CRITERIA FOR COPYRIGHTABILITY IN RUSSIAN COPYRIGHT DOCTRINE AND JUDICIAL PRACTICE

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This article analyzes the current state of the debate on the minimum level of creativity needed for works to be copyrightable, including dominant principles in Russian jurisprudence and judicial practice, principal trends and contradictions that arise in the course of the application of various criteria for copyrightability.

An analysis of the judicial practice of recent years warrants the conclusion that standards of creativity as a criterion for copyrightability have dropped drastically. Today's standards are similar to those of the former American 'sweat of the brow' doctrine.

But, unlike foreign legal systems that set comparatively low standards of protectability, the Russian judiciary has not yet evolved mechanisms of compensation for risks of monopolization of public domain content.

First of all, there is no practice of granting exclusive rights to a work that is similar to an earlier work but has been created independently. Secondly, the practice of refusing protection to non-unique, standard, generally known, and generally available content is dying out. Thirdly, there is currently a trend for giving a large scope of protection to works of low authorship.

As a result, exclusive rights are granted to standard or generally accessible content – content that must belong to the public domain – which puts unjustified restrictions on the creative activities of other authors. Moreover, it makes their legal status unpredictable as it establishes a basis for unintended copyright violations being penalized. This amounts to a classical case of overprotection.

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

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1. Introduction

In 2012, I analyzed the current debate on the minimum requirements of creativity for a work to be copyrightable.[1] In doing so, I attempted to systematize points made in legal literature and principles followed by various tiers of the judiciary. My reason for resuming such studies has been a series of significant institutional reforms since 2012.

One of them is the emergence of the Court for Intellectual Property Rights (Russian acronym: *SIP*),[2] which is authorized to make cassationary reviews of court rulings on intellectual property cases.

Another reform was the abolition of the Supreme Arbitrazh Court on August 6, 2014, with its powers handed over to the Supreme Court of the Russian Federation, which includes a division for economic disputes.

These reforms have seriously changed the mechanism for reviewing court rulings on intellectual property cases in which the litigants were entities or sole traders. So control of judicial practice, including control of its consistency, has been vested in new institutions with different sets of powers. Furthermore, given the polarization of opinions among legal scholars, the appointment of specific persons as judges may seriously affect judicial practice.

It is the purpose of this study to analyze changes that have taken place in the positions of scholars and courts on minimum standards of copyrightability between 2012 and 2016.

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[1] *See* Andrey Kashanin, *Debates on Criteria of Copyrightability in Russia,* 2(1) Russian Law Journal 57–80 (2014). DOI: 10.17589/2309-8678-2014-2-1-57-80.

[2] The SIP opened on July 3, 2013.

2. Debates in Legal Literature in Recent Years

Since 2012, advocates and opponents of lowering the minimum standards of copyrightability have been engaged in heated debates.

Those holding the traditional point of view insisted that the key condition for the protectability of a work should be that it is original and objectively novel (meaning that it should either be different from a work created before or similar to an earlier work that was unknown to all third parties), or even that it should be unique.[3]

Some scholarly papers formulated an alternative position, arguing that independent creation (subjectively perceived novelty or the absence of deliberate replication) should be a sufficient condition of protectability.[4] Two solutions to the problem of parallel creation that this would give rise to were put forward. Some scholars believed that, in dealing with two works created independently from each other, copyright should only be granted to the work that was the first to be published (this would have been similar to the application of the novelty criterion and would have not required the use of the criterion for independent creative activity).[5] Others believed that exclusive rights should be given to each such work.[6] But each solution

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[3] *Гаврилов Э.П.* Комментарий к Закону об авторском праве и смежных правах: Судеб. практика // комментарий к пп. 4–6 ст. 6 [*Gavrilov E.P.* Kommentariy k Zakonu ob avtorskom prave i smejnih pravah; Sudeb. praktika // kommentariy k pp. 4–6 st. 6 [Eduard P. Gavrilov, *Commentary on the Law on Copyright and Related Rights: Court Practice*, commentary on Art. 6, Cls. 4–6]] (Pravovaya Kul'tura 1996); *Гаврилов Э.П.* Оригинальность как критерий охраны объектов авторских прав [Gavrilov E.P. *Original`nost` kak kriteriy ohrani ob`ektov avtorskih prav* [Eduard P. Gavrilov, *Originality as a Criterion of Copyrightability*]] (2005); *Сергеев А.П.* Право интеллектуальной собственности в Российской Федерации [Sergeev A.P. *Pravo intellektual`noy sobstvennosti v Rossiyskoy Federatsii* [Alexander P. Sergeyev, *Intellectual Property Law in the Russian Federation*]] 111 (2d ed., Velbi 2003).

[4] *Чиженок М.В.* Критика объективной новизны // Патенты и лицензии. 2004. № 6. С. 41 [Chijenok M.V. *Kritika ob`ektivnoy novizni* // Patenti i litsenzii. 2004. № 6. S. 41 [Mark V. Chizhenok, *Criticism of Objective Novelty*, 6 Patents and Licences 41 (2004)]]; *Лабзин М.В.* Оригинальность объектов авторского права // Патенты и лицензии. 2007. № 7. С. 16; № 8. С. 20 [Labzin M.V. *Original`nost` ob`ektov avtorskogo prava* // Patenti i litsenzii. 2007. № 7. S. 16; № 8. S. 20 [Maxim V. Labzin, *Originality of Copyrightable Works*, 7 Patents and Licences 16 (2007); 8 Patents and Licences 20 (2007)]]; *Лабзин М.В.* Еще раз об оригинальности объектов авторского права // Патенты и лицензии. 2008. № 4. С. 35–42 [Labzin M.V. *Esche raz ob original`nosti ob`ektov avtorskogo prava* // Patenti i litsenzii. 2008. № 4. S. 35–42 [Maxim V. Labzin, *Once Again on the Originality of Copyrightable Works*, 4 Patents and Licences 35–42 (2008)]]; *Корнеев В.А.* Программы для ЭВМ, базы данных и топологии интегральных микросхем как объект интеллектуальных прав [Korneev V.A. *Programmi dlya EVM, bazi dannih i topologii integral`nih mikroshem kak ob`ekt intellektual`nih prav* [Vladimir A. Korneyev, *Computer Programs, Databases and Integrated Circuit Topologies as Copyrightable Works*]] 37 (Statut 2010); *Савельев А.И.* Лицензирование программного обеспечения в России. Законодательство и практика. Гл. 1, § 3 [Savel`ev A.I. *Litsenzirovanie programmnogo obespecheniya v Rossii. Zakonodatel`stvo i praktika*. Gl. 1, § 3 [Alexander I. Savelyev, *Licensing Software in Russia. Legislation and Practice.* Ch. 1, § 3]] (Infotropic Media 2012).

[5] *See* Labzin, *Id.*; *Хохлов В.А.* Авторское право: законодательство, теория, практика [Hohlov V.A. *Avtorskoe pravo: zakonodatel`stvo, teoriya, praktika* [Vadim A. Khokhlov, *Copyright: Legislation, Theory and Practice*]] 51 (Gorodets 2008).

[6] Chizhenok, *Id.*, at 41; Korneyev, *Id.*, at 37.

would have meant a sharp lowering of standards of creativity. It appears that these proposals for lowering protectability standards were reactions to the increasingly prominent economic aspect of intellectual property of insignificant creative value.

Though those debates were far from over in 2012, and the points made during them needed clarification, the scholarly community has lost interest in the copyrightability standards problem.

It appears that the main reason for this is that judicial practice drastically lowered creativity standards as a protectability condition (I look into this below).[7] In turn, this turned the attention of scholarly literature to the problem of overprotection and monopolization of standard, routine and trivial content that normally belongs in the public domain. It was argued increasingly often that this expansion of the scope of protection seriously limited opportunities for creating new works, sparked copyright conflicts over identical works that were created independently of each other, and resulted in the uncertain legal status of authors of such works since, in the absence of a registration system similar to the system of registration of patents, it would not have been very clear for third parties whether such works of low authorship were protectable.[8] Besides, there has been growing interest in the foreign experience of

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[7] There are only a few works in existence that discuss protectability criteria. *See Калятин В.О., Павлова Е.А.* Комментарий к Постановлению Пленума Верховного Суда РФ № 5, Пленума ВАС РФ № 29 от 26.03.2009 «О некоторых вопросах, возникших в связи с введением в действие части четвертой Гражданского кодекса Российской Федерации» / *Калятин В.О., Мурзин Д.В., Новоселова Л.А. и др.* Научно-практический комментарий судебной практики в сфере защиты интеллектуальных прав. Комментарий к п. 28 [Kalyatin V.O., Pavlova E.A. *Kommentariy k Postanovleniyu Plenuma Verhovnogo Suda RF No. 5, Plenuma VAS RF No. 29 ot 26.03.2009 'O nekotorih voprosah, voznikshih v svyazi s vvedeniem v deystvie chasti chetvertoy Grajdanskogo kodeksa Rossiyskoy Federatsii'* / Kalyatin V.O., Murzin D.V., Novoselova L.A. i dr. *Nauchno-prakticheskiy kommentariy sudebnoy praktiki v sfere zaschiti intellektual`nih prav*. Kommentariy k p. 28 [Kalyatin V.O., Pavlova Ye.A., *Commentary on Resolution No. 5/29 of the Supreme Court Plenary Session of March 26, 2009, 'On Issues Arising in Connection with the Entry into Force of Part Four of the Civil Code of the Russian Federation'*, commentary on Clause 28. In: V.O. Kalyatin, D.V. Murzin, L.A. Novoselova et al., *Scholarly and Practical Commentaries on Judicial Practice in the Protection of Intellectual Property Rights*]] (Ludmila A. Novoselova, ed., Norma, 2014) (explanation of the position stated in Clause 28); *Семенюта Б.Е.* Графический пользовательский интерфейс программы для ЭВМ: проблемы правового регулирования // Вестник Арбитражного суда Московского округа. 2015. № 2. С. 42–58 [Semenyuta B.E. *Graficheskiy pol`zovatel`skiy interfeys programmi dlya EVM: problemi pravovogo regulirovaniya* // Vestnik Arbitrajnogo suda Moskovskogo okruga. 2015. № 2. S. 42–58 [Bogdan Ye. Semenyuta, *Graphic User Interface for a Computer Program: Legal Regulation Problems,* 2 Bulletin of the Arbitrazh Court of the Moscow District 42–58 (2015)]] (the author cautiously suggests that the application of the novelty, originality and uniqueness criteria may be essential in many cases).

