

DEBATES ON CRITERIA OF COPYRIGHTABILITY IN RUSSIA¹

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In codifying intellectual property rights, Russian legislators have left the issue of what standards of originality and creativity form the criteria for copyrightability a matter of debate.

Nevertheless, this issue is crucial to answering questions about where the lower threshold for the copyrightability of a work lies. Indeed, it is essential to determining which intellectual works with an insignificant creative component but of high economic importance (e.g., databases, computer software, advertisement slogans or design work) are to be copyrightable.

Analyses of debates in legal literature and court rulings issued over the past few years warrant the conclusion that there is a trend in favor of setting more relaxed standards of originality and creativity and granting copyright protection to works of low authorship. This article addresses the problem of identifying criteria for copyrightability and non-copyrightability in the Russian legal system. It models various types of demarcation criteria, and analyzes their strengths and weaknesses. It also describes the trend in Russian judicial practice of granting copyright protection to works of low authorship, whilst outlining some of the problems and contradictions that this entails. The article compares principles that have evolved under Russian law with similar principles used abroad, mainly in Germany.

Key words: copyright; intellectual property; intellectual rights; personal non-property rights; exclusive rights; copyrightable work; copyrightability; works of low authorship; originality; creativity.

1. Introduction

Russia's integration into the global economy, with its landmark accession to the World Trade Organization on Aug. 22, 2012, has increased the need for national mechanisms for the protection of intellectual property to meet generally accepted international criteria.

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Over the past two decades, Russia has taken a series of important steps to bring its legislation on intellectual property in line with 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 Jan. 1, 2008.

The presence of a creative component in a work has usually been prescribed as the main copyrightability criterion in both Soviet-era and post-Soviet Russian legislation. The Law on Copyright and Related Rights of July 9, 1993,² which has since been repealed, offered copyright protection to any creative work of science, scholarship, literature or art regardless of its purpose, its standards, and the means of expression that it employed (Art. 6).

Today's Part Four of the Civil Code,³ does not directly establish that creativity must be the main criterion of copyrightability. For instance, Art. 1259, 'Copyrightable Works,' merely lays the basis for a broader use of copyright protection than before, without taking into account the standards, purpose or means of expression of works of science, scholarship, literature or art in deciding their copyrightability. The article lists copyrightable types of work (Cl. 1), prescribing that a work must exist in some objective form – as a written, oral (such as a public reading or other public performance), graphic or three-dimensional representation, an audio or video recording, *etc.* (Cl. 3) – as a requirement for its copyrightability.

Nevertheless, Art. 1257 and Cl. 1 of Art. 1258 of the Civil Code do imply that a creative component is an essential criterion of copyrightability. Article 1257 confers authorship rights to a work of science, scholarship, literature or art upon the individual who has *created* such work.⁴ Under Art. 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 this criterion. Consequently, the questions to which this gives rise are answered by reference to doctrine and judicial practice records.

2. Debates in legal literature

2.1. Former dominant opinion

The creative component of a work is a notion that has never been given a clear definition in Russian law. For this reason, it has never become a specific subject of debate. As such, the minimum standard of creativity required of a work for it to be

² See 1993(147) Российская газета [Russian Gazette].

³ See 2006(289) Российская газета [Russian Gazette].

⁴ Комментарий к части четвертой Гражданского кодекса Российской Федерации (поглавный) [Chapter-by-Chapter Commentary on Part Four of the Civil Code of the Russian Federation] 387 (Alexander Makovsky, ed.) (Statut 2008).

to be recognized as copyrightable has never been singularly addressed. Rather, this issue forms part of a general discussion on copyrightability criteria – those being originality, novelty, and uniqueness – because authors feel that these standards significantly depend on the criteria that have been chosen.⁵

Before the advent of Part Four of the Civil Code, and under the influence of works by V. A. Dozortsev,⁶ originality, novelty and uniqueness had predominantly been seen in legal literature as the sole acceptable criteria of copyrightability. In terms of traditional interpretations, in continental European copyright doctrine,⁷ there is an internal contradiction in the use of originality, novelty and uniqueness characteristics as criteria. Nevertheless, it was considered justifiable to apply these concepts as criteria because during that period the definition of those terms was unambiguous. Indeed, there were not usually any specific meanings attached to these terms and they were normally used either as synonyms or as definitions of each other.⁸ This mainly applies to originality, which was more often taken to mean the novelty⁹ or uniqueness¹⁰ of a work, whereas uniqueness was often regarded as a qualified version of objective novelty.¹¹ Thus, there is no established or clear contrast in Russian doctrine between originality as a manifestation of an author's personal individuality

⁵ 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); as a reflection of the unique identity of the author ('originality' in continental Europe's *droit moral* tradition) – and that should not thus 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.

⁶ Viktor Dozortsev, *Интеллектуальные права. Понятие. Система. Задачи кодификации* [Intellectual Rights: Concept, Systems and Tasks of Codification] (Statut 2003).

⁷ See, e.g., Torsten Bettinger, *Der Werkbegriff im spanischen und deutschen Urheberrecht* 23 ff. (C. H. Beck 2001); Harald P. Knöbl, *Die 'kleine Münze' im System des Immaterialgüter- und Wettbewerbsrechts. Eine rechtsvergleichende Analyse des deutschen, schweizerischen, französischen und US-amerikanischen Rechts* 195 ff. (Dr. Kovac 2002); Thomas Dreier & Gernot Schulze, *Urheberrechtsgesetz Kommentar* § 2, Rn. 18–19 (C. H. Beck 2004).

⁸ See, e.g., Alexander Sergeev, *Право интеллектуальной собственности в Российской Федерации* [Intellectual Property Law in the Russian Federation] 111 (2nd ed., Velbi 2003).

⁹ See *id.*

¹⁰ See Eduard Gavrilov, *Комментарий к Закону об авторском праве и смежных правах* [Commentary on the Law on Copyright and Related Rights] Art. 6, Cls. 4–6 (Pravovaya Kul'tura 1996); *idem.*, *Оригинальность как критерий охраны объектов авторских прав* [Originality as a Criterion of Copyrightability] (a paper written for ConsultantPlus System 2005).

¹¹ 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 whether it is unique: in the former case, a disputed work is compared with works that have been created before, while in the latter such a work is itself assessed, or, more precisely, analyzed as to whether another author may have created a similar or identical work.

(as a criterion of eligibility for copyright protection) and objective novelty as distinct from existing works (used in patent law).

The use of the uniqueness criterion was based on the logic of copyright. If exclusive rights are modelled on the absolute right of full control over a work, the emergence of such rights by virtue of the actual fact of its creation is only possible if this work is unique.¹² 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 author was the first to create the work. Thus, given the large-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 a copyright dispute goes to court, would trigger a sharp increase in legal indeterminacy and instability in the legal positions of the parties to such disputes.

