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COPYRIGHT AS A DRIVER OF THE CREATIVE ECONOMY

Aliev Tigran T[1,*], Pyataeva Olga A[2], Kitaeva Elena O[3], Nevolin Boris S[4], Shramkov Ivan S[5]

[1]Doctor of Law, Head of the department of Copyright and Private Law, Russian State Academy of Intellectual Property
[2]PhD in Economics, Head of the department of Digital economy and entrepreneurship, Russian State Academy of Intellectual Property
[3]Vice-Rector of Youth policy of Russian State Academy of Intellectual Property
[4]Vice-Rector of Digitalization of Russian State Academy of Intellectual Property
[5]Head of Preparatory Office of Russian State Academy of Intellectual Property

Abstract

The article is devoted to the study of economic and legal essence of copyright and agreements on their transfer. On the basis of the conducted analysis the author concluded about necessity of creation effective mechanisms for copyright protection, especially for Internet connections.

Keywords: author, copyright, copyright holder, copyright transfer contracts.

Introduction

In the modern era, called the «information society», we are witnessing the rapid development of intellectual activity. These activities are important not only for the human person but also for the economic and social development of each state. This is an integral part of the security of the state, as there is a lack of intellectual capacity, which is usually the result of a weak legal and regulatory framework, resulting in an uncompetitive economy and, consequently, a weak state. Social processes are changing, and concepts such as computers, software and the Internet are well established. Libraries and archives are being replaced by electronic libraries, which are based everywhere. Electronic databanks containing a large amount of literature, science and art can easily be placed on a computer hard disk or on a website. They are usually served by one person. The Internet is a global concept not only in geographic but also in the socio-legal sense of this word. [1]

Materials and methods

Copyright (chapter 70 of the Civil Code of the Russian Federation) is part of the more general group of intellectual property rights, along with related rights (chapter 71), patent rights (chapter 72), breeding rights (chapter 73), rights in the topology of integrated chips (chapter 74), rights to secretions of production (know-how) (chapter 75), rights to means of individualization (chapter 76), rights to technology (chapter 77).

Copyright is the intellectual right to scientific, literary and artistic works.

Copyright is generally divided into the following:

- personal non-property rights (the right to publish a work, the right of authorship; author's right to a name; the right to the inviolability of the work;
- property rights (exclusive right to the work);
- other rights (the right to remuneration for the use of official work, right of refusal, priority of travel, access rights, etc.)

An important feature of copyright is that it does not generally depend on the ownership of the material carrier (thing) in which the intellectual result is expressed, and the transfer of ownership of a thing does not entail the transfer or grant of rights to the result of the intellectual activity expressed in that thing. An exception is the case of the expropriation of the original work by the owner, who has the exclusive right to the work but is not the author. In such cases, the exclusive right to the work passes to the buyer of the original work, unless otherwise agreed in the contract. [6]

Personal non-property rights are inextricably linked to the author's personality and are inalienable. They belong to the author regardless of the property rights, which he in turn can transfer to others.

The first paragraph of article 6bis of the Berne Convention states: «Regardless of the author's property rights and even after the transfer of those rights, he has the right to demand recognition of his authorship of the work and to counteract any distortion or other alteration of the work, as well as any other infringement of the work which may damage the honor or reputation of the author».

However, it should be noted that non-property rights may, however, be linked to the author's property interests when the author's name is publicly known and serves as a guarantee of the quality and style of the author works. In this case, publication in violation of the author's right to a name leads to direct reputational and property damage. Here, generic copyright in a name is analogous to rights in the means of individualization.

The exclusive right to a work in turn consists of the following rights to its use:

- reproduction of the work, that is, making copies of the work in any material form;
- dissemination of a work by sale or other disposition of its original or copies;
- public display of the work, that is, any demonstration;
- importing the original or copies of the work for distribution;
- the original or a copy of the work;
- public performance of a work;
- transmission of a message;
- telegraphic communication;
- translation or other processing of the work;
- implementation of the design project;
- making the work known to the public.

Web-based publication, technically implemented through orbital satellite clusters, fibre-optic, wired, telephone and terrestrial communications, refers to broadcast message elements and cable messages [2].

Copyright, according to article 1259 of the Civil Code of the Russian Federation, applies to both published and unpublished works expressed in any objective form, including written and oral (in the form of public speech, public performance, etc.). As images, as audio or video recordings, in three-dimensional form [3].