[8] *See*, e.g., *Савельев А.И.* Актуальные вопросы судебной практики в сфере оборота программного обеспечения в России // Вестник Высшего Арбитражного Суда Российской Федерации. 2013. № 4. С. 4–36 [Savel`ev A.I. *Aktual`nie voprosi sudebnoy praktiki v sfere oborota programmnogo obespecheniya v Rossii* // Vestnik Visshego Arbitrajnogo Suda Rossiyskoy Federatsii. 2013. № 4. S. 4–36 [Alexander I. Savelyev, *Key Issues of Judicial Practice in Dealing with the Software Market in Russia,* 4 Bulletin of the Supreme Arbitrazh Court of the Russian Federation 4–36 (2013)]] ('In the majority of computer programs, the content of audiovisual recordings … is quite often determined by considerations of effectiveness and convenience of use. Their creative components are insignificant – creativity and pragmatism are difficult to combine. Granting copyright monopoly to such recordings may heavily

detecting public domain content in a work, especially in copyright systems with minimum standards of protectability where this is particularly important.[9]

3. Judicial Practice

In this article, I analyze judicial practice for the period from June 2012 to February 2016. The main criterion for selecting court rulings for this study was whether or not they contained a reference to Article 1259 of the Civil Code of Russia. Our selection also included rulings which made references to Civil Code Articles 1257 and 1258 and contained the terms 'originality', 'novelty' and 'uniqueness' as key words and used phrases that included any of these terms. The rulings I selected came from the Supreme Court, the former Supreme Arbitrazh Court, the SIP, district arbitrazh courts, the arbitrazh courts of appeal of the city and region of Moscow, and the Moscow City Court.

3.1. Criteria for Copyrightability

Standards of creativity for works in Russia depend, to a significant extent, on which criteria for protectability are used in judicial practice. The first standard of creativity is the application of the novelty, originality and uniqueness criteria, and the second standard of creativity is the use of the independent creation criterion. The latter is assumed to represent a milder requirement and, therefore, a lower standard of protectability, although, strictly speaking, this is not always the case.

impede the development of other computer programs, forcing other market participants to re-invent the wheel, and may obstruct the standardization of software products, something that clearly runs against the objectives of copyright protection and public interests'); Bogdan Ye. Semenyuta, *Id.*, at 42–58 ('it needs to be taken into consideration that, without a detailed explanation of the notion of creativity, there will be a major risk that protection is granted to routine solutions that have been achieved through the investment of significant resources, have been attained independently and, strictly speaking, are new but that another person has achieved the same result with a comparable, or even different, amount of resources and by independent work'). The paper suggests that any solutions aiming to enhance functionality should be unprotectable; *Гаврилов Э.П.* Интеллектуальные права в современной России: некоторые теоретические проблемы // Правовые исследования: новые подходы: сб. статей факультета права НИУ ВШЭ [Gavrilov E.P. *Intellektual`nie prava v sovremennoy Rossii: nekotorie teoreticheskie problemi* // Pravovie issledovaniya: novie podhodi: sb. statey fakul`teta prava NIU VSHE [Eduard P. Gavrilov, *Intellectual Property Rights in Modern Russia: Some Theoretical Problems*. In: Legal Studies: New Approaches, a collection of articles]] 317–336 (Kontrakt, National Research University – Higher School of Economics 2012) (the article deals with the coexistence of, and conflicts between, exclusive rights to identical works); *Гришаев С.П.* Плагиат: вопросы теории и практики [Grishaev S.P. *Plagiat: voprosi teorii i praktiki* [Sergey P. Grishayev, *Plagiarism: Issues of Theory and Practice*]] (2014) (the article examines cases of independent parallel creation, cases of use of the same factual basis by different authors, and issues of limitations of means of expression).

[9] *See* B. Ye. Semenyuta, *Id.*; *Цветков Д.* Копирайт vs. свобода слова? // ЭЖ-Юрист. 2015. № 3. С. 5 [Tsvetkov D. *Kopirayt vs. svoboda slova?* // EJ-Yurist. 2015. № 3. S. 5 [Dmitry Tsvetkov, *Copyright vs. Freedom of Speech?* 3 EZh-Yurist 5 (2015)]].

Analysis reveals that, before 2012, judicial practice had, on the one hand, been insensitive to abstract arguments put forward in the course of scholarly debates but had, on the other hand, been forced to react to specific practical problems and contradictions, been evolving balanced positions on key aspects of copyrightability criteria, on creativity standards, and on the distribution of the burden of proof.

Despite its contradictory character, judicial practice had mainly and increasingly tended to apply the 'pigeonholing' method, i.e., qualifying a work as protectable if it fitted into any of the copyrightable types of work listed in Clause 1 of Article 1259 of the Civil Code, and, furthermore, tended to use the presumed creativity requirements under Clause 28 of Resolution 5/29[10] and the thesis that, *per se,* the absence of novelty, uniqueness and/or originality cannot be proof that the work is not the product of creative effort and, therefore, unprotectable.

Effectively, this meant the use of the independent creation (non-copying) criterion.

However, analysis of judicial practice reveals that 'pigeonholing' was the usual way of dealing with works of high authorship. It was also used for works of insignificant creative value and small elements of works that were likely to be reproductions of public domain content, but relatively seldom[11], and usually when the defendant in a litigation did not dispute the creative character of such a work or element.

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[10] Постановление Пленума Верховного суда Российской Федерации № 5, Пленума Высшего арбитражного суда Российской Федерации № 29 от 26 марта 2009 года «О некоторых вопросах, возникших в связи с введением в действие части четвертой Гражданского кодекса Российской Федерации» [Postanovlenie Plenuma Verhovnogo suda Rossijskoj Federacii No. 5, Plenuma Vysshego arbitrazhnogo suda Rossijskoj Federacii No. 29 ot 26 marta 2009 goda 'O nekotoryh voprosah, voznikshih v svjazi s vvedeniem v dejstvie chasti chetvertoj Grazhdanskogo kodeksa Rossijskoj Federacii' [Resolution No. 5 of the plenary session of March 26, 2009, of the Supreme Court, Resolution No. 29 of the plenary session of March 26, 2009, of the Highest Arbitration Court of the Russian Federation, entitled 'On Issues Arising in Connection with the Entry into Force of Part Four of the Civil Code of the Russian Federation']], was published in *Rossiiskaia Gazeta* [Ros. Gaz.] April 22, 2009, in *Byulleten' Verkhovnogo Suda Rossiyskoi Federatsii* [BVS] [Bulletin of the Supreme Court of the Russian Federation] 2009. No. 6, and in *Vestnik Vysshego Arbitrazhnogo Suda Rossiyskoi Federatsii* [Vestnik VAS RF] [Bulletin of the Supreme Arbitrazh Court of the Russian Federation] 2009. No. 6.

[11] *See* Постановление Федерального арбитражного суда Московского округа от 28 марта 2011 года № КГ-А40/2047-11-4 [Postanovlenie Federal'nogo arbitrazhnogo suda Moskovskogo okruga ot 28 marta 2011 goda № KG-A40/2047-11-4 [Resolution No. KG-A40/2047-11-4 of the Federal Court of Arbitrazh of the Moscow District (March 28, 2011)]]; Постановление Федерального арбитражного суда Московского округа от 31 октября 2011 года № А40-7067/11-110-57 [Postanovlenie Federal'nogo arbitrazhnogo suda Moskovskogo okruga ot 31 oktjabrja 2011 goda № A40-7067/11-110-57 [Resolution No. A40-7067/11-110-57 of the Federal Court of Arbitrazh of the Moscow District (Oct. 31, 2011)]]; Постановления Девятого арбитражного апелляционного суда от 14 ноября 2011 года № 09АП-27804/2011-ГК, № 09АП-27909/2011-ГК [Postanovlenija Devjatogo arbitrazhnogo apelljacionnogo suda ot 14 nojabrja 2011 goda № 09AP-27804/2011-GK, № 09AP-27909/2011-GK [Resolutions No. 09AP-27804/2011-GK and No. 09AP-27909/2011-GK of the 9 Arbitrazh Court of Appeal (Nov. 14, 2011)]]; Постановление Федерального арбитражного суда Уральского округа от 19 марта 2012 года № Ф09-1009/12 [Postanovlenie Federal'nogo arbitrazhnogo suda Ural'skogo okruga ot 19 marta 2012 goda № F09-1009/12 [Resolution No. F09-1009/12 of the Federal Court of Arbitrazh of the Ural District (March 19, 2012)].

In difficult disputes over works of low authorship, courts just as frequently departed from Clause 28 of Resolution 5/29 and dismissed claims. In some cases of this kind, courts based their dismissal on Clause 5, Subclause 4 of Clause 8 and Clause 7 of Article 1259 of the Civil Code.[12] In others, courts directly claimed that a work was neither novel nor original nor unique. These criteria were used by courts of various tiers, including the highest courts.

All this means that, in effect, Clause 28 of Resolution 5/29 failed to completely achieve its main objective of lowering copyrightability standards; courts simply saw this clause as authorization not to raise protectability issues in dealing with works of high authorship.