Russian practice uses relatively inefficient means to determine whether something is part of the public domain – that is: anything that is part of general historical or cultural experience or the nature of things or human relationships; is available from generally accessible sources such as nature or common ideas; or can be naturally reproduced by anyone with medium capabilities, *e.g.*, language, facts, discoveries, widespread and standard images, ideas and esthetic devices.¹³

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

As such, any model for granting exclusive absolute rights to non-unique works (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 in which authors held indeterminate legal positions since in the absence of a registration system for third parties such rights are impossible to identify. This and the absence of precedence registration mechanisms raises the risk of chaos in the copyright system.

Use of the originality and uniqueness criteria meant the use of what, by today's standards, would be quite high standards for the assessment of the creative aspects of copyrightable works.¹⁴

¹² See Dozortsev, *supra* n. 6, at 13–14.

¹³ For an interpretation of the public domain concept used in this study *see, e.g.*, Max Kummer, *Das urheberrechtlich schützbares Werk* 47–48 (Stämpfli 1968); Heinrich Hubmann, *Das Recht des schöpferischen Geistes* 17 ff. (de Gruyter 1954); *idem.*, *Urheber- und Verlagsrecht* 31 ff. (6th ed., C. H. Beck 1987); Britta Stamer, *Der Schutz der Idee unter besonderer Berücksichtigung von Unterhaltungsproduktionen für das Fernsehen* 38–39 (Nomos 2007); Eugen Ulmer, *Urheber- und Verlagsrecht* 275 ff. (3rd ed., Springer 1980).

¹⁴ 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* Kummer, *supra* n. 13, at 30. For a critical analysis, *see* Peter Girth, *Individualität und Zufall im Urheberrecht*, 48 UFITA 30 ff. (1974).

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 instead of being borrowed or copied; an intellectual product had to be new and unique at the very least.

2.2. Latest debates

The reason for 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. In this respect, Russia follows the worldwide trend towards a reduction in copyrightability standards in the face of pressure exerted by the need to protect intellectual products of this kind.¹⁵

Some papers published in recent years¹⁶ have formulated the 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 different from any other available works, or any third party's unawareness of those results – 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, primarily works of low authorship, that may independently duplicate one another.

However, this argument is only convincing if one can prove that copyright is applicable in this context, and that use of the independent creation criterion offers the optimum, or at least a 'lesser-evil,' solution. No one in Russian legal literature has provided sufficient evidence to support the assertion that copyright protection for works of this kind is a better, more effective solution than the use of alternative systems.¹⁷ For instance, there has been no analysis of the potential social effects of

¹⁵ Similar processes have taken place in Germany, with computer programs being a case in point. See, e.g., Eva-Irina Gamm, *Die Problematik der Gestaltungshöhe im deutschen Urheberrecht* 61 ff. (Nomos 2004).

¹⁶ Mark Chizhenok, *Критика объективной новизны [Criticism of Objective Novelty]*, 2004(6) Патенты и лицензии [Patents and Licences] 41 ff.; Maxim Labzin, *Оригинальность объектов авторского права [Originality of Copyrightable Works]*, 2007(7/8) Патенты и лицензии [Patents and Licences]; *idem.*, *Еще раз об оригинальности объектов авторского права (Once Again on the Originality of Copyrightable Works)*, 2008(4) Патенты и лицензии [Patents and Licences]; Vladimir Korneyev, *Программы для ЭВМ, базы данных и топологии интегральных микросхем как объект интеллектуальных прав [Computer, Databases and Integrated Circuit Topologies as Copyrightable Works]* 37 (Statut 2010); Alexander Savelyev, *Лицензирование программного обеспечения в России. Законодательство и практика [Licensing of Software in Russia. Legislation and Practice]* ch. 1, § 3 (Infotropic Media 2012).

¹⁷ E.g., 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., Knöbl, *supra* n. 7, at 311 ff.; Hans-Heinrich Schmieder, *Die Verwandten Schutzrechte: ein Torso?*, 73 UFITA 65 ff. (1975); Frank Thoms, *Der urheberrechtliche Schutz der kleine Münze: Historische Entwicklung – Rechtsvergleichung – Rechtspolitische Wertung* 322 ff. (Florenz 1980); Gernot Schulze, *Die kleine Münze und ihre Abgrenzungsproblematik bei den Werkarten des Urheberrechts* 301 ff. (Hochschul Verlag 1983).

such an approach nor the likelihood of it rendering the copyright mechanism as a whole dysfunctional to a serious extent.

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

Two alternative solutions are offered to this problem.

Some insist that copyright for a work be granted to the person who was the first to create it,¹⁸ 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.¹⁹

However, both options would involve a sharp decline in creativity standards.

Advocacy of the former option, the *novelty criterion*, denies that its use would cause serious dysfunctionality in the copyright mechanism. Proponents of this approach 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, e.g., trade names or useful models. It is thus similarly seen as acceptable that would-be copyright holders should have somewhat indeterminate legal positions to the extent that a work may consequently fail to meet copyrightability criteria in a dispute.

Secondly, it seems possible to presume that a work is novel even though this presumed novelty may be refuted in a court dispute. In principle, authorship disputes in Russia follow similar logic today due to the presumption principle enshrined in Art. 1257 of the Civil Code, under which it is considered to be important in some cases which work was the first to be published (under Art. 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, in one way or another, stem from an evaluation of the extent of acceptable indeterminacy of the legal positions of parties – be they authors, their counterparties or duplicators who are involuntary violators of copyright – arising from this novelty criterion model. Let us just note that the degree of such indeterminacy is directly dependent upon the characteristics of a disputed work, and consequently on the likelihood of its duplication.

¹⁸ See Labzin, *supra* n. 16; Vadim Khokhlov, Авторское право: законодательство, теория, практика [Copyright : Legislation, Theory and Practice] 51 (Gorodets 2008).

¹⁹ See Chizhenok, *supra* n. 16; Korneyev, *id.* at 37.

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.

Another set of objections has it that, due to the absence in Russian law of principles for the identification of parts of the public domain in a work that are similar to principles existing in German law,²⁰ this model involves a high risk of monopolization of elements of the public domain in dealing with works of low authorship. This is because the probability of duplication is directly dependent 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, and standards accepted in a specific industry, *etc.* It is easy to imagine a situation where an idea that is generally accessible is expressed in one or several standard forms, and that granting copyright protection to such work – if it meets the novelty criterion – would therefore result in the so-called indirect monopolization of the ideas that it expresses.²¹ Consequently, the monopolization of elements of the public domain would make it impossible to define 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 the coexistence of independent exclusive rights* to the same production.

