeal of the Northwestern District on Case No. A56-14726/2010, February 24, 2011; Resolution of the Federal Arbitration Court of Appeal of the Volga-Vyatka District on Case No. A43-40479/2009, June 16, 2010.

<sup>52</sup> Resolution of the Federal Court of Arbitration of the Volga-Vyatka District on Case No. A43-4663/2008-7-119, October 20, 2008; Resolution of the Federal Court of Arbitration of the Volga-Vyatka District on Case No. A43-10849/2009, January 18, 2010.

<sup>53</sup> Resolution of the Cassation Board of the Federal Court of Arbitration of the Volga-Vyatka District, Case No. A28-19473/2005-393/25, November 29, 2006. This resolution was repealed by Resolution No. 2096/07 of the Presidium of the Supreme Court of Arbitration of the Russian Federation, June 26, 2007.

<sup>54</sup> Resolution No. F09-1009/12 of the Federal Court of Arbitration of the Ural District, March 19, 2012; Resolution No. KG-A40/2047-11-4 of the Federal Court of Arbitration of the Moscow District, March 28, 2011.

considerations of functionality, on standard solutions, and on fundamental data stated in technical and regulatory documents, such as user requirement specifications, or findings of geological explorations. In some cases, such factors are directly indicated as grounds for ruling a design to be non-copyrightable or for denying any violation of copyright.<sup>55</sup> In others, the claimant is challenged to prove that his or her design is new, original, and unique.<sup>56</sup>

### **3. Distribution of the Burden of Proof for the Creative Nature of a Work**

By and large, courts consistently follow the principle of work's presumed creative nature that is prescribed in Clause 28 of Resolution 5/29. We cannot cite any instance in the judicial practice of recent years where a court threw out a suit from the author of a work of traditional high authorship because the claimant had failed to prove the creative nature of the work.

Nevertheless, it would be inaccurate to say that courts always follow the chief message of Clause 28, which aims to loosen creativity standards and vastly expand the range of works eligible for copyright. The key issue is what precisely a court sees as outweighing the presumed creativity principle, and hence what it sees as a reason to hand over the burden of proving the creative nature of a work to the claimant.

An analysis of judicial practice shows that this takes place when the work in question can be categorized as a work of low authorship or a work without any creative aspect because, for example, it merely reproduces part of the public domain. In such cases, neither formal reference to Clause 5 or Subclause 4 of Clause 6 of Article 1259 of the Civil Code, nor putting the disputable work in any of the categories listed in Clause 1 of Article 1259, nor the defendant's providing evidence of the non-creative nature of the work (e.g. an expert assessment) is of any decisive significance.

In some cases, courts at their own initiative have made the burden of proof the claimant's responsibility and assessed the proof at their own discretion, with an assessment of a copy of the work presented to the court being accepted as a sufficient basis for this.<sup>57</sup> Quite often, while

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<sup>55</sup> Designing ventilated cladding for a building is a purely technical task, according to Ruling No. VAS-4707/11 of the Supreme Court of Arbitration of the Russian Federation, May 17, 2011, or to Resolution of the Federal Court of Arbitration of the Northwestern District on Case No. A56-62462/2009, December 15, 2010. Creation of design and construction documents is a technical and organizational task of optimizing the process of design and construction in the "Standard Construction Units" category, according to Resolution No. 09AP-15365/2011-GK of the Ninth Arbitration Court of Appeal, July 21, 2011.

<sup>56</sup> Resolution No. F09-4849/08-S6 of the Federal Court of Arbitration of the Ural District on Case No. A07-8108/2006, July 11, 2008, left in force by Ruling of the Supreme Court of Arbitration No. 12879/08, October 17, 2008; Resolution No. 09AP-5916/2008-GK of the Ninth Arbitration Court of Appeal, November 18, 2010, which was repealed subsequently.