Originality, novelty and uniqueness remained the usual criteria in complicated disputes over works of low creative value. Our interpretation was that, in the absence of effective means of identifying public domain content, works of high authorship were the only category to which the criterion for independent creation could be applied safely. Works or elements of works of relatively low creative value are mainly based on public domain content. Unconditionally qualifying such works as copyrightable would have entailed risks of unjustified monopolization of public domain content, or 'overprotection'. Resources employed by courts to dismiss claims of protection by authors of such works included the use of high standards of copyrightability and making it the claimant's responsibility to prove that their work meets such standards.

To sum up, the intention to minimize standards of copyrightability came up against a lack of criteria in the Russian legal system for identifying public domain content.[13]

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[12] 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, television program listings 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.

[13] The public domain is a realm that embraces anything that is part of the general historical or cultural experience of humankind, an element of objective reality or a feature of human relationships, is available from publicly available resources such as nature and universal ideas, and can be reproduced by and expected from any person of average capabilities. This includes, e.g., language, facts, discoveries, generally known or standard images and ideas, and means of artistic expression. For an interpretation of the public domain concept used in this study *see, e.g.,* Max Kummer, *Das Urheberrechtlich Schutzbare werk* 47–48 (Stampfli & Cie 1968); Heinrich Hubmann, *Das Recht des schopferischen Geistes* 17 ff. (De Gruyter 1954); idem., *Urheber- und Verlagsrecht* 31 ff. (6 ed., C.H. Beck 1987); Britta Stamer, *Der Schutz der Idee unter besonderer Berucksichtigung von Unterhaltungsproduktionen fur das Fernsehen* 38–39 (Nomos 2007); Eugen Ulmer, *Urheber- und Verlagsrecht* 275 ff. (3d ed., Springer 1980).

Identification criteria for public domain content must be based on concepts of excessive or insufficient protection, and such concepts must, in turn, be based on the economic analysis of foreseen effects of such protection. For instance, if the objective is to promote science and art, copyright monopoly must not cover technical means used by artists, factual or standard data, or the like.

Therefore, it was logical to forecast that either the originality, novelty and uniqueness criteria would continue to be applied to works of low authorship or criteria for identifying public domain content would be developed in jurisprudence and through practice.

I have to admit that our forecast has proven to be off the mark.

The activities of the SIP, which exercised the determining influence on the practice of arbitrazh (commercial) courts, aimed to minimize standards of creativity. This trend is comparable to principles of the sweat of the brow doctrine, which was previously used in the American copyright system.[14]

Detailed court rulings on copyrightability have become much less frequent. This may be due to the SIP consistently repealing rulings that declare works to be unprotectable due to their lack of novelty, originality or uniqueness. This would discourage litigants from making objections to the effect that the lack of novelty, originality and uniqueness makes a work unprotectable.

The dominant trend today is to use the 'pigeonholing' method. According to practically all SIP rulings and to more than 90 percent of rulings of lower courts, it is sufficient to rely on Clause 1 of Article 1295 of the Civil Code to determine whether a work is copyrightable. This applies both to works of high authorship, e.g., works of literature,[15] music,[16] paintings,

[14] Sweat of the brow is an American doctrine according to which a simple diligent effort of putting together protectable and unprotectable content is copyrightable even if it is purely mechanical and involves no making of decisions or choices. *See Jeweler's Circular Publishing Co. v. Keystone Publishing Co.,* 281 F. 83, 88 (2d Cir. 1922).

[15] *See*, e.g., Постановление Суда по интеллектуальным правам от 4 сентября 2015 года № С01-336/2014 по делу № А40-141009/2012 [Postanovlenie Suda po intellektual'nym pravam ot 4 sentjabrja 2015 goda № S01-336/2014 po delu № A40-141009/2012 [SIP Resolution No. S01-336/2014 of September 4, 2015, on Case No. A40-141009/2012]]; Постановление Суда по интеллектуальным правам от 24 июня 2015 года № С01-463/2015 по делу № А56-8331/2014 [Postanovlenie Suda po intellektual'nym pravam ot 24 ijunja 2015 goda № S01-463/2015 po delu № A56-8331/2014 [SIP Resolution No. S01-463/2015 of June 24, 2015, on Case No. A56-8331/2014]]; Постановление Суда по интеллектуальным правам от 18 июня 2015 года № С01-289/2015 по делу № А56-13679/2014 [Postanovlenie Suda po intellektual'nym pravam ot 24 ijunja 2015 goda № S01-463/2015 po delu № A56-13679/2014 [SIP Resolution No. S01-289/2015 of June 18, 2015, on Case No. A56-13679/2014]]; Определение Суда по интеллектуальным правам от 28 июля 2015 года № С01-725/2015 по делу № А40-150413/2014 [Opredelenie Suda po intellektual'nym pravam ot 28 ijulja 2015 goda № S01-725/2015 po delu № A40-150413/2014 [SIP Court Judgment No. S01-725/2015 of July 28, 2015, on Case No. A40-150413/2014]].

[16] *See*, e.g., Постановление Суда по интеллектуальным правам от 14 января 2016 года № С01-1060/2014 по делу № А19-18151/2014 [Postanovlenie Suda po intellektual'nym pravam ot 14 janvarja 2016 goda № S01-1060/2014 po delu № A19-18151/2014 [SIP Resolution No. S01-1060/2014 of January 14, 2016, on Case No. A19-18151/2014]]; Постановление Суда по интеллектуальным правам от 18 декабря 2015 года № С01-33/2013 по делу № А40-144511/2012 [Postanovlenie Suda po intellektual'nym pravam ot 18 dekabrja 2015 goda № S01-33/2013 po delu № A40-144511/2012 [SIP Resolution No. S01-33/2013 of December 18, 2015, on Case No. A40-144511/2012]]; Постановление Суда по интеллектуальным правам от 9 декабря 2015 года № С01-823/2015 по делу № А70-12794/2014 [Postanovlenie Suda po intellektual'nym pravam ot 9 dekabrja 2015 goda № S01-823/2015 po delu № A70-12794/2014 [SIP Resolution No. S01-823/2015 of December 9, 2015, on Case No. A70-12794/2014]]; Постановление Суда по интеллектуальным правам от 15 октября 2015 года № С01-758/2015 по делу № А76-2795/2015 [Postanovlenie Suda po intellektual'nym pravam ot

sculptures[17] and audiovisual works,[18] and to works of what is often considered low

15 oktjabrja 2015 goda № S01-758/2015 po delu № A76-2795/2015 [SIP Resolution No. S01-758/2015 of October 15, 2015, on Case No. A76-2795/2015]]; Постановление Суда по интеллектуальным правам от 23 сентября 2015 года № C01-793/2015 по делу № A25-1946/2014 [Postanovlenie Suda po intellektual'nym pravam ot 23 sentjabrja 2015 goda № S01-793/2015 po delu № A25-1946/2014 [SIP Resolution No. S01-793/2015 of September 23, 2015, on Case No. A25-1946/2014]];

Постановление Суда по интеллектуальным правам от 23 июля 2015 года № C01-310/2015 по делу A45-9472/2014 [Postanovlenie Suda po intellektual'nym pravam ot 23 ijulja 2015 goda № S01-310/2015 po delu A45-9472/2014 [SIP Resolution No. S01-310/2015 of July 23, 2015, on Case No. A45-9472/2014]]; Постановление Суда по интеллектуальным правам от 18 июня 2015 года № C01-145/2015 по делу № A45-8706/2014 [Postanovlenie Suda po intellektual'nym pravam ot 18 ijunja 2015 goda № S01-145/2015 po delu № A45-8706/2014 [SIP Resolution No. S01-145/2015 of June 18, 2015, on Case No. A45-8706/2014]].

[17] *See*, e.g., Постановление Суда по интеллектуальным правам от 25 декабря 2015 года № C01-1076/2015 по делу № A51-5983/2015 [Postanovlenie Suda po intellektual'nym pravam ot 25 dekabrja 2015 goda № S01-1076/2015 po delu № A51-5983/2015 [SIP Resolution No. S01-1076/2015 of December 25, 2015, on Case No. A51-5983/2015]]; Постановление Суда по интеллектуальным правам от 25 декабря 2015 года № C01-1060/2014 по делу A40-124255/2013 [Postanovlenie Suda po intellektual'nym pravam ot 25 dekabrja 2015 goda № S01-1060/2014 po delu A40-124255/2013 [SIP Resolution No. S01-1060/2014 of December 25, 2015, on Case No. A40-124255/2013]] (an image used for a logo); Постановление Суда по интеллектуальным правам от 15 декабря 2015 года № C01-985/2014 по делу № A76-1534/2014 [Postanovlenie Suda po intellektual'nym pravam ot 15 dekabrja 2015 goda № S01-985/2014 po delu № A76-1534/2014 [SIP Resolution No. S01-985/2014 of December 15, 2015, on Case No. A76-1534/2014]] (a picture of a literary character); Постановление Суда по интеллектуальным правам от 27 октября 2015 года № C01-860/2015 по делу № A40-181203/2014 [Postanovlenie Suda po intellektual'nym pravam ot 27 oktjabrja 2015 goda № S01-860/2015 po delu A40-181203/2014 [SIP Resolution No. S01-860/2015 of October 27, 2015, on Case No. A40-181203/2014]]; Постановление Суда по интеллектуальным правам от 16 марта 2015 года № C01-186/2014 по делу № A60-10411/2013 [Postanovlenie Suda po intellektual'nym pravam ot 16 marta 2015 goda № S01-186/2014 po delu № A60-10411/2013 [SIP Resolution No. S01-186/2014 of March 16, 2015, on Case No. A60-10411/2013]].