This model is based on similar examples from other subdivisions of Russian intellectual property law (protection of integrated circuit topographies, industrial secrets, collective trademarks, the name of the place of origin of a product). Moreover, examples can be cited of the recognition of independent rights to identical works in the world's leading legal systems.²²

Let us just note here that making a sustainable case for the principle of the coexistence of independent rights to identical works requires, on the one hand, 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 adverse social effects.

²⁰ 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.

²¹ Christina Berking, *Die Unterscheidung von Form und Inhalt im Urheberrecht* 75 ff. (Nomos 2002).

²² It is the dominant opinion in German doctrine and judicial practice that duplicating works are copyrightable (see Dreier & Schulze, *supra* n. 7, at 51, § 2, Rn. 17). U.S. law accepts the coexistence of two authors as being independent holders of copyright to the same work (see Melville Nimmer & David Nimmer, *Nimmer on Copyright* § 13.03, LEXIS 10441 (2004); Berking, *supra* n. 21, at 83–84). On the other hand, Italian doctrine predominantly rules out the copyrightability of such works (see Ulrich Fuchs, *Der Werkbegriff im italienischen und deutschen Urheberrecht* 40 (C. H. Beck 1996)).

One of the potential causes of the chaotization of a copyright system is the fact that a conflict of personal non-property rights and exclusive rights is difficult to resolve if the exclusive rights are absolute rights modelled on the right of monopolistic domination. In such a situation, an individual would find it hard to exercise rights that are formally reserved for them. Bearing in mind that the principle issue is rights to works of low authorship with their high probability of independent duplication, such situations are likely to become typical.²³ Until now advocates of the coexistence of rights principle in Russian jurisprudence have not analyzed this set of problems.

3. Judicial practice

3.1. Earlier practice

Judicial practice before the entry into force of Part Four of the Russian Civil Code generally complied with dominant doctrinal principle and stressed a high-standard creative component as its main criterion for copyrightability. As such, a work primarily had to simultaneously meet the originality, novelty and uniqueness criteria to be considered copyrightable while no unequivocal interpretation was put on those criteria.²⁴ It was insufficient to prove that a work was the result of the author's independent efforts, namely that it had not been a borrowing from or a copy of a work by someone else.

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;²⁵ ¶ 21 of Resolution No. 15 of the Plenary Session of the Supreme Court of the Russian Federation dated June 19, 2006, 'Issues That Have Arisen in Courts of Law in the Consideration of Civil Cases Involving the Application of Copyright Law and

²³ The movement of continental European copyright systems towards mechanisms that do not involve the granting of monopoly over the use of a work are a way to mitigate more acute copyright conflicts. Such mechanisms are a feature of competition law, of knowhow 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 the results of somebody else's intellectual endeavour without the investment of resources necessary for independent creation – use that is taken to be legally unacceptable. As a minimum, this model possesses what are the distinguishing characteristics of delictual mechanisms. See, e.g., Jerome H. Reichman, *Legal Hybrids between the Patent and Copyright Paradigms*, 94 Col. L. Rev. 2432–2558 (1994); Lyman R. Patterson, *Copyright and 'the Exclusive Right' of Authors*, 1 J. Intell. Prop. L. 1–48 (1993). In Russia, there are no manifest processes of this kind yet.

²⁴ See, e.g., Resolution No. A56-16934/0 of the Federal Court of Arbitration of the Northwestern District (Dec. 10, 2001) [hereinafter Resolution No. A56-16934/0]; Resolution No. A56-4615/2005 of the Federal Court of Arbitration of the Northwestern District (Jan. 27, 2006); Resolution No. A13-14361/2005-20 of the Federal Court of Arbitration of the Northwestern District (July 5, 2006); Resolution No. A05-6902/04-16 of the Federal Court of Arbitration of the Northwestern District (Oct. 24, 2006); Ruling No. A40-7353/04-26-41 of the Court of Arbitration of the City of Moscow (Febr. 8, 2005).

²⁵ The document was not published officially. Hereinafter court rulings whose sources of official publication are untraceable are cited from the ConsultantPlus System.

Legislation on Related Rights²⁶ (the clause confirms the originality criterion); and ¶¶ 1 and 2 of Resolution No. 47 of the Presidium of the Russian Supreme Court of Arbitration dated Sept. 29, 1999, 'Review of the Practice of Disputes over the Use of the Law of the Russian Federation "On Copyright and Related Rights"'.²⁷

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, a 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 a reason to question the creative nature of a disputed work could be established, such as where 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.²⁸ Notably, making it the responsibility of a defendant to prove the creative nature of any work without exception would have meant copyright protection for vast numbers of low authorship works.

3.2. Resolution No. 5/29

After the entry into force of Part Four of the Russian Civil Code, Russian judicial practice has, on the one hand, shown a lack of sensitivity to the above-mentioned discussions in legal literature and, on the other, in being forced to react to specific practical problems and contradictions, has been evolving 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 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).²⁹

Paragraph 28 of the Resolution says that 'the lack of novelty, uniqueness and/or originality of 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 a result of creative work unless proved otherwise.'

²⁶ See 2006(137) Российская газета [Russian Gazette]; 2006(8) Бюллетень Верховного Суда Российской Федерации [Bulletin of the Supreme Court of the Russian Federation].

²⁷ See 1999(221) Российская газета (Ведомственное приложение) [Russian Gazette (Agency Supplement)]; 1999(11) Вестник Высшего Арбитражного Суда Российской Федерации [Bulletin of the Supreme Court of Arbitration of the Russian Federation].

²⁸ See, e.g., Resolution No. A56-16934/0, *supra* n. 24.

²⁹ See 2009(70) Российская газета [Russian Gazette]; 2009(6) Бюллетень Верховного Суда Российской Федерации [Bulletin of the Supreme Court of the Russian Federation]; 2009(6) Вестник Высшего Арбитражного Суда Российской Федерации [Bulletin of the Supreme Court of Arbitration of the Russian Federation].

These points unambiguously prescribe the use by courts of the independent creation criterion, which renders non-deliberate copying also acceptable, and introduces the principle of the presumed creative nature of a work.

It must be noted that neither the interpretation of the creativity criterion by the resolution nor less the above-mentioned presumed creativity principle follow directly from the above-cited sections of Arts. 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 the supreme courts aimed at efficient regulation clearly go further than making interpretations of legislation.

Moreover, these points are in blatant contradiction of Ruling No. 537-O of the Constitutional Court dated Dec. 20, 2005, which remains in force, and states 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.’ This is a *de facto* prohibition on the use of the uniqueness criterion.

Let us analyze how much use lower courts and the supreme courts themselves make of Resolution No. 5/29 in dealing with specific disputes – namely, what standards of creativity and criteria for copyrightability they use, whether they grant simultaneous protection to mutually duplicating works, and what their principles are for distributing the burden of proof.

It should be noted at the outset that, despite the unambiguous wording of the afore-mentioned clause in Resolution No. 5/29, court rulings in specific cases far from always comply with this clause.