<sup>57</sup> See Ruling No. VAS-5413/10 of the Supreme Court of Arbitration, June 15, 2010; Ruling No. VAS-4707/11 of the Supreme Court of Arbitration, May 17, 2011; Resolution of the Federal Court of Arbitration of the Northwestern District on Case No. A56-62462/2009, December 15, 2010; Resolution No. 09AP-5916/2008-GK of the Ninth Arbitration Court of Appeal, November 18, 2010; Resolution of the Federal Court of Arbitration of the Northwestern District on Case No. A56-35168/2009, July 6, 2010; Ruling of the Moscow City Court on Case No. 33-10009/2011, April 8, 2011.

explaining a decision to put the burden of proof on the claimant, courts argue that the disputed work reproduces ideas from the public domain (Clause 5 of Article 1259 of the Civil Code),<sup>58</sup> or that it is a mere work of reference (Subclause 3 of Clause 6 of Article 1259),<sup>59</sup> or that it comes under none of the types listed in Clause 1 of Article 1259.<sup>60</sup>

In some cases, courts make broad interpretations of the claimant's duty to prove that their work is copyrightable.<sup>61</sup> Interestingly, in some cases, the transfer of the burden of proof is accompanied by higher creativity standards, namely the claimant is required to prove the work to be new, original, and unique.<sup>62</sup> It appears that the transfer of the burden of proof to the claimant is a reaction by courts to the increasing risk of monopolizing elements of the public domain as a result of the lowering of copyright standards that is one of the objectives of Resolution 5/29.

#### **4. An Author's Resources for the Creation of an Original Work and Factors Ruling Out the Creative Nature of a Work**

Unlike doctrinal polemics, which neglect the danger of monopolizing parts of the public domain as a result of lower standards of creativity, courts are forced to react to such risks by developing legal means of detecting public domain elements in a work.

One such means is the thesis that the general ideas contained in a work are non-copyrightable (Clause 5 of Article 1259).<sup>63</sup> Another is the qualification of a work or parts thereof as a mere record of events or facts (Subclause 4 of Clause 6 of Article 1259).<sup>64</sup> A third is direct reference to factors that, in the court's opinion, reflect the non-creative nature of a work (such as the use of generally accessible sources of information, including sources, such as the Internet,

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<sup>58</sup> Resolution No. 09AP-27014/2011 of the Ninth Arbitration Court of Appeal, November 7, 2011.

<sup>59</sup> Resolution of the Federal Court of Arbitration of the Northwestern District on Case No. A56-35168/2009, July 6, 2010 (reference to the use of generally accessible sources of information); Ruling No. VAS-2305/11 of the Supreme Court of Arbitration of the Russian Federation, March 11, 2011 (a work reproducing information from the producer).

<sup>60</sup> Resolution of the Federal Court of Arbitration of the Northwestern District on Case No. A56-62462/2009, December 15, 2010.

<sup>61</sup> Ruling No. VAS-5413/10 of the Supreme Court of Arbitration of the Russian Federation, June 15, 2010; Resolution No. A56-16934/0 of the Federal Court of Arbitration of the Northwestern District, December 10, 2001; Resolution No. 09AP-5916/2008-GK of the Ninth Arbitration Court of Appeal, November 18, 2010; Ruling of the Moscow City Court on Case No. 33-10009/2011, April 8, 2011.

<sup>62</sup> Ruling No. VAS-5413/10 of the Supreme Court of Arbitration, June 15, 2010; Ruling No. VAS-2305/11 of the Supreme Court of Arbitration, March 11, 2011; Resolution No. 09AP-27014/2011 of the Ninth Arbitration Court of Appeal, November 7, 2011; Resolution No. 09AP-5916/2008-GK of the Ninth Arbitration Court of Appeal, November 18, 2010; Resolution of the Federal Court of Arbitration of the Northwestern District on Case No. A56-35168/2009, July 6, 2010.

<sup>63</sup> Resolution No. KG-A40/1795-10 of the Federal Court of Arbitration of the Moscow District, April 5, 2010; Resolution No. 09AP-15365/2011-GK of the Ninth Arbitration Court of Appeal, July 21, 2011.

