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DEBATES ON THE CRITERIA OF COPYRIGHTABILITY IN THE RUSSIAN LEGAL LITERATURE

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DEBATES ON THE CRITERIA OF COPYRIGHTABILITY IN THE RUSSIAN LEGAL LITERATURE[2]

In codifying intellectual property rights, Russian legislators have left what standards of originality and creativity can be considered criteria of copyrightability a moot point. Nevertheless, it is crucial for answering questions about where the lower boundary of copyrightability lies and, consequently, what intellectual products that have an insignificant creative component, but are of high economic importance – such as databases, computer software, advertisement slogans or design work – should be copyrightable. This article addresses the problem of identifying criteria for copyrightability and non-copyrightability in the Russian legal literature by modeling various types of demarcation criteria and analyzing their strong and weak points. Analyzing debates in the legal literature warrant the conclusion that there is a trend to set looser standards for originality and creativity and grant copyright protection to works of low authorship.

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Introduction

Russia's integration with the global economy, with its joining the World Trade Organization on August 22, 2012, being a major landmark, signifies an increasing need for national mechanisms for protecting intellectual property to meet generally accepted international criteria. Over the past two decades, Russia has taken a series of important steps to bring its legislation on intellectual property up to the highest European standards. One such step is Part Four of the Civil Code of the Russian Federation, "Rights to Results of Intellectual Work and Means of Individualization," which entered into force on January 1, 2008.

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 The Law on Copyright and Related Rights of July 9, 1993,[3] which has since been repealed, offered copyright protection to any creative work of science, scholarship, literature, or art regardless of its purpose, standards, and the means of expression that it employed (Article 6).

Today's Part Four of the Civil Code,[4] 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, and the means of expression used in them being taken into account in deciding whether they are copyrightable. The article lists copyrightable types of works (Clause 1), and prescribes an objective form of existence of a work – written, oral, such as a public reading or other public performance, a graphic or three-dimensional representation, an audio or video recording, etc. (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 to a work of science, scholarship, literature, or art to the individual who has *created* this work.[5] 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, the questions that this gives rise to are answered through doctrine and judicial practice records.

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[3] Published in Rossiyskaya Gazeta, No. 147, August 3, 1993.

[4] Published in Rossiyskaya Gazeta, No. 289, December 22, 2006.

[5] *Kommentariy k chasti chetvertoy Grajdanskogo kodeksa Rossiĭskoĭ 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.

Below I analyze the debates in the Russian legal literature over the past two decades on copyrightability criteria – originality, novelty, and uniqueness – as well as on the minimum standards of a work's creativity that must be met in order to be recognized as copyrightable.

I. Former Dominant Opinion

The creative component of a work is a notion that has never been given a clear definition in Russian law and therefore has never become a specific subject for debates. Therefore, the minimum standards that a work's creativity has to meet to be recognized as copyrightable are not discussed specifically. This issue is part of a general discussion on copyrightability criteria – originality, novelty, and uniqueness – because authors feel that these standards significantly depend on the criterion that has been chosen.[6]

Before Part Four of the Civil Code came out, and under the influence of works by V. A. Dozortsev,[7] originality, novelty, and uniqueness had been predominantly seen in the legal literature as the sole acceptable criteria of copyrightability. In terms of traditional interpretations, namely in the copyright doctrine of continental European,[8] there is an internal contradiction about the use of the originality, novelty, and uniqueness characteristics as criteria. Yet it was believed to be justifiable to apply them as criteria, as in that period there were no unambiguous definitions of those terms – there were usually no specific meanings attached to them and they were normally used either as synonyms or as definitions of each other.[9] This mainly applies to originality, which was usually taken to mean the novelty[10] or uniqueness[11] of a work, and

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[6] 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), or as a reflection of the unique identity of the author ("originality" in the 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.

[7] V. A. Dozortsev, *Intellektual`nie prava. Ponyatie. Sistemsa. Zadachi kodifikatsii (Intellectual Rights: Concept, Systems and Tasks of Codification)*, Statut, Moscow, 2003

[8] See, e.g., T. Bettinger, *Der Werkbegriff im spanischen und deutschen Urheberrecht,* Verlag C. H. Beck, München, 2001, S. 23 ff.; 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. 195 ff.; T. Dreier, G. Schulze, *Urheberrechtsgesetz Kommentar,* Verlag C. H. Beck, München, 2004, § 2, Rn 18-19.

[9] See, e.g., A. P. Sergeyev, *Intellectual Property Law in the Russian Federation*, Moscow, 2003, p. 111.

[10] See ibid.