3.3. The latest judicial practice

3.3.1. Criteria for copyrightability

The most common method of dealing with a copyrightability dispute is to use Cl. 1 of Art. 1259 of the Civil Code, which lists types of copyrightable work.³⁰ Methods

³⁰ See, *e.g.*, Ruling No. VAS-100/12 of the Supreme Court of Arbitration of the Russian Federation (Febr. 8, 2012) [hereinafter Ruling No. VAS-100/12]; Ruling No. VAS-13931/11 of the Supreme Court of Arbitration of the Russian Federation (Dec. 5, 2011) [hereinafter Ruling No. VAS-13931/11]; Resolution No. A31-4368/2011 of the Federal Court of Arbitration of the Volga-Vyatka District (March 19, 2012) [hereinafter Resolution No. A31-4368/2011]; Resolution No. A17-4872/2010 of the Federal Court of Arbitration of the Volga-Vyatka District (Sept. 26, 2010) [hereinafter Resolution No. A17-4872/2010]; Resolution No. A17-4829-5892/2009 of the Federal Court of Arbitration of the Volga-Vyatka District (Aug. 13, 2010); Resolution No. A43-40479/2009 of the Federal Court of Arbitration of the Volga-Vyatka District (June 16, 2010); Resolution No. A41-44971/10 of the Federal Court of Arbitration of the Moscow District (Nov. 3, 2011); Resolution No. KG-A40/6477-11-1,2 of the Federal Court of Arbitration of the Moscow District (July 20, 2011); Resolution No. A56-14726/2010 of the Federal Court of Arbitration of the Northwestern District (Febr. 24, 2011) [hereinafter Resolution No. A56-14726/2010]; Resolution No. A56-13796/2010 of the Federal Court of Arbitration of the Northwestern District (Febr. 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) [hereinafter Resolution No. F09-121/12]; Resolution No. A11-7400/2010 of the Federal Court of Arbitration of the Volga-Vyatka District

used for putting a work under one of these categories rarely involve any substantial discussion on whether the work in question meets the criteria of copyrightability. They are normally used if the defendant raises no objections to the work being ruled non-copyrightable or if the court, in assessing the evidence, finds no reason to question the copyrightability of the work.

This corroborates the thesis that methods used to place a work under a category are based on wholly different principles, namely non-legal conventional concepts of works, than those used to determine whether a work meets the general criteria of copyrightability.³¹ For this reason, reference to the type of the work in question in a legal judgment can represent the use by the court of any criterion of copyrightability and any standard of creativity.

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

Therefore, in trying to discern from any of such court ruling – *i.e.* a ruling that makes no direct references to copyrightability criteria – what copyrightability standards the court has used, one has to assume that, regardless of the formulae and declarations utilised, 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. Here, 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 occurred, and if the coincidence between the two works that are the source of the dispute is seen as grounds for concluding that one 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 non-new works being declared copyrightable. In fact, rights disputes should involve debates on the possibility of the 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 judicial hierarchy shows that, besides the use of the categorization method, it has been

(Nov. 15, 2011); Resolution No. 09AP-6425/2010-GK of the 9th Arbitration Court of Appeal (Apr. 27, 2010); Ruling No. 33-1686 of the Moscow City Court (Febr. 8, 2011).

³¹ See Andrey Kashanin, *Развитие механизма демаркации в авторском праве континентальной Европы* [Development of the Demarcation Mechanism in Copyright in Continental Europe], 11(3) Вестник гражданского права [Civil Law Review] 61 (2011).

a dominant trend in recent years to make direct use of the principle of the presumed creative nature of a work as prescribed by Resolution No. 5/29, as well as of the thesis that neither novelty nor originality is a significant criterion.³²

However, this trend usually manifests in fairly straightforward cases centered on traditional works with a prominent creative aspect (e.g., large works of literature,³³ audio-visual productions³⁴) or cases of indisputable copying (e.g., reprinting more than 130 photographs³⁵). One also sometimes comes across, though relatively seldom, the use of the independent creation criterion and the presumed creativity principle (which cannot be refuted by citing lack of novelty or originality) for works of low authorship (that may include small parts that are highly likely to be reproducing elements of the public domain).³⁶ 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 their position.

It happens no less frequently in difficult cases where works of low authorship are dealt with that courts directly disregard ¶ 28 of Resolution No. 5/29 and find a reason to throw out a suit. In some cases of this kind, courts cite Cl. 5, Subcl. 4 of Cl. 6, and Cl. 7 of Art. 1259 of the Civil Code.³⁷ In others, courts merely argue that the work in question fails to satisfy the novelty, originality and uniqueness criteria.³⁸

³² See Resolution No. KG-A40/2047-11-4 of the Federal Court of Arbitration of the Moscow District (March 28, 2011) [hereinafter Resolution No. KG-A40/2047-11-4]; Ruling No. 4g/1-7255 of the Moscow City Court (Aug. 17, 2011) [hereinafter Ruling No. 4g/1-7255]; Resolutions No. 09AP-27804/2011-GK and No. 09AP-27909/2011-GK of the 9th Arbitration Court of Appeal (Nov. 14, 2011) [hereinafter Resolutions No. 09AP-27804/2011-GK and No. 09AP-27909/2011-GK]; Resolution No. 09AP-19512/2011-GK of the 9th Arbitration Court of Appeal (Sept. 7, 2011); Resolution No. F09-1009/12 of the Federal Court of Arbitration of the Ural District (March 19, 2012) [hereinafter Resolution No. F09-1009/12]; Resolution No. A31-4368/2011, *supra* n. 30.

³³ See Ruling No. 4g/1-7255, *supra* n. 32.

³⁴ See Ruling No. VAS-13931/11, *supra* n. 30; Resolution No. A31-4368/2011, *id.*

³⁵ See Ruling No. VAS-100/12, *supra* n. 30.

³⁶ See Resolution No. KG-A40/2047-11-4, *supra* n. 32; Resolution No. A40-7067/11-110-57 of the Federal Court of Arbitration of the Moscow District (Oct. 31, 2011) [hereinafter Resolution No. A40-7067/11-110-57]; Resolutions No. 09AP-27804/2011-GK and No. 09AP-27909/2011-GK, *supra* n. 32; Resolution No. F09-1009/12, *supra* n. 32.

³⁷ Under Cl. 5 of Art. 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 Subcl. 4 of Cl. 6 of Art. 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 Cl. 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 the result of the author's creative work.

³⁸ In such cases there remains a tendency for the simultaneous use of these criteria, which, strictly speaking, are based on incompatible theoretical tenets. This is because not all that is new can be considered unique while anything that is original, *i.e.* anything in which the author's individuality manifests itself, and anything that is unique, is new by definition. Thus, use of the novelty criterion

Apparently the reason for this state of affairs is that, in the absence of an effective means of defining the public domain, the independent creation criterion can be painlessly applied to high authorship works of the traditional kind. Low authorship works – or relatively small parts of other works, which is essentially the same thing – 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 – courts, in the absence of other means, have to raise their copyrightability standards and make it the claimant's responsibility to prove that the work is creative in character.