[18] *See*, e.g., Постановление Верховного суда РФ от 4 марта 2015 года № 9-АД15-2 [Postanovlenie Verhovnogo suda RF ot 4 marta 2015 goda № 9-AD15-2 [Russian Federation Supreme Court Resolution No. 9-AD15-2 of March 4, 2015]]; Постановление Суда по интеллектуальным правам от 3 февраля 2016 года № C01-1/2016 по делу № A40-72653/2015 [Postanovlenie Suda po intellektual'nym pravam ot 3 fevralja 2016 goda № S01-1/2016 po delu № A40-72653/2015 [SIP Resolution No. S01-1/2016 of February 3, 2016, on Case No. A40-72653/2015]]; Постановление Суда по интеллектуальным правам от 9 февраля 2016 года № C01-1425/2014 по делу № A70-3995/2014 [Postanovlenie suda po intellektual'nym pravam ot 9 fevralja 2016 goda № S01-1425/2014 po delu № A70-3995/2014 [SIP Resolution No. S01-1425/2014 of February 9, 2016, on Case No. A70-3995/2014]]; Постановление Суда по интеллектуальным правам от 4 февраля 2016 года № C01-1217/2015 по делу № A50-3186/2015 [Postanovlenie suda po intellektual'nym pravam ot 4 fevralja 2016 goda № S01-1217/2015 po delu № A50-3186/2015 [SIP Resolution No. S01-1217/2015 of February 4, 2016, on Case No. A50-3186/2015]]; Постановление Суда по интеллектуальным правам от 25 января 2016 года № C01-1038/2015 по делу № A17-6168/2014 [Postanovlenie suda po intellektual'nym pravam ot 25 janvarja 2016 goda № S01-1038/2015 po delu № A17-6168/2014 [SIP Resolution No. S01-1038/2015 of January 25, 2016, on Case No. A17-6168/2014]]; Постановление Суда по интеллектуальным правам от 14 января 2016 года № C01-128/2015 по делу № A76-3355/2014 [Postanovlenie Suda po intellektual'nym pravam ot 14 janvarja 2016 goda № S01-128/2015 po delu № A76-3355/2014 [SIP Resolution No. S01-128/2015 of January 14, 2016, on Case No. A76-3355/2014]]; Постановление Суда по интеллектуальным правам от 15 декабря 2015 года № C01-985/2014 по делу № A76-1534/2014 [Postanovlenie Suda po intellektual'nym pravam ot 15 dekabrja 2015 goda № S01-985/2014 po

authorship, such as computer programs,[19] photographs,[20] works of architecture, urban

delu № A76-1534/2014 [SIP Resolution No. S01-985/2014 of December 15, 2015, on Case No. A76-1534/2014]];

Постановление Суда по интеллектуальным правам от 25 ноября 2015 года № C01-988/2015 по делу № A45-9538/2015 [Postanovlenie Suda po intellektual'nym pravam ot 25 nojabrja 2015 goda № S01-988/2015 po delu № A45-9538/2015 [SIP Resolution No. S01-988/2015 of November 25, 2015, on Case No. A45-9538/2015]]; Постановление Суда по интеллектуальным правам от 29 октября 2015 года № C01-784/2015 по делу № A40-148107/2014 [Postanovlenie Suda po intellektual'nym pravam ot 29 oktjabrja 2015 goda № S01-784/2015 po delu № A40-148107/2014 [SIP Resolution No. S01-784/2015 of October 29, 2015, on Case No. A40-148107/2014]; Постановление Суда по интеллектуальным правам от 28 октября 2015 года C01-740/2015 по делу № A68-5875/2014 [Postanovlenie Suda po intellektual'nym pravam ot 28 oktjabrja 2015 goda S01-740/2015 po delu № A68-5875/2014 [SIP Resolution No. S01-740/2015 of October 28, 2015, on Case No. A68-5875/2014]].

[19] *See*, e.g., Определение Высшего арбитражного суда от 14 сентября 2012 года № ВАС-8654/12 по делу № A32-29617/2011 [Opredelenie Vysshego arbitrazhnogo suda ot 14 sentjabrja 2012 goda № VAS-8654/12 po delu № A32-29617/2011 [Supreme Arbitrazh Court Judgment of 14.09.2012 No. VAS-8654/12 on Case No. A32-29617/2011]; Постановление Суда по интеллектуальным правам от 2 февраля 2016 года № C01-1255/2015 по делу № A63-1829/2015 [Postanovlenie Suda po intellektual'nym pravam ot 2 fevralja 2016 goda № S01-1255/2015 po delu № A63-1829/2015 [SIP Resolution No. S01-1255/2015 of February 2, 2016, on Case No. A63-1829/2015]]; Постановление Суда по интеллектуальным правам от 1 февраля 2016 года № C01-1224/2015 по делу A60-14106/2015 [Postanovlenie Suda po intellektual'nym pravam ot 1 fevralja 2016 goda № S01-1224/2015 po delu A60-10362/2015 [SIP Resolution No. S01-1224/2015 of February 1, 2016, on Case No. A60-10362/2015]]; Постановление Суда по интеллектуальным правам от 20 января 2016 года № C01-1163/2015 по делу A60-10362/2015 [Postanovlenie Suda po intellektual'nym pravam ot 20 janvarja 2016 goda № S01-1163/2015 po delu A60-10362/2015 [SIP Resolution No. S01-1163/2015 of January 20, 2016, on Case No. A60-10362/2015]]; Постановление Суда по интеллектуальным правам от 15 января 2016 года № C01-1170/2015 по делу A76-7663/2015 [Postanovlenie Suda po intellektual'nym pravam ot 15 janvarja 2016 goda № S01-1170/2015 po delu A76-7663/2015 [SIP Resolution No. S01-1170/2015 of January 15, 2016, on Case No. A76-7663/2015]]; Постановление Суда по интеллектуальным правам от 22 декабря 2015 года № C01-1041/2015 по делу № A08-8467/2014 [Postanovlenie Suda po intellektual'nym pravam ot 22 dekabrja 2015 goda № S01-1041/2015 po delu № A08-8467/2014 [SIP Resolution No. S01-1041/2015 of December 22, 2015, on Case No. A08-8467/2014]]; Постановление Суда по интеллектуальным правам от 16 декабря 2015 года № C01-1040/2015 по делу № A32-36970/2014 [Postanovlenie Suda po intellektual'nym pravam ot 16 dekabrja 2015 goda № S01-1040/2015 po delu № A32-36970/2014 [SIP Resolution No. S01-1040/2015 of December 16, 2015, on Case No. A32-36970/2014]]; Постановление Суда по интеллектуальным правам от 16 ноября 2015 года № C01-955/2015 по делу № A42-6076/2014 [Postanovlenie Suda po intellektual'nym pravam ot 16 nojabrja 2015 goda № S01-955/2015 po delu № A42-6076/2014 [SIP Resolution No. S01-955/2015 of November 16, 2015, on Case No. A42-6076/2014]].

[20] *See*, e.g., Определение Высшего арбитражного суда от 10 сентября 2012 года № ВАС-9300/12 по делу № A60-39303/2010 [Opredelenie Vysshego arbitrazhnogo suda ot 10 sentjabrja 2012 goda № VAS-9300/12 po delu № A60-39303/2010 [Ruling No. VAS-9300/12 of the Supreme Court of Arbitrazh of the Russian Federation of September 10, 2012, on Case No. A60-39303/2010]]; Постановление Суда по интеллектуальным правам от 18 января 2016 года № C01-1286/2014 по делу № A40-169281/2013 [Postanovlenie Suda po intellektual'nym pravam ot 18 janvarja 2016 goda № S01-1286/2014 po delu № A40-169281/2013 [SIP Resolution No. S01-1286/2014 of January 18, 2016, on Case No. A40-169281/2013]]; Постановление Суда по интеллектуальным правам от 12 ноября 2015 года № C01-910/2015 по делу № A40-98130/2014 [Postanovlenie Suda po intellektual'nym pravam ot 12 nojabrja 2015 goda № S01-910/2015 po delu № A40-98130/2014 [SIP Resolution No. S01-910/2015 of November 12, 2015, on Case No. A40-98130/2014]]; Постановление Суда по интеллектуальным правам от 7 сентября 2015 года № C01-739/2015 по делу № A34-7366/2014 [Postanovlenie Suda po intellektual'nym pravam ot 7 sentjabrja 2015 goda № S01-739/2015 po

planning and landscaping,[21] websites,[22] maps,[23] and works of industrial design.[24]

However, it should be taken into consideration that litigants cannot provide new evidence of copyrightability in the cassationary court. There also are restrictions on the assessment of evidence and the processing of complaints. A court cannot initiate any protectability/unprotectability case – any such case must be based on a suit brought by someone disputing the protectability or unprotectability of the work.

Therefore, it can be deduced that the use of the 'pigeonholing' method *per se* may not necessarily be evidence of the lowering of protectability standards. It may imply that issue of protectability has not been the subject of judicial review and that the work in question was the source of protectability ligitations in lower courts.

However, this appears to be a misinterpretation. Analysis of Articles 286-288, Clause 1 of Article 281.11, Clauses 2 and 3 of Article 291.14, and Clauses 2 and 3 of Article 308.11 of the Arbitrazh Procedure Code and studies of judicial practice make clear that, on the whole, the abovementioned restrictions cannot prevent a cassationary court from initiating a copyrightability case because cassationary

delu № A34-7366/2014 [SIP Resolution No. S01-739/2015 of September 7, 2015, on Case No. A34-7366/2014]]; Постановление Суда по интеллектуальным правам от 15 июня 2015 года № C01-484/2015 по делу № A57-2146/2014 [Postanovlenie Suda po intellektual'nym pravam ot 15 ijunja 2015 goda № S01-484/2015 po delu № A57-2146/2014 [SIP Resolution No. S01-484/2015 of June 15, 2015, on Case No. A57-2146/2014]]; Постановление Суда по интеллектуальным правам от 26 мая 2015 года № C01-403/2015 по делу № A57-14087/2014 [Postanovlenie Suda po intellektual'nym pravam ot 26 maja 2015 goda № S01-403/2015 po delu № A57-14087/2014 [SIP Resolution No. S01-403/2015 of May 26, 2015, on Case No. A57-14087/2014]].