[11] See E. P. Gavrilov, *Kommentariy k Zakonu ob avtorskom prave i smejnih pravah (Commentary on the Law on Copyright and Related Rights),* Pravovaya Kul'tura, Moscow, 1996, Clauses 4-6, Art. 6; 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.

uniqueness was often regarded as a qualified version of objective novelty.[12] Hence there is no established clear contrast in the Russian doctrine between originality as a manifestation of the author's personal individuality (as a criterion of eligibility for copyright protection) and objective novelty as a distinction from existing works (used in patent law).

The use of the uniqueness criterion was based on the logic of copyright. If exclusive rights are modeled on the absolute right of full control over a work, then the emergence of such rights by virtue of the fact of its actual creation is only possible if this work is unique.[13] The uniqueness of copyrightable works precludes inevitable conflicts between unconnected holders of such exclusive rights to identical works, if such works are created independently of each other and are recognized as copyrightable.

Such conflicts would have been unresolvable within the limits of copyright alone, primarily due to the absence of mechanisms for determining which of the authors was the first to create a work. Hence, given the wide-scale existence of mutually duplicating creative projects, the parallel existence of exclusive rights to the same object, just as postponing the establishment of precedence until the moment when a copyright dispute went to court, would set off a sharp growth in legal indeterminacy and add an element of instability to the legal positions of parties in such disputes.

Russian practice uses relatively inefficient means for determining whether something is part of the public domain, including anything that is part of general historical or cultural experience, or that is part of the nature of things or human relationships, or that is available from generally accessible sources, such as nature and common ideas, or that can be naturally reproduced by anyone with medium capabilities, such as language, facts, discoveries, and widespread and standard images, ideas, and esthetic devices.[14]

This means that copyright protection for non-unique works poses risks of direct or indirect monopolization of parts of the public domain, and consequent limitations on their public use.

Thus, any model for granting exclusive absolute rights to non-unique works (for example, granting rights to a non-unique work to its first creator or to anyone else who has created it independently) would give rise to increasingly frequent situations where authors held

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[12] Which, strictly speaking, is incorrect. While it is true that a unique work is always new, the logic of determining if a work is new is essentially different from the logic of determining if it is unique: in the former case, a disputed work is compared with works that have been created before, while in the latter a work is itself assessed, or, more precisely, it is analyzed whether another author may have created a similar or identical work.

[13] V. A. Dozortsev, Ibid, pp.13-14.

[14] For the interpretation of the public domain concept that we use in this study see, e.g., M. Kummer, *Das urheberrechtlich schützbare Werk,* Bern, 1968, S. 47-48; H. Hubmann, *Das Recht des Schöpferischen Geistes,* Berlin, 1954, S. 17 ff.; ders. *Urheber- und Verlagsrecht,* 6. Aufl., München, 1987. S. 31 ff.; B. Stamer, *Der Schutz der Idee unter besonderer Berücksichtigung von Unterhaltungsproduktionen für das Fernsehen,* Baden-Baden, 2007, S. 38-39; E. Ulmer, *Urheber- und Verlagsrecht,* 3. Aufl., Berlin-Göttingen-Heidelberg, 1980, S. 275 ff.

indeterminate legal positions, since such rights are impossible to identify in the absence of a registration system for third parties. This and the absence of precedence registration mechanisms would raise the risk of chaos in the copyright system.

Using the criteria of originality and uniqueness meant the using what by today's standards would be quite high standards for assessing the creative aspects of copyrightable works.[15]

The dominant rule in that period was that it was insufficient to prove that a work was produced by the author's own intellectual efforts, rather than being a borrowing or a copy. An intellectual product had to be new and unique at the very least.

II. Latest Debates

The reason for new debates on copyrightability standards from the point of view of creativity is the increasingly frequent emergence of works of low authorship in Russia, primarily computer software and databases. In this respect, Russia is following the worldwide trend for copyrightability standards to decline under the pressure of the need to protect intellectual products of low authorship.[16]

Some papers published in recent years[17] formulate a principle that independent creation, namely a work that is not a deliberate copy of someone else's work and is novel even from the subjective point of view of its author, must be an essential criterion. Such papers criticize the above-described principle that copyrightability must be conditional on objective novelty – defined as being different from any other available results or any third party's unawareness of them – or, more emphatically, on uniqueness.

One of the more serious arguments propounded by advocates of the independent creation criterion is that there is a social need for the legal protection of a large category of works that may independently duplicate one another – primarily works of low authorship.

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[15] Although effectively such standards are not excessively high. Moreover, critics have argued that *Max Kummer's* uniqueness concept means a model where works with insignificant creative aspects are to be copyrightable. See M. Kummer, Op. Cit., S. 30. For a critical analysis see P. Girth, *Individualität und Zufall im Urheberrecht,* UFITA 48 (1974), S. 30 ff.

[16] Similar processes have taken place in Germany, with computer programs being a case in point. See, e.g., E.-I. Gamm, *Die Problematik der Gestaltungshöhe im deutschen Urheberrecht,* Baden-Baden, 2004, S. 61ff.