The attitude in judicial practice to *parallel creation*, as an indication of the application of the independent creation or novelty criterion, is practically unambiguous. In a vast majority of disputes over works of low authorship (*i.e.* cases where there is no sufficient evidence of copying or that the defendant has created the disputed work independently), coincidence or similarity between the works created by the claimant and the defendant are seen as sufficient reason to assume that illegitimate borrowing and a violation of the claimant's rights have taken place.³⁹ As a rule, parallel creation does not even come into consideration.⁴⁰ The

is redundant. See Resolution No. F09-4849/08-S6 of the Federal Court of Arbitration of the Ural District (July 11, 2008) [hereinafter Resolution No. F09-4849/08-S6], which was left in force by Ruling No. 12879/08 of the Supreme Court of Arbitration of the Russian Federation (Oct. 17, 2008) [hereinafter Ruling No. 12879/08]; Resolution No. A40-133968/09-27-952 of the Federal Court of Arbitration of the Moscow District (March 28, 2012) [hereinafter Resolution No. A40-133968/09-27-952]; Resolution No. 09AP-27014/2011-GK of the 9th Arbitration Court of Appeal (Nov. 7, 2011) [hereinafter Resolution No. 09AP-27014/2011-GK]; Resolution No. 09AP-5916/2008-GK of the 9th Arbitration Court of Appeal (Nov. 18, 2010) [hereinafter Resolution No. 09AP-5916/2008-GK] (repealed afterwards); Resolution No. 09AP-31934/2011-GK of the 9th Arbitration Court of Appeal (Dec. 27, 2011) [hereinafter Resolution No. 09AP-31934/2011-GK]; Ruling No. VAS-5413/10 of the Supreme Court of Arbitration of the Russian Federation (June 15, 2010) [hereinafter Ruling No. VAS-5413/10]; Resolution No. KG-A41/13081-09 of the Federal Court of Appeal of the Moscow District (Jan. 19, 2010) [hereinafter Resolution No. KG-A41/13081-09]; Resolution No. A56-35168/2009 of the Federal Court of Arbitration of the Northwestern District (July 6, 2010) [hereinafter Resolution No. A56-35168/2009]; Ruling No. 33-36846 of the Moscow City Court (Nov. 26, 2010) [hereinafter Ruling No. 33-36846]; Resolution No. 09AP-13024/2009 of the 9th Arbitration Court of Appeal (Sept. 8, 2009) [hereinafter Resolution No. 09AP-13024/2009].

³⁹ See Resolution No. F09-4849/08-S6, *supra* n. 38, left in force by Ruling No. 12879/08, *id.*; Resolution No. 09AP-13024/2009, *id.*; Resolution No. F09-5444/11 of the Federal Court of Arbitration of the Ural District (Sept. 1, 2011) [hereinafter Resolution No. F09-5444/11]; Resolution No. A43-4663/2008-7-119 of the Federal Court of Arbitration of the Volga-Vyatka District (Oct. 20, 2008) [hereinafter Resolution No. A43-4663/2008-7-119].

⁴⁰ See Resolution No. 09AP-27014/2011, *supra* n. 38; 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 (Dec. 26, 2011).

principle used in foreign (including German) law 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 before⁴¹ 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 ¶ 28 of Resolution No. 5/29, courts give determining significance to the novelty criterion in the majority of difficult disputes over works of low authorship. However, individual cases where each mutually duplicating work is granted independent copyright protection do still arise,⁴² 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.

3.3.2. *Standards of creativity*

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

On the one hand, it is fair to conclude that, in effect, the use of ¶ 28 of Resolution No. 5/29 leads to lower standards in many cases. Indeed, the presumption of the creative character of a work and the refusal to verify that such a work meets the novelty, originality and uniqueness criteria provide a basis for works of low authorship, even if banal or trivial, to be recognized as copyrightable.⁴³ Moreover, courts seldom raise the issue of the reproduction of elements of the public domain, and this is one more factor behind the wide-scale use of copyrightability.

On the other hand, in numerous cases, especially where defendants raise objections amounting to allegations that a disputed work is non-creative, courts explicitly use higher standards, primarily based on novelty, originality and uniqueness criteria, sometimes putting the burden of proof on the claimant (more about this below). Here, they argue that a copyrightable work cannot be a mere technical manual, source of reference or reproduction of ideas that form part of the public domain.⁴⁴

⁴¹ See Dreier & Schulze, *supra* n. 7 at 51, § 2, Rn. 17; Berking, *supra* n. 21 at 83–84. For similar instruments in U.S. judicial practice see Nimmer & Nimmer, *supra* n. 22, at § 13.03.

⁴² This is not normally done offhand, and sometimes interpretations of court rulings are required to underlie such conclusions. See Resolution No. F09-6166/10-56 of the Federal Court of Arbitration of the Ural District (Sept. 1, 2010); Resolution No. F09-9135/11 of the Federal Court of Arbitration of the Ural District (Jan. 26, 2012) [hereinafter Resolution No. F09-9135/11]; Resolution No. KG-A40/1594-09 of the Federal Court of Arbitration of the Moscow District (May 25, 2009).

⁴³ See Resolution No. KG-A40/2047-11-4, *supra* n. 32; Resolution No. A40-7067/11-110-57, *supra* n. 36; Resolutions No. 09AP-27804/2011-GK and No. 09AP-27909/2011-GK, *supra* n. 32; Resolution No. F09-1009/12, *id.*

⁴⁴ 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, *supra* n. 38.

Cases where courts use specific standards of creativity are comparatively rare. Thus, one usually has to use indirect evidence to discern what standards have been used, *e.g.*, the character of the work, criteria used, instruments used in recourse to the public domain, and other circumstances.

Nevertheless, it is instructive to analyze such standards as applied to specific types of works.