Results

Thus, in order to declare the beginning of the defense, certifying the identity of the work as a protected object and its conformity to the author, it is not necessary to bring the work to the public attention by means of publication - the protection begins automatically upon the creation of the Work. The basis for the creation of copyright is the mere existence of a work in an objective form, which, however, makes sense to fix on a certain date. In the event of the theft of an unpublished original or a copy, in this connection and the subsequent legal challenge to the existence of the copyright, the author has proof of authorship. It should be noted that, at present, the law does not adequately protect copyrights in such situations.

Registration of work or other formalities are not required for the exercise and protection of copyright. With regard to computer programs and databases it is possible to register at the request of the right holder in accordance with the rules of Article 1262 of the Civil Code. According to them, the right holder, during the period of the exclusive right to a computer program or database, can voluntarily register such program or database with the Federal Intellectual Property Executive.

The author of the result of the intellectual activity has the right of authorship, the right to a name and other personal non-property rights. The author's authorship, name and other personal non-property rights are inalienable and not transferable. The waiver of these rights is null and void. Authorship and the author's name are protected indefinitely.

The exclusive right to the result of the intellectual activity created by the creative work arises initially from its author. This right may be transferred by the author to another person under a treaty and may also be transferred to other persons on other grounds established by law.

The rights to the result of the intellectual activity created by the joint creation of two or more citizens (co-authorship) belong to the co-authors.
Knowledge and understanding of the theoretical foundations of copyright is the key to the correct qualification of validity and the correct resolution of copyright disputes. Knowing what copyright protects and to what extent allows you to understand what work is copyrighted and to what extent you can use the ideas and works of others.

According to article 1228, paragraph 1, of the Civil Code of the Russian Federation, the author of the result of intellectual activity is a citizen whose creative work has created such a result.

Article 1259, paragraph 1, of the Civil Code of the Russian Federation states that copyrights are works of science, literature and art, irrespective of the dignity and purpose of the work and the manner of its expression.

These and other provisions of the law lead to the conclusion that in order to determine whether a particular photograph is copyrighted, it is necessary first to analyse the process of its creation, the creative contribution of the photographer and how the photograph was created. The result is just an act of creativity.

Often, some copyright lawyers express the highly controversial view that only original, unique, new and different works that have already been created should be protected and protected by our copyright law. Thus, these lawyers shift the focus from creative activity to its outcome, although the law clearly states that the merits of the work do not affect its ability to be an object protected by copyright. Unfortunately, even in case law, it is often accepted that the value and level of a work are the key criteria for assessing its copyright protection (if such a question arises in the process) independently of the creation process.

The motives for this distortion of the law are clear. For example, according to lawyers advocating the obligatory originality of copyrighted works, it is not clear how to protect almost identical photographs of popular objects (nature objects, world-famous architectural creations, etc.). [4]

But it is probably wrong to give up protecting photographs based solely on their value, dignity and quality. At least it's illegal, given the copyright rules in force in Russia.

In deciding whether a particular photograph is copyrighted or whether it is an original work or a remake of someone else's work, it is necessary to analyze subjective factors in the form of activity of the photographer, his contribution to the created photograph. The result (the photo itself) should be studied only insofar as it allows to judge the activity of the photographer in its creation. The value of a photograph, its uniqueness and originality as such may be taken into account, for example, in determining compensation for copyright infringement of such a photograph.

We would like to draw attention to the fact that the need to analyze the photographer's activity in creating a photo does not imply that a photo created in 5 seconds and not subjected to any significant processing after that will not be copyrighted. The creative contribution of a photographer need not be reflected in the long hours of work on the image. Creative impulse, creative perception of a particular scene, desire to fix it in this way, and otherwise, choice of perspective, composition, combinations of light, moment of filming and much more. [5]

As a case study, I would like to select the author's dispute, which was considered on 28 11 2011 by the London Patent Court of Beers County (case 1CL 70031). The case is interesting, first, because of the complexity of the issue and, secondly, because of the deep and seemingly rational and correct approach to analysis.

Figure 1. Plaintiff's photograph (Mr. Fielder)

Source of borrowing: https://kolosov.info/kommentarii/avtorskoe-pravo-vortchestvo-fotografiya

Figure 2. Respondent photograph (Mr. Houghton)

Source of borrowing: https://kolosov.info/kommentarii/avtorskoe-pravo-vortchestvo-fotografiya

The question before the court is whether the defendant violated the plaintiff’s copyright by creating his photograph.