<sup>64</sup> Ruling No. VAS-2305/11 of the Supreme Court of Arbitration of the Russian Federation, March 11, 2011; Resolution No. F03-8505/2010 of the Federal Court of Arbitration of the Far Eastern District, December 20, 2010 (use of information from a producer).

access to which is completely unrestricted),<sup>65</sup> the compliance of a work with certain standards,<sup>66</sup> functionality requirements,<sup>67</sup> pragmatic nature,<sup>68</sup> external factors<sup>69</sup>, use of a general model,<sup>70</sup> certain underlying concepts,<sup>71</sup> the general nature of the information that the work is based on,<sup>72</sup> and the unity of information and facts.<sup>73</sup>

No comprehensive list of such factors has been compiled, and it is too early to say that this is a definitive instrument. Court rulings in such cases tend to be extremely casuistic and fail to show any connection between conclusions on the copyrightability or non-copyrightability of a work, the author's resources for self-expression, and for the creation of an original work. They also fail to describe factors that would rule out the creative nature of a work.<sup>74</sup> Nevertheless, the above-cited court rulings are based on similar logic.

Moreover, Russian judicial practice has yet to formulate the problem of indirect monopolization of elements from the public domain. So far courts have dealt with situations where parts of the public domain were expressed in one of several standard forms, and hence providing a work that includes such public domain elements with copyright protection would limit public use of such content, even if such a work were an independent and new creation.<sup>75</sup>

## **5. Copyright Protection of Smaller Forms of Art and of Parts of a Work. The Volume of a Work's Copyright Protection**

In terms of the context of this article, one interesting aspect of the copyright protection of a part of a work is the use by Russian courts of the above-quoted Clause 7 of Article 1259 of the

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<sup>65</sup> Ruling No. VAS-2305/11 of the Supreme Court of Arbitration of the Russian Federation, March 11, 2011; Resolution No. F03-8505/2010 of the Federal Court of Arbitration of the Far Eastern District, December 20, 2010; Resolution No. KG-A40/1795-10 of the Federal Court of Arbitration of the Moscow District, April 5, 2010; Resolution of the Federal Court of Arbitration of the Northwestern District on Case No. A56-35168/2009, July 6, 2010.

<sup>66</sup> Resolution No. 09AP-27014/2011-GK of the Ninth Arbitration Court of Appeal, November 7, 2011; Resolution of the Federal Court of Arbitration of the Moscow District on Case No. A40-133968/09-27-952, March 28, 2012; Resolution No. 09AP-13024/2009 of the Ninth Arbitration Court of Appeal, September 8, 2009.

<sup>67</sup> Resolution No. 09AP-15365/2011-GK of the Ninth Arbitration Court of Appeal, July 21, 2011.

<sup>68</sup> Resolution No. 09AP-27014/2011-GK of the Ninth Arbitration Court of Appeal, November 7, 2011.

<sup>69</sup> Resolution No. 09AP-27014/2011-GK of the Ninth Arbitration Court of Appeal, November 7, 2011; Resolution of the Federal Court of Arbitration of the Moscow District on Case No. A40-133968/09-27-952, March 28, 2012.

<sup>70</sup> Resolution of the Federal Court of Arbitration of the North Caucasus District on Case No. A32-46580/2009, December 6, 2010.

<sup>71</sup> Resolution No. 09AP-27014/2011-GK of the Ninth Arbitration Court of Appeal, November 7, 2011.

<sup>72</sup> Resolution No. KG-A40/2047-11-4 of the Federal Court of Arbitration of the Moscow District, March 28, 2011.

<sup>73</sup> Resolution of the Federal Court of Arbitration of the Volga-Vyatka District on Case No. A43-4663/2008-7-119, October 20, 2008.