[17] M. V. Chizhenok, *Kritika ob`ektivnoŭ 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 dannih 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, *Litsenzirovanie programmnogo obespecheniya v Rossii. Zakonodatel'stvo i Praktika (Licensing of Software in Russia. Legislation and Practice),* Moscow, 2012, § 3, Chapter 1.

However, this will only be a convincing argument if one can prove that copyright is applicable there, and that use of the independent creation criterion offers an optimal – or at least a "lesser-evil" – solution. No one in the Russian legal literature has provided sufficient evidence that copyright protection for works of this kind is a better and more effective solution than the use of alternative systems.[18] For instance, there has been no analysis of its potential social effects or the likelihood that it will make the copyright mechanism dysfunctional to a serious extent.

Another argument in favor of the independent creation concept as the main criterion of copyrightability is the assumed justification for copyrighting results of parallel creation. This is a key aspect for this concept since it signifies advocacy of lower standards for the creative character of a work, and this sharply raises the risk of independent creation of identical works by unconnected persons.

Two alternative solutions are offered to this problem. Some insist that copyright for a work should be granted to the person who was the first to create it,[19] which in fact meets the novelty criterion but does not automatically imply the use of the independent creation criterion. Others believe that it is possible to give the same rights to the authors of all mutually duplicating works created independently of each other.[20] However, either option would involve a sharp decline in creativity standards.

Advocacy of the former option – the *novelty criterion* – is based on denying that its use would cause any serious dysfunctionality in the copyright mechanism. They argue that it is by no means necessary to have an a priori system for determining the absolute novelty of a work. First of all, there have been instances in the majority of legal systems where legal protection was granted to a product of intellectual work that duplicated another product and was created after it, such as trade names or useful models. Hence, similarly, it is seen as acceptable that copyright seekers should hold somewhat indeterminate legal positions, so that a work may consequently fail to meet copyrightability criteria in a dispute.

Secondly, it appears to be possible to presume a work to be novel, even though this presumed novelty may be refuted in a court dispute. In principle, authorship disputes in Russia follow a similar logic today due to the presumption principle enshrined in Article 1257 of the Civil Code, under which it is considered to be important in some cases on which work was the

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[18] For example: competition law mechanisms, related rights law, and various mechanisms *sui generis.* In some instances, patent law and protection mechanisms for industrial secrets are applicable. See, e.g., H. P. Knöbl, Op. Cit., S. 311 ff.; H.-H. Schmieder, "Die Verwandten Schutzrechte - ein Torso?", *UFITA 73*, 1975, S. 65 ff.; F. Thoms, *Der urheberrechtliche Schutz der kleine Münze: Historische Entwicklung – Rechtsvergleichung – Rechtspolitische Wertung,* München, 1980, S. 322 ff.; G. Schulze, *Die kleine Münze und ihre Abgrenzungsproblematik bei den Werkarten des Urheberrechts,* Freiburg, 1983, S. 301 ff.

[19] M. V. Labzin, *Original`nost` ob`ektov avtorskogo prava (Originality of Copyrightable Works),* Patenty i Litsenzii (Patents and Licences*),* Nos. 7 and 8, 2007; V.A. Khokhlov, *Avtorskoe pravo: zakonodatel`stvo, teoriya, praktika (Copyright: Legislation, Theory and Practice),* Gorodets, Moscow, 2008, p. 51.

[20] M. V. Chizhenok, Op. Cit.; V. A. Korneyev, Op. Cit., p. 37.

first to be published (under Article 1257, the person who is named as the author in the original work or in any of its copies is to be considered its author unless the opposite is proved). This makes any other mechanism for determining the absolute novelty of a work unnecessary.

It appears that quite a wide range of objections to this scheme may be put forward. Many of them would, in one way or another, stem from the evaluation of the extent of acceptable indeterminacy of the legal positions of parties – authors, their counterparties, or duplicators who are involuntary violators of copyright – which arises from this model of the novelty criterion. Let us just note that the degree of such indeterminacy is directly dependent on the characteristics of a disputed work, and consequently on the likelihood of its duplication.

This is an effective scheme if applied to traditional-type works with a high-standard creative component. If, however, it is applied to works of low authorship, where the probability of independent duplication is quite high, legal indeterminacy and its potential adverse social effects may quickly reach prohibitive proportions.

The nature of another set of objections is that, due to the absence in Russian law of principles for identifying parts of the public domain in a work that are similar to principles existing in German law,[21] this model involves a high risk of monopolizing elements of the public domain in dealing with works of low authorship. The reason is that the probability of duplication directly depends on the role that has been played in the creation of a work by general historical and cultural experience, natural and social laws, generally accessible sources, standards accepted in a specific industry, and so forth. It is easy to imagine a situation where an idea that is generally accessible is expressed in one or several standard forms, meaning that granting copyright protection to such a work – if it meets the novelty criterion – would result in a so-called indirect monopolization of the ideas that it expresses.[22] Consequently, monopolizing elements of the public domain would make it impossible to give a definition of a third party's eligibility for copyright.