[21] *See*, e.g., Определение Высшего арбитражного суда от 6 августа 2012 года № ВАС-7697/12 по делу № A60-10618/2011 [Opredelenie Vysshego arbitrazhnogo suda ot 6 avgusta 2012 goda № VAS-7697/12 po delu № A60-10618/2011 [Ruling No. VAS-7697/12 of the Supreme Court of Arbitrazh of the Russian Federation of August 6, 2012, on Case No. A60-10618/2011]]; Постановление Суда по интеллектуальным правам от 18 декабря 2015 года № C01-383/2014 по делу № A60-10618/2011 [Postanovlenie Suda po intellektual'nym pravam ot 18 dekabrja 2015 goda № S01-383/2014 po delu № A60-10618/2011 [SIP Resolution No. S01-383/2014 of December 18, 2015, on Case No. A60-10618/2011]]; Постановление Суда по интеллектуальным правам от 14 августа 2015 года № C01-173/2013 по делу № A82-15456/2012 [Postanovlenie Suda po intellektual'nym pravam ot 14 avgusta 2015 goda № S01-173/2013 po delu № A82-15456/2012 [SIP Resolution No. S01-173/2013 of August 14, 2015, on Case No. A82-15456/2012]].

[22] *See*, e.g., Постановление Суда по интеллектуальным правам от 9 декабря 2015 года № C01-1000/2015 по делу № A40-52455/2015 [Postanovlenie Suda po intellektual'nym pravam ot 9 dekabrja 2015 goda № S01-1000/2015 po delu № A40-52455/2015 [SIP Resolution No. S01-1000/2015 of December 9, 2015, on Case No. A40-52455/2015]].

[23] *See*, e.g., Постановление Суда по интеллектуальным правам от 30 сентября 2015 года № C01-803/2015 по делу № A56-55409/2014 [Postanovlenie Suda po intellektual'nym pravam ot 30 sentjabrja 2015 goda № S01-803/2015 po delu № A56-55409/2014 [SIP Resolution No. S01-803/2015 of September 30, 2015, on Case No. A56-55409/2014]].

[24] *See*, e.g., Постановление Суда по интеллектуальным правам от 20 сентября 2014 года № C01-1128/2014 по делу № A40-13480/2014 [Postanovlenie Suda po intellektual'nym pravam ot 20 sentjabrja 2014 goda № S01-1128/2014 po delu № A40-13480/2014 [SIP Resolution No. S01-1128/2014 of November 20, 2014, on Case No. A40-13480/2014]].

courts are authorized to verify whether a lower court has correctly applied and interpreted substantive and other law in dealing with the same case.[25]

In cases where it is essential to depart from the practice of using the originality and novelty criteria, the SIP directly declares such criteria irrelevant.[26]

Protectability litigations in lower courts may, to some extent, provide the basis for interpreting the practice of the use of the 'pigeonholing' method; the fact that the copyrightability of an independently created (non-copied) work is disputed may *per se* be evidence of higher standards of protectability.

Analysis of SIP practice corroborates this. The issue of proving the protectability of works of high authorship, e.g., works of literature or music, or audiovisual works, and some works of low authorship, primarily computer programs, practically never arises.[27]

However, increasingly, SIP rulings on works of low authorship contain references to their authors trying to prove their copyrightability, e.g., references to the distribution of the burden of proof (see below) or to a lower court ruling declaring the work protectable, which implies that the opposite could have been proven.[28] The question is what criteria are used.

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[25] Before the SIP was set up, district arbitrazh courts often issued copyrightability rulings.

[26] *See*, e.g., Постановление Суда по интеллектуальным правам от 18 января 2016 года № С01-1286/2014 по делу № А40-169281/2013 [Postanovlenie Suda po intellektual'nym pravam ot 18 janvarja 2016 goda № S01-1286/2014 po delu № A40-169281/2013 [SIP Resolution No. S01-1286/2014 of January 18, 2016, on Case No. A40-169281/2013]; Постановление Суда по интеллектуальным правам от 9 апреля 2014 года № С01-239/2014 по делу № А40-15537/2012 [Postanovlenie Suda po intellektual'nym pravam ot 9 aprelja 2014 goda № S01-239/2014 po delu № A40-15537/2012 [SIP Resolution No. S01-239/2014 of April 9, 2014, on Case No. A40-15537/2012]; Постановление Суда по интеллектуальным правам от 29 июля 2014 года № С01-658/2014 по делу № А12-30345/2013 [Postanovlenie Suda po intellektual'nym pravam ot 29 ijulja 2014 goda № S01-658/2014 po delu № A12-30345/2013 [SIP Resolution No. S01-658/2014 of July 29, 2014, on Case No. A12-30345/2013]].

[27] The reason for this is the presumed creative character of such works under Clause 28 of Resolution 5/29. See references to judicial practice in above footnotes on such works.

As regards computer programs, it is usually only piracy cases (i.e., unauthorized copying of a program in full, without processing it, and not the separate copying of any of its elements) that are taken to court. In one dispute over a deciphering key, the SIP simply ruled that such a key was part of a copyrightable program and was itself protectable until proven otherwise. *See* Постановление Суда по интеллектуальным правам № С01-675/2015 от 10 сентября 2015 года № А40-105604/2013 [Postanovlenie Suda po intellektual'nym pravam № S01-675/2015 ot 10 sentjabrja 2015 goda № A40-105604/2013 [SIP Resolution No. S01-675/2015 of September 10, 2015, on Case No. A40-105604/2013]].

[28] *See*, e.g., Постановление Суда по интеллектуальным правам от 21 сентября 2015 года № С01-557/2015 по делу А10-343/2014 [Postanovlenie Suda po intellektual'nym pravam ot 21 sentjabrja 2015 goda № S01-557/2015 po delu A10-343/2014 [SIP Resolution No. S01-557/2015 of September 21, 2015, on Case No. A10-343/2014]]; Постановление Суда по интеллектуальным правам от 24 сентября 2015 года № С01-669/2015 по делу № А60-7894/2014 [Postanovlenie Suda po intellektual'nym pravam ot 19 janvarja 2016 goda № S01-669/2015 po delu № A40-7894/2014 [SIP Resolution No. S01-669/2015 of September 14, 2015, on Case No. A60-7894/2014]] (architectural designs); Постановление Суда по интеллектуальным правам от 19 января 2016 года № С01-1109/2015 по делу № А40-156890/2013 [Postanovlenie Suda po intellektual'nym pravam ot 19 janvarja 2016 goda № S01-1109/2015 po delu № A40-156890/2013 [SIP Resolution No. S01-1109/2015 of January 19, 2016, on Case No. A40-

Therefore, in relation to works of high authorship – and works of low authorship as I demonstrate below – the use of the 'pigeonholing' method in the absence of further debates on copyrightability issues means the use of the criterion for independent creation (non-copying), i.e., the minimum creativity criterion.

Another dominant trend is the direct invoking of the *presumption of the creative character of a work* (and, consequently, its protectability) as established by Clause 28 of Resolution 5/29 and the rejection of the novelty, originality and uniqueness criteria as irrelevant.[29]

In view of the above, the issue of the basis on which the creativity presumption can be overridden is fundamental. In previous practice, such presumptions could have been overturned, either by invoking Clause 5, Subclause 4 of Clause 6 and Clause 7 of Article 1259 of the Civil Code, which list unprotectable types of work, or by ignoring Resolution 5/29, i.e., if a work was found to fail to meet the novelty, originality, and uniqueness criteria.[30]

156890/2013]]; Постановление Суда по интеллектуальным правам от 30 сентября 2015 года № С01-803/2015 по делу № А56-55409/2014 [Postanovlenie Suda po intellektual'nym pravam ot 30 sentjabrja 2015 goda № S01-803/2015 po delu № A56-55409/2014 [SIP Resolution No. S01-803/2015 of September 30, 2015, on No. A56-55409/2014]] (works of cartography); Постановление Суда по интеллектуальным правам от 15 июня 2015 года № С01-484/2015 по делу № А57-2146/2014 [Postanovlenie Suda po intellektual'nym pravam ot 15 ijunja 2015 goda № S01-484/2015 po delu № A57-2146/2014 [SIP Resolution No. S01-484/2015 of June 15, 2015, on Case No. A57-2146/2014]]; Постановление Суда по интеллектуальным правам от 18 января 2016 года № С01-1286/2014 по делу № А40-169281/2013 [Postanovlenie Suda po intellektual'nym pravam ot 18 janvarja 2016 goda № S01-1286/2014 po delu № A40-169281/2013 [SIP Resolution No. S01-1286/2014 of January 18, 2016, on Case No. A40-169281/2013]] (photographs).

[29] Обзор судебной практики по делам, связанным с разрешением споров о защите интеллектуальных прав. Пункт 3 (утвержден Президиумом Верховного Суда Российской Федерации 23 сентября 2015 года) [Obzor sudebnoj praktiki po delam, svjazannym s razresheniem sporov o zashhite intellektual'nyh prav. Punkt 3 (utverzhden Prezidiumom Verhovnogo Suda Rossijskoj Federacii 23 sentjabrja 2015 goda) [Clause 3 of *Review of Judicial Practice in Dealing with Disputes on the Protection of Intellectual Rights,* approved by the Presidium of the Supreme Court on September 23, 2015]].