<sup>74</sup> In German law, this idea has become firmly established via the *Gestaltungsspielraum* general principle. See E.-I. Gamm, *Die Problematik der Gestaltungshöhe im deutschen Urheberrecht*, Baden-Baden, 2004, S. 82 ff.; U. Fuchs, *Der Werkbegriff im italienischen und deutschen Urheberrecht*, München, 1996, S. 54-56; T. Dreier, G. Schulze, *Op. Cit.* § 2, Rn. 33. S. 55.

<sup>75</sup> In the United States, the *merger doctrine* is used to eliminate such risks. See *Herbert Rosenthal Jewelry Corp. v. Kalpakian*, 446 F.2d 738, 742 (9th Cir. 1971) and M. Nimmer and D. Nimmer, *Op. Cit.* § 13.03[B][3]. In Germany the *Gestaltungsspielraum* doctrine is used for this same purpose. See C. Berking, *Op. Cit.*, S. 75).



Civil Code with the aim of preventing the monopolization of any part of the public domain. Such danger arises when the point of dispute is a comparatively small part of a work, such as its title and smaller forms of art, whose copyright protection would essentially mean the monopolization of artistic devices, including individual words, set phrases, or specific commonly used tonal ranges. In such cases, courts often deny protection, arguing that the claimant has failed to prove that they are the result of their own independent creative work and meet the novelty, originality, and uniqueness criteria.<sup>76</sup>

This means that providing or denying copyright protection to any such item does not depend on whether or not its author has been able to prove that it is the product of independent creation.

It is an interesting point that this represents the use of high standards of copyrightability, for the author's individuality must manifest itself therein to make them copyrightable.

This corroborates a hypothesis that was mentioned above in relation to the issue of the copyrightability of works of low authorship, namely that, on the whole, lowering copyrightability standards means that copyrightability assessment merely amounts to assessing the possibility of borrowing individual parts of a work, and hence it becomes possible that a work is copyrightable as a whole, but any part of it or, which is practically the same thing, a work with minor changes, may be in free use.<sup>77</sup> In other words, the individuality criterion has not lost its legal significance, but rather has begun to be used at a different stage in dispute resolution.

Furthermore, the Russian practice of protecting elements and sections of works implies that Russian law is ready to accept a copyright scheme where the possibility of using elements in other works depends on their degree of individuality.<sup>78</sup>

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<sup>76</sup> Ruling No. VAS-5413/10 of the Supreme Court of Arbitration of the Russian Federation, June 15, 2010; Resolution No. KG-A41/13081-09 of the Federal Court of Arbitration of the Moscow District, January 19, 2010 (advertising slogans); Resolution of the Federal Court of Arbitration of the Northwestern District on Case No. A56-35168/2009, July 6, 2010 (advertising banners); Ruling of the Moscow City Court on Case No.33-36846, November 26, 2010 (title of a work); Ruling of the Moscow City Court on Case No. 33-10009/2011, April 8, 2011 (title of a work).

<sup>77</sup> H. P. Knöbl, *Die "kleine Münze" im System des Immaterialgüter- und Wettbewerbsrechts. Eine rechtsvergleichende Analyse des deutschen, schweizerischen, französischen und US-amerikanischen Rechts*, Verlag Dr. Kovac, 2002, S. 157. G. Rau, *Antikunst und Urheberrecht*, Schriftenreihe der UFITA, Heft 58, Berlin, 1978, S. 35 ff.

<sup>78</sup> See E. Ulmer, *Urheber- und Verlagsrecht*, 3. Aufl., Berlin-Heidelberg-New York, 1980, S. 275 ff., and T. Dreier, G. Schulze, Op. Cit., § 24, Rn. 1, 4, 8. There are similar procedures for comparing degrees of originality of works or parts of works in American copyright practice: In trying to determine whether a disputed work is a copy of another, a court looks for significant similarity between elements of the two works, and the degree of individuality of the elements is the determining factor. See *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340, 361 (1991).