A second model for solving the duplication problem involves copyright protection for each author and is based on the *principle of coexistence of independent exclusive rights* to the same production. It is based, first of all, on similar examples from other subdivisions of Russian intellectual property law (protection of integrated circuit topographies, industrial secrets, collective trademarks, the name of a product's place of origin). Secondly, examples may be cited of recognizing independent rights to identical works in the world's leading legal systems.[23]

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[21] Determining the Gestaltungsspielraum (the scope of resources for the creation of an original work) via the identification of factors that rule out the creative character of the work.

[22] C. Berking, *Die Unterscheidung von Form und Inhalt im Urheberrecht,* Baden-Baden, 2002, S. 75 ff.

[23] It is the dominant opinion in German doctrine and judicial practice that duplicating works are copyrightable (T. Dreier, G. Schulze, Op. Cit. § 2, Rn. 17, S. 51). U.S. law accepts the coexistence of two authors as being independent holders of

Let us just note here that making a sustainable case for the principle of coexistence of independent rights to identical works requires a meticulous comparative study of copyright mechanisms and mechanisms for the protection of other above-mentioned products of intellectual work. In any case, it would have to be explained why, in a specific legal system, the coexistence of independent rights to identical works would involve – or, conversely, would not involve – an unacceptable degree of indeterminacy in the legal positions of copyright seekers, prohibitive dysfunctions, or any adverse social effects.

One of the potential causes of a copyright system turning chaotic is that a conflict of personal non-property rights and exclusive rights is difficult to resolve if the exclusive rights are absolute rights modeled on the right of monopolistic domination. In such a situation, an individual would find it hard to exercise rights that are formally reserved for him or her. Bearing in mind that the primary issue deals with rights to works of low authorship that have a high probability of independent duplication, such situations are likely to become typical.[24] Until now advocates for the principle of coexistence of rights in Russian jurisprudence have not analyzed this set of problems.

III. Principal Conclusions

The Russian literature is laconic and inconsistent in its discussing the problem of identifying criteria of copyrightability and non-copyrightability in the Russian legal system. The creative component of a work is a notion that has never been given a clear definition in Russian law. Nevertheless, what minimum standards of creativity a work has to meet in order to be recognized as copyrightable it is not discussed specifically in the legal literature. This issue is part of a general discussion on criteria for copyrightability – originality, novelty, and uniqueness – because authors feel that these standards significantly depend on the criterion that has been chosen.

Before Part Four of the Civil Code came into force, originality, novelty, and uniqueness had been predominantly seen in the legal literature as the sole acceptable criteria of

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copyright to the same work (see M. Nimmer, D. Nimmer, *Nimmer on Copyright,* LexisNexis, 2004, § 13.03; C. Berking, Op. Cit., S. 83-84). On the other hand, the Italian doctrine predominantly rules out the copyrightability of such works (U. Fuchs, *Der Werkbegriff im italienischen und deutschen Urheberrecht,* München, 1996. S. 40).

[24] The movement of copyright systems in continental European towards mechanisms that do not involve granting a monopoly to the use of a work is a way to mitigate more acute copyright conflicts. Such mechanisms are a feature of competition law, of know-how protection systems and, in effect, of Anglo-American copyright systems, and are based on the prohibition of certain kinds of activities, in this case the use of results of somebody else's intellectual work without the investment of resources necessary for independent creation – a use that is taken to be legally unacceptable. As a minimum, this model possesses distinguishing marks of delictual mechanisms. See, e.g., J. H. Reihman, *Legal Hybrids between the Patent and Copyright Paradigms,* Col. L. Rev., 1994, Vol. 94, pp. 2432-2558; L. Ray Patterson, *Copyright and 'the Exclusive Right' of Authors*, J. Intell. Prop. L., 1993, Vol. 1, pp. 1-48. In Russia, there are no manifest processes of this kind yet.

copyrightability. It was considered justifiable to apply them as criteria, because in that period there were no unambiguous definitions for those terms – there were usually no specific meanings attached to them and they were normally used either as synonyms or as definitions of each other.

The reason for the new debates on copyrightability standards from the point of view of creativity is the increasingly frequent emergence in Russia of works of low authorship, primarily computer software and databases. A number of papers published in recent years formulate a principle that independent creation – namely a work that is not a deliberate copy of someone else's work and is novel even from the subjective point of view of its author – must be an essential criterion. In this respect, Russia is following the worldwide trend for copyrightability standards to decline under the pressure of a need to protect intellectual products of this kind.

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