The plaintiff did a lot of postwork on the photo: improved the red color of the bus, completely removed the sky, moved the picture (for example, the bus) into a monochrome, removed some people from the front, stretched the original, corrected the perspective to level the buildings vertically. In total (including a trip to the shoot) it took 80 hours to create a scandalous photo.
The plaintiff’s photograph became popular, and many were licensed to create derivative products (souvenirs, T-shirts, etc. D.).

A photograph of the defendant was created from several photos of the defendant and photos from the iStockphoto website.

Obviously, there’s no trivial copying of other people’s work.
The case referred to the Austrian Supreme Court’s decision of 16.12.2003 in O (Peter) v F KG ([2006] ECDR 9). He stated that a copyrighted work must be the result of his own intellectual activity, not necessarily having any level of originality.

Of course, the postwork of the photograph usually indicates the continuation of the photographer’s creative thought.

The Court held that the photograph of the plaintiff was clearly copyrighted both from the point of view of the photographing process (leitmotif, perspective, light decision, exposure, etc.). So is the postwork of the photograph in order to implement the author’s idea.

Copyright infringement is considered not only the full copy, but also the copy of the protected parts of the work. The part that can be copied is not a question of quantity, but of quality.

The comparison is not only and not so much the result, but rather the actions that led to the result (the product). Whether and to what extent other people’s work was used to create a photograph. It should be understood, however, that the result itself, not the activity, is objectively visible.

The bus on the bridge in front of the Parliament building and Big Ben is a popular composition. The selection of a key object by color on a black and white background is also not unique.

One of the defendant's main arguments was that the place was popular, the plot is obvious, many tourists photograph the Parliament building and the bus from such a place. By the way, I am interested in photography, I walked in this «place», but I did not want to make such a picture. I liked the other angle better, as it turned out, no less popular.

The defendant argued that the plaintiff's photograph was not unique or original; it was so simple that it could only be violated by copying, not by re-photographing. The plaintiff also drew attention to the kit, which was the result of his own creative research in a controversial photo, such as the composite relationship between the bus and the parliament building (angle, shooting points, direction of the bus), the achromatic background, the white sky - and then, that the defendant confirmed that he knew about the plaintiff's photograph before the creation of his own.

The court noted that the defendant wanted to create a similar photograph, but in such a way as not to infringe the plaintiff's copyright. In fact, he wanted to «circumvent» the plaintiff's copyright. Thus, his actions were based on a photograph of the plaintiff.

The court acknowledged that the issue was complex, but noted the similarity of the photographs. While recognizing the differences in many elements of the two controversial photographs, the Court emphasized that it was not a mere coincidence that the photograph of the defendant, who knew about the photograph of the plaintiff, also depicted Big Ben and Parliament. a building in black and white, a bright red bus moving from right to left and sort of framed by the parliament building (aligned with it), white sky, no other vehicles. Despite the difference in most of the details of the composition of the two photographs, the court found that the key elements to be protected by copyright matched those elements that distinguished the plaintiff's photograph from most others.

By the way, the «similar» photographs of third parties presented by the defendants played against him because the court saw how different the embodiment of the same scene could be.

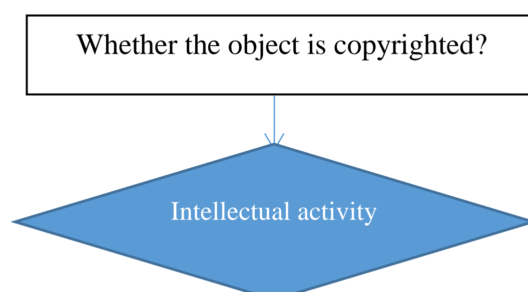
The Court also noted that if the accused wanted to create a new, original photograph of the same scene, he would have hired a photographer and set a goal, but that was not the case.