## 6. Arguments Accepted by Courts as Proof of the Creative Nature of Works

Quite often in copyright dispute resolution, evidence accepted by courts as proof of the creative nature of a work is a copy of this work (the court then makes its conclusion after examining it),<sup>79</sup> expert assessments,<sup>80</sup> and an agreement on the creation of the work and the transfer of rights to it<sup>81</sup> (though, strictly speaking, such agreements are the legal basis for the actual fact of its production, but not for its creative nature).<sup>82</sup> One problem in the use of expert assessments is that a person who is an expert in a field other than law is given the legal task of determining whether a disputed work is new, original, and unique.<sup>83</sup>

### III. Principal Conclusions

The Russian judicial practice of resolving disputes over whether a work is creative and therefore copyrightable is rather inconsistent. Nevertheless, there are obvious indications of a tendency to lower copyrightability standards for various reasons, primarily in order to protect works of low authorship, mainly computer programs and databases.

It is namely originality, novelty, and uniqueness that cease to be criteria of copyrightability and are replaced by the requirement for independent creation, which may involve non-deliberate copying. At the same time, since there are no definitively approved criteria for identifying possible elements of the public domain in a work, Russian judicial practice is coming up against growing risks of partially monopolizing the public domain. One way to eliminate such risks is to return to higher standards of copyrightability. Another is to evolve a methodology similar to those existing in foreign legal systems.

Consequently, as in Germany, there are signs of a trend in Russian judicial practice to diversify standards of creativity for different types of works. If the point of dispute is a traditional type of work with a prominent creative aspect, then courts use low standards of

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<sup>79</sup> Resolution of the Federal Court of Arbitration of the North Caucasus District on Case No. A32-46580/2009, December 6, 2010; Resolution No. F09-8434/11 of the Federal Court of Arbitration of the Ural District, December 26, 2011; Resolution No. 09AP-24568/2009-GK of the Ninth Arbitration Court of Appeal, March 1, 2010.

<sup>80</sup> Resolution of the Federal Court of Arbitration of the Volga District on Case No. A65-24595/2008, December 13, 2010; Resolution No. F09-1153/09-S6 of the Federal Court of Arbitration of the Ural District, September 16, 2009; Resolution No. 09AP-15365/2011-GK of the Ninth Arbitration Court of Appeal, July 21, 2011; Resolution No. F09-4849/08-S6 of the Federal Court of Arbitration of the Ural District on Case No. A07-8108/2006, July 11, 2008; Resolutions No. 09AP-13192/2011-GK and No. 09AP-13193/2011-GK of the Ninth Arbitration Court of Appeal, June 30, 2011.

<sup>81</sup> Ruling of the Court of Arbitration of the City of Moscow on Case No. A40-29046/10-12-177, May 25, 2010; Resolution No. 09AP-17376/2010-GK of the Ninth Arbitration Court of Appeal, August 26, 2010.

<sup>82</sup> As a curious point, we would like to cite a case where the actual existence of the dispute was used by the court as evidence of the copyrightability of the disputed work, for otherwise, the court argued, the dispute would be senseless. See Resolution of the Federal Court of Arbitration of the Volga District on Case No. A65-24595/2008, December 13, 2010.

<sup>83</sup> Resolution No. 2096/07 of the Presidium of the Supreme Court of Arbitration of the Russian Federation, June 26, 2007.

copyrightability, believing that proof of independent production is sufficient for the work to be ruled copyrightable. On the other hand, in dealing with works of low authorship, courts quite often set special, higher standards, making copyrightability conditional on originality, novelty, and uniqueness.

The distribution of the burden of proof is one more way in which differentiation between works of the traditional creative type and works of low authorship manifests itself. As a general rule, courts follow the principle of a work's presumed creative nature. However, in many cases where there are reasons to categorize a disputed work as a work of low authorship, courts transfer the burden of proving its creative nature to the claimant that is alleging that his or her exclusive rights have been violated.

Russian courts are gradually evolving a practice where works or elements of works are considered non-copyrightable if a significant role in their production has been played by factors that rule out any creative aspect, such as requirements of functionality, compliance with various standards, or reproduction of elements of the public domain. This creates a basis for developing a construct similar to Germany's *Gestaltungsspielraum*.

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