First of all, courts rarely use any special copyrightability standards for works that normally have a prominent creative component. For example, in respect of works of literature and visual art, audiovisual works, and pieces of music, there is, as a rule, no need to prove the creative character of such works.⁴⁵ Quite often, courts directly argue that it is inappropriate to use any special creativity standards for such works.⁴⁶

However, in some cases, higher copyrightability standards are used for works of this kind. This usually happens where such works have a significant non-creative component that entails a risk of monopolization of 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),⁴⁷ if it depends on external circumstances (*e.g.*, chronological or seasonal repertoires), if it is based on common concepts or intended for pragmatic use, borrows its main underlying concept and structure from an earlier edition, uses a standard layout (theatre programmes),⁴⁸ has fragments that coincide with specialist terms or classifications, schemes or business models, or uses information from generally accessible sources such as the Internet.⁴⁹

A claimant seeking copyright for a short phrase such as the title of a work or an advertisement slogan will also have to offer substantial reasons for its copyright protection – they will need to prove its creative character,⁵⁰ novelty, originality

⁴⁵ See Resolution No. A31-4368/2011, *supra* n. 30; Resolution No. A17-4872/2010, *id.*; Resolution No. F09-121/12, *id.*; Resolution No. A29-5892/2009 of the Federal Court of Arbitration of the Volga-Vyatka District (Aug. 13, 2010); Resolution No. 09AP-24568/2009-GK of the 9th Arbitration Court of Appeal (March 1, 2010) [hereinafter Resolution No. 09AP-24568/2009-GK]; Resolution No. A43-27386/2010 of the Federal Court of Arbitration of the Volga-Vyatka District (Oct. 12, 2011); Ruling No. 4g/1-7255, *supra* n. 32.

⁴⁶ See Resolution No. 09AP-24568/2009-GK, *supra* n. 45.

⁴⁷ See Ruling No. VAS-2305/11 of the Supreme Court of Arbitration of the Russian Federation (March 11, 2011) [Ruling No. VAS-2305/11]; Resolution No. F03-8505/2010 of the Federal Court of Arbitration of the Far Eastern District (Dec. 20, 2010) [hereinafter Resolution No. F03-8505/2010].

⁴⁸ See Resolution No. 09AP-27014/2011-GK, *supra* n. 38; Resolution No. A40-133968/09-27-952, *id.*

⁴⁹ See Resolution No. KG-A40/1795-10 of the Federal Court of Arbitration of the Moscow District (Apr. 5, 2010) [hereinafter Resolution No. KG-A40/1795-10]; Ruling No. A40-17182/09-51-199 of the Court of Arbitration of the City of Moscow (Nov. 24, 2009).

⁵⁰ See Ruling No. 33-10009/2011 of the Moscow City Court (Apr. 8, 2011) [hereinafter Ruling No. 33-10009/2011].

and individuality,⁵¹ as well as establishing that it cannot be considered a phrase in common use.⁵²

There have been cases where proof of creativity, originality and uniqueness is expected from seekers of copyright protection for *computer graphics*.⁵³

More often, special standards of creativity are used for works whose authors have used considerations of functionality, various kinds of technical standard, elements of the public domain and other non-creative factors. *Computer programs* may be seen as an exception to this rule, possibly because courts mainly encounter cases of suspected piracy, *i.e.* the copying of a program as a whole without its revision or use of individual elements of it.⁵⁴

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 whereby authors are required to prove novelty, originality and uniqueness, in other cases, courts set lower copyrightability standards.

For instance, in some cases courts have declared a *work of design* copyrightable if a special selection or combination of available and standard means and resources were used by its creator (designs of cakes);⁵⁵ if there were differences between disputed works (cover designs of books);⁵⁶ if there were distinctions that ruled out the duplication of the entire set of artistic images (designs of Internet portals);⁵⁷ or if there were differences in the details of a newspaper design⁵⁸ 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. Here, one court assumed that similarities between two works (*e.g.*, designs of bread packaging)⁵⁹ were a sufficient reason to deny copyrightability to

⁵¹ See Ruling No. VAS-5413/10, *supra* n. 38; Resolution No. KG-A41/13081-09, *id.*

⁵² See Ruling No. 33-36846, *supra* n. 38.

⁵³ See Resolution No. 09AP-31934/2011-GK, *supra* n. 38.

⁵⁴ See Ruling No. A11-7400/2010 of the Federal Court of Arbitration of the Volga-Vyatka District (Nov. 15, 2011).

⁵⁵ See Resolution No. 09AP-13024/2009, *supra* n. 38.

⁵⁶ See Resolution No. F09-9135/11, *supra* n. 42.

⁵⁷ See Resolution No. A32-46580/200 of the Federal Court of Arbitration of the North Caucasus District (Dec. 6, 2010).

⁵⁸ See Ruling No. 33-16364 of the Moscow City Court (May 30, 2011).

⁵⁹ See Resolution No. F09-5444/11, *supra* n. 39.

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 criteria⁶⁰ or verified the copyrightable status of such works (e.g., advertisement modules),⁶¹ which de facto meant special discussion of 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.⁶² The author's ability to choose their specific approach to photography (e.g., photographing a conveyor belt at a factory)⁶³ is *per se* deemed to represent the creative character of a photograph.

On the other hand, there have been non-copyrightability rulings in respect of photographs in the society sections of newspapers (their sources of information were used as the formal reason to deny them copyrightability),⁶⁴ as well as for 'handheld' pictures, where the author was able to choose the angle,⁶⁵ and pictures taken automatically (not to be confused with the non-copyrightability of CCTV footage).⁶⁶

Copyright practice in *cartography* has been more consistent.

There is a clear trend in favour of setting minimal standards of creativity for maps, and in no case do such standards involve uniqueness verification. Maps are usually recognized as copyrightable *a priori*.⁶⁷ Even if a court brings up the issue of original or individual style, a map's design as chosen by its author and affecting its accuracy, informativeness, clarity and convenience of use, will normally meet this criterion.⁶⁸

A court will argue that, while two different maps may have the same basis, they may significantly differ from each other in their detail, including volumes of information, graphic means and the use of certain elements. It is these characteristics that represent the author's distinctive style and make a map copyrightable. It is

⁶⁰ See Resolution No. A40-133968/09-27-952, *supra* n. 38.

⁶¹ See Resolution No. A64-5347/2010 of the Federal Court of Arbitration of the Central District (July 27, 2011).

⁶² See Resolutions No. 09AP-27804/2011-GK and 09AP-27909/2011-GK, *supra* n. 32; Resolutions No. 09AP-13192/2011-GK and 09AP-13193/2011-GK of the 9th Arbitration Court of Appeal (June 30, 2011).

⁶³ See Resolution No. F09-1153/09-S6 of the Federal Court of Arbitration of the Ural District (Sept. 16, 2009).

⁶⁴ See Resolution No. 09AP-19024/2011-GK of the 9th Arbitration Court of Appeal (Aug. 22, 2011).

⁶⁵ See Ruling No. 33-1800 of the Moscow City Court (Jan. 24, 2012).

⁶⁶ See Resolution No. 09AP-2257/2011 of the 9th Arbitration Court of Appeal (Apr. 20, 2011).

⁶⁷ See Resolution No. 09AP-6425/2010-GK of the 9th Arbitration Court of Appeal (Apr. 27, 2010); Resolution No. A56-14726/2010, *supra* n. 30; Resolution No. A43-40479/2009 of the Federal Arbitration Court of Appeal of the Volga-Vyatka District (June 16, 2010).