See also, e.g., Постановление Суда по интеллектуальным правам от 18 января 2016 года № С01-1286/2014 по делу № А40-169281/2013 [Postanovlenie Suda po intellektual'nym pravam ot 18 janvarja 2016 goda № S01-1286/2014 po delu № A40-169281/2013 [SIP Resolution No. S01-1286/2014 of January 18, 2016 on Case No. A40-169281/2013]]; Постановление Суда по интеллектуальным правам от 9 апреля 2014 года № С01-239/2014 по делу № А40-15537/2012 [Postanovlenie Suda po intellektual'nym pravam ot 9 aprelja 2014 goda № S01-239/2014 po delu № A40-15537/2012 [SIP Resolution No. S01-239/2014 of April 9, 2014, on Case No. A40-15537/2012]]; Постановление Суда по интеллектуальным правам от 21 марта 2014 года № С01-506/2013 по делу № А56-27251/2013 [Postanovlenie Suda po intellektual'nym pravam ot 21 marta 2014 goda № S01-506/2013 po delu № A56-27251/2013 [SIP Resolution No. S01-506/2013 of March 21, 2014, on Case No. A56-27251/2013]]; Постановление Суда по интеллектуальным правам от 29 июля 2014 года № С01-658/2014 по делу № А12-30345/2013 [Postanovlenie Suda po intellektual'nym pravam ot 29 ijulja 2014 goda № S01-658/2014 po delu № A12-30345/2013 [SIP Resolution No. S01-658/2014 of July 29, 2014, on Case No. A12-30345/2013]]; Постановление Суда по интеллектуальным правам от 24 апреля 2015 года № С01-257/2015 по делу № А40-19843/2014 [Postanovlenie Suda po intellektual'nym pravam ot 24 aprelja 2015 goda № S01-257/2015 po delu № A40-19843/2014 [SIP Resolution No. S01-257/2015 of April 24, 2015 on Case No. A40-19843/2014]].

[30] *See*, e.g., Постановление Федерального арбитражного суда Московского округа от 27 марта 2012 года по делу № А40-133968/09-27-952 [Postanovlenie Federal'nogo arbitrazhnogo suda

This was usually the case with works of low authorship, whose protection would have carried the risk of monopolization of public domain content.

The SIP consistently follows Clause 28 of Resolution 5/29 in seeking to put an end to this practice and abandon the use of the *novelty, originality and uniqueness* criteria. The SIP does not only do this in relation to works of high authorship but also, and even more commonly, with works of insignificant creative value, including works that, according to one of the parties to a litigation, are neither novel nor original nor unique, e.g., photographs,[31] works of industrial design,[32] or architectural designs.[33] The SIP has no objection to attempts to prove that works of those types are non-creative but prohibits invoking the novelty, originality and uniqueness criteria for this purpose, though it does not explain in what way non-creativeness can be proven. This effectively makes it impossible for litigants and lower courts to contest the presumption that a work is creative.

The SIP's logic suggests that a creativity presumption can be overridden by proving that a work is not an independent creation, in other words, that it is a deliberate replication of another work, or by proving that it is uncopyrightable under Clause 5, Subclause 4 of Clause 6 and Clause 7 of Article 1259 of the Civil Code.

However, judicial practice is yet to develop effective principles for dealing with cases in which *independent parallel creation of a work* is possible in principle, i.e., there is no mechanism for determining whether independent parallel creation or unfair replication has taken place. Insufficient attention to the parallel creation issue is the cause of the contradictory nature of today's practice.

Logically, there should be several ways of dealing with such cases.

Moskovskogo okruga ot 27 marta 2012 goda po delu № A40-133968/09-27-952 [Resolution of March 27, 2012, of the Federal Arbitrazh Court of the Moscow District on Case No. A40-133968/09-27-952]], Постановление Девятого арбитражного апелляционного суда от 7 ноября 2011 № 09АП-27014/2011-ГК [Postanovlenie Devjatogo arbitrazhnogo apelljacionnogo suda ot 7 nojabrja 2011 № 09AP-27014/2011-GK [Resolution of the Ninth Arbitrazh Court of Appeal No. 09AP-27014/2011-GK of November 7, 2011]].

[31] Постановление Суда по интеллектуальным правам от 9 апреля 2014 года № С01-239/2014 по делу № А40-15537/2012 [Postanovlenie Suda po intellektual'nym pravam ot 9 aprelja 2014 goda № S01-239/2014 po delu № A40-15537/2012 [SIP Resolution No. S01-239/2014 of April 9, 2014, on Case No. A40-15537/2012]].

[32] *See*, e.g., Постановление Суда по интеллектуальным правам от 18 января 2016 года № С01-1286/2014 по делу № А40-169281/2013 [Postanovlenie Suda po intellektual'nym pravam ot 18 janvarja 2016 goda № S01-1286/2014 po delu № A40-169281/2013 [SIP Resolution No. S01-1286/2014 of January 18, 2016, on Case No. A40-169281/2013]], Постановление Суда по интеллектуальным правам от 1 августа 2014 года № С01-541/2014 по делу № А78-6109/2012 [Postanovlenie Suda po intellektual'nym pravam ot 1 avgusta 2014 goda № S01-541/2014 po delu № A78-6109/2012 [SIP Resolution No. S01-541/2014 of August 1, 2014, on Case No. A78-6109/2012]].

[33] Постановление Суда по интеллектуальным правам от 24 апреля 2014 года № С01-257/2015 по делу № А40-19843/2014 [Postanovlenie Suda po intellektual'nym pravam ot 24 aprelja 2014 goda № S01-257/2015 po delu № A40-19843/2014 [SIP Resolution No. S01-257/2015 of April 24, 2015, on Case No. A40-19843/2014]].

One way is to qualify a work that is similar to another but is the result of independent and parallel creation as non-unique and, therefore, uncopyrightable. This would mean the use of the uniqueness or originality criterion, and, consequently, relatively high standards of protectability. However, if standards are to be lowered and non-unique works can be qualified as copyrightable, it would seem logical to use one of the following two methods.

One of these is to recognize the rights of the first creator, which would mean the use of the novelty (non-replication) criterion.

The other is to grant rights to both creators if each work was created independently from the other. However, this would require the development of methods to distinguish independent parallel creation from mere copying.[34]

The parallel creation issue has almost never been raised in practice.[35]

Despite its drastic lowering of creativity criteria, the Russian law enforcement system effectively disregards the possibility of independent parallel creation of similar works. When two works are identical or similar (or when an element of one work is identical or similar to an element in another work), a court will practically always declare one of them a mere replication of the other and hence a violation of

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[34] In legal systems that authorize the protection of parallel creation, various intermediary rules, some stricter than others, are used in practice. In Germany, for example, such works are granted protection in exceptional situations where the author is assumed to have been unaware, and could not have been expected to be aware, of the existence of the work he has replicated. In all other cases, replication is presumed to have been deliberate. *See* Thomas Dreier, Gernot Schulze, *Urheberrechtsgesetz Kommentar* § 2, Rn. 17 (C.H. Beck 2004). In the United States, special mechanisms have been developed through practice for verifying whether replication has been deliberate or not. *See* Melville Nimmer, David Nimmer, *Nimmer on Copyright,* § 13.03, LEXIS 10441 (2004). Christina Berking, *Die Unterscheidung von Form und Inhalt im Urheberrecht* 75 ff., 83–84 (Nomos 2002).

[35] There have been very rare instances of replication cases being taken up by courts, usually at the insistence of defendants. *See* Постановление Суда по интеллектуальным правам от 19 января 2016 года № С01-1109/2015 по делу № А40-156890/2013 [Postanovlenie Suda po intellektual'nym pravam ot 19 janvarja 2016 goda № S01-1109/2015 po delu № A40-156890/2013 [SIP Resolution No. S01-1109/2015 of January 19, 2016 on Case No. A40-156890/2013]]; Постановление Федерального арбитражного суда Волго-Вятского округа от 30 августа 2012 по делу № А11-7029/2011 [Postanovlenie Federal'nogo arbitrazhnogo suda Volgo-Vjatskogo okruga ot 30 avgusta 2012 po delu № A11-7029/2011 [Resolution of August 30, 2012, of the Federal Arbitrazh Court of the Volga-Vyatka District on Case No. A11-7029/2011]]; Постановление Федерального арбитражного суда Дальневосточного округа от 16 сентября 2011 № Ф03-4356/2011 по делу № А04-1179/2011 [Postanovlenie Federal'nogo arbitrazhnogo suda Dal'nevostochnogo okruga ot 16 sentjabrja 2011 № F03-4356/2011 po delu № A04-1179/2011 [Resolution of the Federal Arbitrazh Court of the Far Eastern District No. F03-4356/2011 of September 16, 2011, on Case No. A04-1179/2011]]; Постановление Девятого арбитражного апелляционного суда от 04 сентября 2015 № 09АП-14070/2015-ГК по делу № А40-5706/14 [Postanovlenie Devjatogo arbitrazhnogo apelljacionnogo suda ot 04 sentjabrja 2015 № 09AP-14070/2015-GK po delu № A40-5706/14 [Resolution of the Ninth Arbitrazh Court of Appeal No. 09AP-14070/2015-GK of September 3, 2015, on Case No. A40-5706/14]]; Определение Московского городского суда от 3 ноября 2015 года по делу № 4г/8-11086/2015 [Opredelenie Moskovskogo gorodskogo suda ot 3 nojabrja 2015 goda po delu № 4g/8-11086/2015 [Moscow City Court Judgment No. 4g/8-11086/2015 of November 3, 2015]].

exclusive rights.[36] There are very few exceptions – cases where two identical or similar works or elements are declared by court to be unprotectable due to their belonging to the public domain under Clause 5 and Subclause 4 of Clause 6 of Article 1259 of the Civil Code[37] (see below for more details).