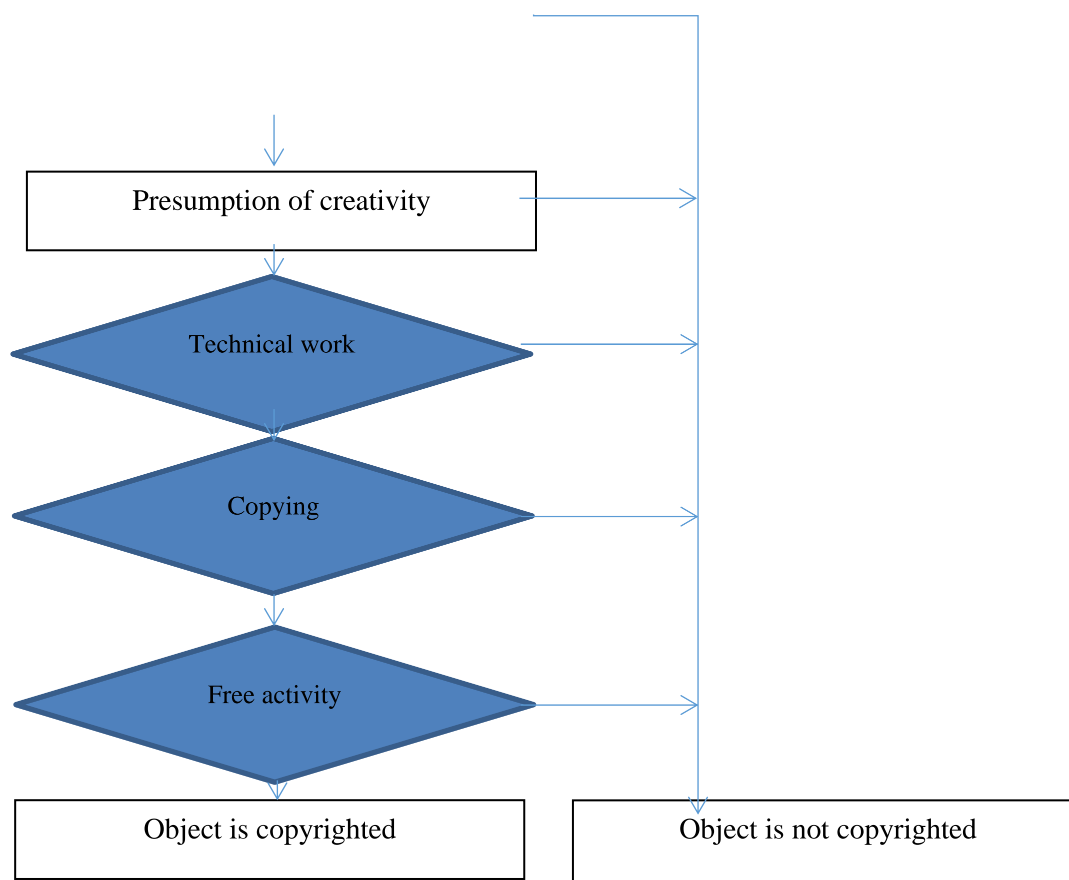
Throughout the analysis, the English judge sees the right approach: analysis is not so much the result of creative activity as the creative activity itself, which is truly subjective.

The Court went so far as to go in its analysis of the copyright dispute that it did not consider as evidence the photographs of the plaintiff's souvenirs with his photograph and the defendant's tea with his disputed photograph, which were placed in the shops on the same shelf. and can, of course, create confusion among consumers and thus become an act of unfair competition. For unfair competition has nothing to do with copyright and it has different grounds and criteria for identification. [7]

In practice, courts face problems in deciding whether an object is copyrighted or whether it contains features of creativity. According to the author of this article, the following algorithm can be used in practice:

Figure 3. Algorithm used in practice





The diagram shows that in order to establish creative signs in an object, we have to answer the following questions in order:

1. Is the object the result of intellectual activity? A negative answer excludes copyright protection. This criterion discards the results of accidental and unconscious actions, as well as those not committed by man. For example, satellite images taken automatically are not copyrighted.

2. There is a further presumption of creativity. This means that signs of creativity are assumed, but can be disproved at subsequent stages.

3. Will the result be achieved by performing typical actions using a previously known algorithm? Creativity should go beyond the usual technical work. In particular, a telephone directory will not be subject to copyright under this criterion.

4. Is the object copied from another product? Here it is necessary to establish not only the existence of an earlier copy, but also the potential of the author to know about it. At this stage, an auto-level expert examination may be appointed to determine whether, with his level of skills and education, a person could have created a controversial work. There are no signs of creativity if the work is a copy of another work.

5. Was the activity free? Of course, the author is always bound by certain limits (style, genre, culture). However, only a framework that determines the finite number of options is relevant. Such a framework results in the same result being achieved independently by two people. An example of this is a chess game that is not copyrighted.

Thus, creativity in copyright is an independent, free intellectual activity, going beyond the ordinary technical work.

As a conclusion, the Russian Federation now has a legal and regulatory framework for the protection of copyright and related rights on the Internet and is gradually developing a practice of enforcement, but there are also problems inherent in the legal systems of most countries

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