⁶⁸ See Resolution No. A43-4663/2008-7-119, *supra* n. 39; Resolution No. A43-10849/2009 of the Federal Court of Arbitration of the Volga-Vyatka District (Jan. 18, 2010).

impossible to single out any of the elements of a map, *e.g.*, the font, colours or street names, as the map as a whole is copyrightable.⁶⁹ 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 ¶ 1 of Review No. 122 dated Dec. 13, 2007, which at minimum involve taking account of external factors such as generally accessible information or generally known facts.

On the other hand, there is no consistent practice for assessing the copyrightability of *architectural and other technical designs*.

In some instances, courts recognize such designs as creative without trying to find out how the supposed creative character of a design manifests itself.⁷⁰

More often, however, courts take into account that such designs are based on 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 non-copyrightable or for denying any violation of copyright.⁷¹ In others, the claimant is challenged to prove that their design is new, original and unique.⁷²

3.3.3. *Distributing the burden of proof regarding the creative character of a work*

By and large, courts consistently follow the principle of the presumed creative character of a work prescribed in ¶ 28 of Resolution No. 5/29. We cannot cite any instance in the judicial practice of recent years where a court has thrown out a suit from the author of a work falling within the traditional high authorship category on the grounds the claimant failed to prove the creative character of the work.

⁶⁹ See Resolution No. A28-19473/2005-393/25 of the Cassation Board of the Federal Court of Arbitration of the Volga-Vyatka District (Nov. 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) [hereinafter Resolution No. 2096/07].

⁷⁰ See Resolution No. F09-1009/12, *supra* n. 32; Resolution No. KG-A40/2047-11-4, *id.*

⁷¹ 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) [hereinafter Ruling No. VAS-4707/11], and to Resolution No. A56-62462/2009 of the Federal Court of Arbitration of the Northwestern District (Dec. 15, 2010) [hereinafter Resolution No. A56-62462/2009]. The creation of design and construction documents is the 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 9th Arbitration Court of Appeal (July 21, 2011) [hereinafter Resolution No. 09AP-15365/2011-GK].

⁷² See Resolution No. F09-4849/08-S6, *supra* n. 38, left in force by Ruling No. 12879/08, *id.*; Resolution No. 09AP-5916/2008-GK, *id.*, which was repealed subsequently.

Nevertheless, it would be inaccurate to say that courts always follow the chief message of ¶ 28, which aims to loosen creativity standards and vastly expand the range of works eligible for copyright protection. The point at issue is what a court sees as outweighing the presumed creativity principle, and therefore as reason to impose the burden of proving the creative character of a work on 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 Cl. 5 or Subcl. 4 of Cl. 6 of Art. 1259 of the Civil Code, nor placing the disputable work within any of the categories listed in Cl. 1 of Art. 1259, nor the defendant's provision of evidence as to the non-creative character of the work (*e.g.*, an expert assessment) is of any decisive significance.

In some cases, courts have placed the burden of proof on the claimant at their own initiative, assessing such 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.⁷³ Quite often, in explaining a decision to place the burden of proof on the claimant, courts argue that the disputed work reproduces ideas from the public domain (Cl. 5 of Art. 1259 of the Civil Code),⁷⁴ or that it is a mere work of reference (Subcl. 3 of Cl. 6 of Art. 1259),⁷⁵ or that it comes under none of the types of work listed in Cl. 1 of Art. 1259.⁷⁶

In some cases, courts interpret the claimant's duty to prove that their work is copyrightable broadly.⁷⁷

Interestingly, in some cases, the transfer of the burden of proof is accompanied by higher creativity standards – namely, that the claimant is required to prove that the work is new, original and unique.⁷⁸ It appears that imposing the burden of proof on the claimant is a reaction by the courts to the increasing risk of monopolization of elements of the public domain as a result of the lowering of copyright standards that forms one of the objectives of Resolution No. 5/29.

⁷³ See Ruling No. VAS-5413/10, *supra* n. 38; Ruling No. VAS-4707/11, *supra* n. 71; Resolution No. A56-62462/2009, *id.*; Resolution No. 09AP-5916/2008-GK, *supra* n. 38; Resolution No. A56-35168/2009, *id.*; Ruling No. 33-10009/2011, *supra* n. 50.

⁷⁴ See Resolution No. 09AP-27014/2011, *supra* n. 38.

⁷⁵ See Resolution No. A56-35168/2009, *supra* n. 38 (reference to the use of generally accessible sources of information); Ruling No. VAS-2305/11, *supra* n. 47 (a work reproducing information from the producer).

⁷⁶ See Resolution No. A56-62462/2009, *supra* n. 71.

⁷⁷ See Ruling No. VAS-5413/10, *supra* n. 38; Resolution No. A56-16934/0 of the Federal Court of Arbitration of the Northwestern District (Dec. 10, 2001); Resolution No. 09AP-5916/2008-GK, *supra* n. 38; Ruling No. 33-10009/2011, *supra* n. 50.

⁷⁸ See Ruling No. VAS-5413/10, *supra* n. 38; Ruling No. VAS-2305/11, *supra* n. 47; Resolution No. 09AP-27014/2011, *supra* n. 38; Resolution No. 09AP-5916/2008-GK, *id.*; Resolution No. A56-35168/2009, *id.*

3.3.4. *An author's resources for the creation of an original work and factors ruling out the creative character of a work*

Unlike doctrinal polemics that neglect the danger of monopolization of 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 to detect public domain elements in a work.

One such means is the thesis that general ideas that a work contains are non-copyrightable (Cl. 5 of Art. 1259).⁷⁹ Another is the qualification of a work, or parts of it, as a mere record of events or facts (Subcl. 4 of Cl. 6 of Art. 1259).⁸⁰ A third is direct reference to factors that, in the court's opinion, reflect the non-creative character of the work (*e.g.*, the use of generally accessible sources of information, including sources such as the Internet, access to which is completely unrestricted),⁸¹ the compliance of the work with certain standards,⁸² functionality requirements,⁸³ its pragmatic character,⁸⁴ external factors,⁸⁵ use of a general model,⁸⁶ certain underlying concepts,⁸⁷ the general character of the information the work is based on,⁸⁸ and the unity of information and facts.⁸⁹

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, fail to show any connection between conclusions on the copyrightability or non-copyrightability of a work and the author's resources for self-expression and for the creation of an original work, and fail to describe factors that would rule out the creative character of a work.⁹⁰ Nevertheless, the above-cited court rulings are based on similar logic.

⁷⁹ See Resolution No. KG-A40/1795-10, *supra* n. 49; Resolution No. 09AP-15365/2011-GK, *supra* n. 71.

⁸⁰ See Ruling No. VAS-2305/11, *supra* n. 47; Resolution No. F03-8505/2010, *id.* (use of information from a producer).