This would suggest that courts do not yet use the independent creation (non-copying) criterion and interpret independent creative activity as creation of a new work.

However, this directly contradicts the above-cited thesis in Clause 28 of Resolution 5/29 that the non-novelty of a work cannot *per se* be proof that it is not the result of creative effort. The Russian judiciary avoids the use of the novelty criterion, and the SIP consistently repeals rulings based on it, and, in some cases, grants exclusive rights to a work or elements of it that were widely known before their publication under the claimant's name.[38] Such rigid application of Clause 28 effectively results in the granting of exclusive rights to content that was first published under the name of a specific person even if it is not new and was known before. However, it remains unclear how one can prove any such case to be a case of deliberate replication and contest the presumed creative nature of such content.

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[36] *See*, e.g., Постановление Суда по интеллектуальным правам от 29 июля 2014 года № С01-658/2014 по делу № А12-30345/2013 [Postanovlenie Suda po intellektual'nym pravam ot 29 ijulja 2014 goda № S01-658/2014 po delu № A12-30345/2013 [SIP Resolution No. S01-658/2014 of July 29, 2014, on Case No. A12-30345/2013]]; Определение Московского городского суда от 3 ноября 2015 года по делу № 4г/8-11086/2015 [Opredelenie Moskovskogo gorodskogo suda ot 3 nojabrja 2015 goda po delu № 4g/8-11086/2015 [Moscow City Court Judgment No. 4g/8-11086/2015 of November 3, 2015]]; Постановление Суда по интеллектуальным правам от 18 декабря 2015 года № С01-383/2014 по делу № А60-10618/2011 [Postanovlenie Suda po intellektual'nym pravam ot 18 dekabrja 2015 goda № S01-383/2014 po delu № A60-10618/2011[SIP Resolution No. S01-383/2014 of December 18, 2015, on Case No. A60-10618/2011]].

[37] Постановление Федерального Арбитражного суда Дальневосточного округа от 16 сентября 2011 года № Ф03-4356/2011 по делу № А04-1179/2011 [Postanovlenie Federal'nogo Arbitrazhnogo suda Dal'nevostochnogo okruga ot 16 sentjabrja 2011 goda № F03-4356/2011 po delu № A04-1179/2011 [Resolution No. F03-4356/2011 of the Federal Court of Arbitrazh of the Far Eastern District of September 16, 2011, on Case No. A04-1179/2011]]; Постановление Девятого арбитражного апелляционного суда от 3 сентября 2015 года № 09АП-14070/2015-ГК по делу № А40-5706/14 [Postanovlenie Devjatogo arbitrazhnogo apelljacionnogo suda ot 3 sentjabrja 2015 goda № 09AP-14070/2015-GK po delu № A40-5706/14 [Resolution of the Ninth Arbitrazh Court of Appeal No. 09AP-14070/2015-GK of September 3, 2015, on Case No. A40-5706/14]]; Апелляционное определение Московского городского суда от 18 апреля 2014 года по делу № 33-12780 [Apelljacionnoe opredelenie Moskovskogo gorodskogo suda ot 18 aprelja 2014 goda po delu № 33-12780 [Moscow City Court judgment of April 18, 2014, on Appeal Case No. 33-12780]].

[38] *See* Постановление Суда по интеллектуальным правам от 29 июля 2014 года № С01-658/2014 по делу № А12-30345/2013 [Postanovlenie Suda po intellektual'nym pravam ot 29 ijulja 2014 goda № S01-658/2014 po delu № A12-30345/2013 [SIP Resolution No. S01-658/2014 of July 29, 2014, on Case No. A12-30345/2013]];

Постановление Суда по интеллектуальным правам от 18 декабря 2015 года № С01-383/2014 по делу № А60-10618/2011 [Postanovlenie Suda po intellektual'nym pravam ot 18 dekabrja 2015 goda № S01-383/2014 po delu № A60-10618/2011 [SIP Resolution No. S01-383/2014 of December 18, 2015, on Case No. A60-10618/2011]].

To sum up, analysis of SIP practice prompts the conclusion that this amounts to a model maximally close to the theory of presentation.[39] In other words, practically any content belonging to any of the protectable types ['of work'?] listed in Part 1 of Article 1259 of the Civil Code will be granted protection if it has first been published under the name of a specific author regardless of whether it has or has not been known before or whether use was made in it of any non-unique elements that would have been available for independent creation.

One can dispute the exclusive rights of such an author only by proving that they acquired such rights after someone else did. In such a case, the coincidence or similarity of content is a sufficient reason to accuse the defendant of violation of exclusive rights, e.g., of copying the content, where there is no legitimate possibility of parallel independent creation. It is now only possible to dismiss a claim of violation of exclusive rights in the very rare cases when a court finds that uncopyrightable content has been replicated (Clause 5 and Subclause 4 of Clause 6 and Clause 7 of Article 1259 of the Civil Code).

Saying that this is somewhat like the appropriation of unclaimed property is only a slight exaggeration – one may acquire copyright to practically any content by publishing it under one's own name regardless of whether it is the result of creative work and is novel, original or unique, or whether elements of it are in the public domain. Strictly speaking, it is a model that is not based on the independent creation criterion since parallel creation does not come into account at all. Nor can it be said that comprehensive use is made of the criterion for novelty and non-replication as the novelty criterion is in effect only applied when one claims rights to content to which someone else owns rights and is not applied to publicly accessible and replicable content (content that is *vorgegeben,* to use the German term).

With its low requirements of creativity, the American sweat of the brow doctrine is the system to which the SIP strategy is closest, except that non-acceptance of the possibility of parallel creation and the absence of a methodology for identifying public domain content make the SIP approach even more radical and a potential basis for the monopolization of public domain content because presenting such content as one's own creation is usually enough for the acquisition of exclusive rights to it.[40]

This amounts to a classical case of overprotection and the consequent monopolization of public domain content, and puts heavy restrictions on public resources for the creation of new content.

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[39] On the theory of presentation, a doctrine that one should be granted exclusive rights to any object that one merely claims to be one's own, see, Max Kummer, *Id.,* at 75. Peter Girth, *Individualitat und Zufall im Urheberrecht*, 48 UFITA 25–26, 39–41 (1974). Hans-Heinrich Schmieder, *Geistige Schöpfung als Auswahl und Bekenntnis*, 52 UFITA 107–114 (1969).

[40] There exist SIP rulings that are directly based on the typical American copyright criterion that, to be protectable, a work needs to be non-borrowed content that is not a replication of something that had been publicly accessible before. *See* Постановление Суда по интеллектуальным правам от 14 мая 2015 года № С01-277/2015 по делу № А40-51226/2014 [Postanovlenie Suda po intellektual'nym pravam ot 14 maja 2015 goda № S01-277/2015 po delu № A40-51226/2014 [SIP Resolution No. S01-277/2015 of May 14, 2015, on Case No. A40-51226/2014]].

It is the general logic behind the model that is currently extensively applied by the SIP, the body whose conduct determines the practice of lower arbitrazh courts. Nevertheless, it would be incorrect to claim that no alternatives to this model are used. First of all, lower arbitrazh courts, which are forced to react to the problem of monopolization of public domain content, still issue rulings based on the originality, uniqueness and novelty criteria,[41] though less frequently than before. Besides, the SIP itself uses these criteria[42] on rare occasions, usually in a bid to prevent the monopolization of public domain content.

These criteria are also used by courts of general jurisdiction, which are outside the jurisdiction of the SIP.[43]

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[41] *See*, e.g., Постановление Девятого арбитражного апелляционного суда от 23 сентября 2015 года № 09АП-14070/2015-ГК по делу № А08-1560/2014 [Postanovlenie Devjatogo arbitrazhnogo apelljacionnogo suda ot 23 sentjabrja 2015 goda № 09AP-14070/2015-GK po delu № A08-1560/2014 [Resolution No. 09AP-14070/2015-GK of the Nineteenth Arbitrazh Court of Appeal of September 23, 2015, on Case No. A08-1560/2014]] (a work of cartography; the resolution was repealed afterwards); Постановление Девятого арбитражного апелляционного суда от 3 сентября 2015 года № 09АП-14070/2015-ГК по делу № А40-5706/14 [Postanovlenie Devjatogo arbitrazhnogo apelljacionnogo suda ot 3 sentjabrja 2015 goda № 09AP-14070/2015-GK po delu № A40-5706/14 [Resolution of the Ninth Arbitrazh Court of Appeal of September 3, 2015, on Case No. A40-5706/14]] (jewelry design); and Постановление Девятого арбитражного апелляционного суда от 29 октября 2015 года № 09АП-41914/2015-ГК по делу № А40-70695/13 [Postanovlenie Devjatogo arbitrazhnogo apelljacionnogo suda ot 29 oktjabrja 2015 goda № 09AP-41914/2015-GK po delu № A40-70695/13 [Resolution No. 09AP-41914/2015-GK of the Ninth Arbitrazh Court of Appeal of October 29, 2015, on Case No. A40-70695/13]] (a literary character).