⁸¹ See Ruling No. VAS-2305/11, *supra* n. 47; Resolution No. F03-8505/2010, *id.*; Resolution No. KG-A40/1795-10, *supra* n. 49; Resolution No. A56-35168/2009, *supra* n. 38.

⁸² See Resolution No. 09AP-27014/2011-GK, *supra* n. 38; Resolution No. A40-133968/09-27-952, *id.*; Resolution No. 09AP-13024/2009, *id.*

⁸³ See Resolution No. 09AP-15365/2011-GK, *supra* n. 71.

⁸⁴ See Resolution No. 09AP-27014/2011-GK, *supra* n. 38.

⁸⁵ See Resolution No. 09AP-27014/2011-GK, *supra* n. 38; Resolution No. A40-133968/09-27-952, *id.*

⁸⁶ See Resolution No. A32-46580/2009 of the Federal Court of Arbitration of the North Caucasus District (Dec. 6, 2010) [hereinafter Resolution No. A32-46580/2009].

⁸⁷ See Resolution No. 09AP-27014/2011-GK, *supra* n. 38.

⁸⁸ See Resolution No. KG-A40/2047-11-4, *supra* n. 32.

⁸⁹ See Resolution No. A43-4663/2008-7-119, *supra* n. 39.

⁹⁰ In German law, this idea has become firmly established via the *Gestaltungsspielraum* general principle. See Gamm, *supra* n. 15, at 82 ff.; Fuchs, *supra* n. 22, at 54–56; Dreier & Schulze, *supra* n. 7, at 55, § 2, Rn. 33.

Moreover, Russian judicial practice has yet to address the problem of indirect monopolization of elements of the public domain. Courts have so far dealt with situations where parts of the public domain were expressed in one of several standard forms. Here, providing a work that includes such public domain elements with copyright protection would limit public use of such content even where a subsequent work is an independent and new creation.⁹¹

3.3.5. *Copyright protection of smaller forms of art and parts of a work: the volume of copyright protection of a work*

In the context of this article, one interesting aspect of the copyright protection of part of a work is the use by Russian courts of the above-quoted Cl. 7 of Art. 1259 of the Civil Code with a view to preventing the monopolization of any part of the public domain. Such a danger arises when the point of dispute is a comparatively small part of a work (e.g., its title), or smaller forms of art whose copyright protection would essentially mean monopolization of artistic devices (e.g., 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 such parts (or smaller works) are the result of their own independent creative work and meet the novelty, originality and uniqueness criteria.⁹²

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.

Moreover, this interestingly represents the use of high standards of copyrightability, as the author's individuality must manifest itself in the work to make it copyrightable.

This corroborates the hypothesis outlined above on the copyrightability of works of low authorship, namely that, on the whole, lowering copyrightability standards means that copyrightability assessment merely amounts to an assessment of the possibility to borrow individual parts of a work. Thus, it is possible for a work to be copyrightable as a whole but for any part of that work or, similarly, a work with minor changes, to be in free use.⁹³ In other words, the individuality criterion has not lost its legal significance but has begun to be used at a different stage in dispute resolution.

⁹¹ In the United States, the *merger doctrine* is used to eliminate such risks. See *Herbert Rosenthal Jewellery Corp. v. Kalpakian*, 446 F.2d 738, 742 (9th Cir. 1971); *Nimmer & Nimmer*, *supra* n. 22, at § 13.03[B] [3]. In Germany, the *Gestaltungsspielraum* doctrine is used for this purpose. See *Berking*, *supra* n. 21, at 75.

⁹² Ruling No. VAS-5413/10, *supra* n. 38; Resolution No. KG-A41/13081-09, *id.* (advertising slogans); Resolution No. A56-35168/2009, *id.* (advertising banners); Ruling No. 33-36846, *id.* (title of a work); Ruling No. 33-10009/2011, *supra* n. 50 (title of a work).

⁹³ See *Knöbl*, *supra* n. 7, at 157; *Gerhard Rau, Antikunst und Urheberrecht* 35 ff. (Schweitzer 1978).

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.⁹⁴

3.3.6. Arguments accepted by courts as proof of the creative character of works

Quite often in copyright dispute resolution, evidence accepted by courts as proof of the creative nature of a work include a copy of the work (the court then draws its conclusions after examining this copy),⁹⁵ expert assessments,⁹⁶ and any agreement on the creation of the work and the transfer of rights to it⁹⁷ (though, strictly speaking, such agreements are the legal basis for the actual fact of its production rather than its creative character).⁹⁸

One problem with the use of expert assessments is that an expert in a field other than law is given the legal task of determining whether a disputed work is new, original and unique.⁹⁹

4. 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.

Originality, novelty and uniqueness have increasingly ceased to be the criteria for copyrightability, being replaced by the requirement of independent creation,

⁹⁴ See Ulmer, *supra* n. 13, at 275 ff.; Dreier & Schulze, *supra* n. 7, at § 24, Rn. 1, 4, 8. There exist 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. Here, 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).

⁹⁵ See Resolution No. A32-46580/2009, *supra* n. 86; Resolution No. F09-8434/11 of the Federal Court of Arbitration of the Ural District (Dec. 26, 2011); Resolution No. 09AP-24568/2009-GK of the 9th Arbitration Court of Appeal (March 1, 2010).

⁹⁶ See Resolution No. A65-24595/2008 of the Federal Court of Arbitration of the Volga District (Dec. 13, 2010) [hereinafter Resolution No. A65-24595/2008]; Resolution No. F09-1153/09-S6 of the Federal Court of Arbitration of the Ural District (Sept. 16, 2009); Resolution No. 09AP-15365/2011-GK of the 9th Arbitration Court of Appeal (July 21, 2011); Resolution No. F09-4849/08-S6 of the Federal Court of Arbitration of the Ural District (July 11, 2008); Resolutions No. 09AP-13192/2011-GK and No. 09AP-13193/2011-GK of the 9th Arbitration Court of Appeal (June 30, 2011).

⁹⁷ See Ruling No. A40-29046/10-12-177 of the Court of Arbitration of the City of Moscow (May 25, 2010); Resolution No. 09AP-17376/2010-GK of the 9th Arbitration Court of Appeal (Aug. 26, 2010).

⁹⁸ As a curious point, it is interesting 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 No. A65-24595/2008, *supra* n. 96.

⁹⁹ See Resolution No. 2096/07, *supra* n. 69.

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 comes up against the growing risk of partial monopolization of 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 methodologies existing in foreign legal systems.

Consequently, as in Germany, Russian judicial practice evinces signs of a trend to diversify standards of creativity for different types of works. If the point of dispute is a work of a traditional type with a prominent creative aspect, courts will use low standards of 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 upon originality, novelty and uniqueness.

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 the general rule, courts follow the principle of the presumed creative character of a work. 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 character to the claimant who alleges that their exclusive rights have been violated.

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

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