[42] *See*, e.g., Постановление Суда по интеллектуальным правам от 6 ноября 2013 года № С01-162/2013 по делу № А73-14263/2012 [Postanovlenie Suda po intellektual'nym pravam ot 6 nojabrja 2013 goda № S01-162/2013 po delu № A73-14263/2012 [SIP Resolution No. S01-162/2013 of November 6, 2013, on Case No. A73-14263/2012]] – 'to receive legal protection, a work [of literature – *A.K.*] must be creative, i.e., original (unique)'; Постановление Суда по интеллектуальным правам от 25 августа 2014 года № С01-543/2014 по делу № А12-18806/2013 [Postanovlenie Suda po intellektual'nym pravam ot 25 avgusta 2014 goda № S01-543/2014 po delu A12-18806/2013 [SIP Resolution No. S01-543/2014 of August 25, 2014, on Case No. A12-18806/2013] – 'the main criterion for distinguishing a creative work from a work of manufacturing or production is the uniqueness of its result' (a work of cartography);

Постановление Суда по интеллектуальным правам от 12 августа 2015 года № С01-632/2015 по делу № А56-55404/2014 [Postanovlenie Suda po intellektual'nym pravam ot 12 avgusta 2015 goda № S01-632/2015 po delu № A56-55404/2014 [SIP Resolution No. S01-632/2015 of August 12, 2015 on Case No. A56-55404/2014] (a work of cartography); Постановление Суда по интеллектуальным правам от 23 января 2015 года № С01-7/2014 по делу № А60-17048/2013 [Postanovlenie Suda po intellektual'nym pravam ot 23 janvarja 2015 goda № S01-7/2014 po delu № A60-17048/2013 [SIP Resolution No. C01-7/2014 of January 23, 2015, on Case No. A60-17048/2013]] – 'to receive legal protection, a work must be creative, i.e., original (unique)' (indices of changes to construction costs); Решение Суда по интеллектуальным правам от 29 августа 2014 года по делу № СИП-615/2014 [Reshenie Suda po intellektual'nym pravam ot 29 avgusta 2014 goda po delu № SIP-615/2014 [SIP Decision of August 29, 2014, on Case No. SIP-615/2014]] (invented title of a scholarly work).

[43] *See*, e.g., Определение Московского городского суда от 3 ноября 2015 года № 4г/8-11086/2015 [Opredelenie Moskovskogo gorodskogo suda ot 3 nojabrja 2015 goda № 4g/8-11086/2015 [Moscow City Court Judgment No. 4g/8-11086/2015 of November 3, 2015]]; Апелляционное определение Московского областного суда от 16 апреля 2014 года по делу № 33-6628/2014 [Apelljacionnoe opredelenie Moskovskogo oblastnogo suda ot 16 aprelja 2014 goda po delu № 33-6628/2014 [Appellate Judgment of the Moscow Regional Court of April 16, 2014, on Case No. 33-6628/2014]]; Кассационное определение Московского гордоского суда от 23 сентября 2013 года № 4г/2-9280/13 [Kassacionnoe opredelenie Moskovskogo gordoskogo suda ot 23 sentjabrja 2013 goda № 4g/2-9280/13 [Moscow City Court Cassationary Judgment No. 4g/2-9280/13 of September 23, 2013]].

Finally, there have been indications that the Supreme Court has recently begun to use higher standards of protectability than those used by the SIP.[44] However, one should not overestimate this trend as references to Clause 28 of Resolution 5/29 occur in the rulings of top-level courts more often.

3.2. Standards of Creativity for Individual Types of Work

There are comparatively few instances in which courts use specific detailed creativity criteria for specific types of work, and so a court usually has to base its conclusions on indirect data such as the character of a work and its possible inclusion of content belonging to the public domain.

Analysis of practice reveals the following trends.

First of all, the overall tendency to lower creativity standards as a result of the use of the abovementioned general criteria for protectability remains in place and is gaining momentum. The drastic lowering of copyrightability standards and the increasingly wide-scale rejection of suits based on allegations of use of non-original and non-novel content with references to Clause 28 of Resolution 5/29 eliminates any need for setting detailed standards of this kind. For this reason, rulings that directly try to establish minimal standards of copyrightability have become much less frequent.

Rulings of this kind are extremely rare and are usually motivated by a desire to avoid the monopolization of content belonging to the public domain. However, on the whole, they represent a contradictory and unsystematic practice.

Courts extremely rarely set special protectability requirements for works of high authorship, primarily *works of literature, music, painting and sculpture, and audiovisual works.* Normally, there is no need to prove that such works are creative. However, there are instances where higher protectability standards are used for such works.

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[44] *See*, e.g., Обзор судебной практики по делам, связанным с разрешением споров о защите интеллектуальных прав. Секция 3, 9 (утвержден Президиумом Верховного Суда Российской Федерации 23 сентября 2015 года) [Obzor sudebnoj praktiki po delam, svjazannym s razresheniem sporov o zashhite intellektual'nyh prav. Cekcija 3, 9 (utverzhden Prezidiumom Verhovnogo Suda Rossijskoj Federacii 23 sentjabrja 2015 goda) [Sections 3 and 9 of *Review of the Judicial Practice for Dealing with Disputes over the Protection of Intellectual Rights,* approved by the Presidium of the Supreme Court on September 23, 2015]]; Определение Судебной коллегии по гражданским делам Верховного суда РФ от 23 июня 2015 года № 5-КГ15-58 [Opredelenie Sudebnoj kollegii po grazhdanskim delam Verhovnogo suda RF ot 23 ijunja 2015 goda № 5-KG15-58 [Supreme Court Judgment No. 5-KG15-58 of June 23, 2015 (Division for Civil Cases)]]; Определение Судебной коллегии по административным делам Верховного Суда РФ от 22 сентября 2014 года № 117-АПГ 14-2 [Opredelenie Sudebnoj kollegii po administrativnym delam Verhovnogo Suda RF ot 22 sentjabrja 2014 goda № 117-APG 14-2 [Supreme Court Judgment No. 117-APG 14-2 of September 22, 2014 (Division for Administrative Cases)]]; Определение Судебной коллегии по экономическим спорам Верховного Суда РФ от 11 июня 2015 года № 309-ЭС14-7875 по делу № А50-21004/2013 [Opredelenie Sudebnoj kollegii po jekonomicheskim sporam Verhovnogo Suda RF ot 11 ijunja 2015 goda № 309-ES14-7875 po delu № A50-21004/2013 [Supreme Court Judgment No. 309-ES14-7875 of June 11, 2015, on Case No. A50-21004/2013 (Division for Economic Disputes)]].

This usually happens if there is a significant non-creative aspect to such a work with a consequent risk of monopolization of public domain content. A literary work cannot be protected if it is just a media article with brief factual information, e.g., a description of a city.[45] One ruling stated that Subclause 4 of Clause 6 of Article 1259 of the Civil Code, which prohibits the protection of factual reports, only applies to what is essentially media information and, for that reason, is neither original nor unique, and not the result of creative effort. However, this rule does not extend to creative forms of presenting such information, including presenting it in the form of a compilation, e.g., a collection of indices of revised construction costs.[46] At the same time, a ruling on a similar dispute says that, as there exist numerous organizations that create similar content, the claimant should have proven that their content was original and unique as distinct from content produced by others. A claim that unique calculation methods had been used in compiling indices of revised construction costs was dismissed.[47]

In a new trend, lower standards of protectability are used for works of low authorship. It happens much less frequently that special requirements of creativity are set for such works, whose creation is based on considerations of functionality, on generally accepted standards of various kinds, on public domain content, or on other factors ruling out creativity. Works of this kind are usually *a priori* considered protectable, and no proof is required of their copyrightability. They are assumed to belong to some of the listed protectable types and presumed to be creative, and the novelty, uniqueness and originally criteria are considered to be irrelevant in dealing with them. There are very rare instances where courts examine suspected

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[45] Постановление Суда по интеллектуальным правам от 24 апреля 2015 года № С01-305/2015 по делу № А46-10011/2014 [Postanovlenie Suda po intellektual'nym pravam ot 24 aprelja 2015 goda № S01-305/2015 po delu № A46-10011/2014 [SIP Resolution No. S01-305/2015 of April 24, 2015, on Case No. A46-10011/2014]].

[46] *See* Постановление Девятого арбитражного апелляционного суда от 1 августа 2014 года № 09АП-13978/2014-ГК, 09АП-27393/2014-ГК по делу № А40-96413/2012 [Postanovlenie Devjatogo arbitrazhnogo apelljacionnogo suda ot 1 avgusta 2014 goda № 09AP-13978/2014-GK, 09AP-27393/2014-GK po delu № A40-96413/2012 [Resolution of the Ninth Arbitrazh Court of Appeal No. 09AP-13978/2014-GK, 09AP-27393/2014-GK of August 1, 2014, on Case No A40-96413/2012]]. The SIP upheld this resolution by Постановление Суда по интеллектуальным правам от 25 ноября 2014 года № С01-1132/2014 [Postanovlenie Suda po intellektual'nym pravam ot 25 nojabrja 2014 goda № S01-1132/2014 [Resolution No. S01-1132/2014 of November 25, 2014]]. See also Постановление Девятого арбитражного апелляционного суда от 19 марта 2013 года № 09АП-5127/2013-ГК, 09АП-5128/2013-ГК по делу № А40-132543/11-26-1032 [Postanovlenie Devjatogo arbitrazhnogo apelljacionnogo suda ot 19 marta 2013 goda № 09AP-5127/2013-GK, 09AP-5128/2013-GK po delu № A40-132543/11-26-1032 [Resolution of the Ninth Arbitrazh Court of Appeal No. 09AP-5127/2013-GK, 09AP-5128/2013-GK of March 19, 2013, on Case No. A40-132543/11-26-1032]].

[47] Постановление Суда по интеллектуальным правам от 23 января 2015 года № С01-7/2014 по делу № А60-17048/2013 [Postanovlenie Suda po intellektual'nym pravam ot 23 janvarja 2015 goda № S01-7/2014 po delu № A60-17048/2013 [SIP Resolution No. S01-7/2014 of January 23, 2015, on Case No. A60-17048/2013]].

monopolization of public domain content – this happens if a defendant provides evidence of this.

As regards *works of design,* reproducing essential characteristics of such a work (e.g., a font design) is a violation of exclusive rights.[48]

Hence, the presence of differences is insufficient for a work to be considered an independent creation. On the other hand, use of standard fonts in a work of graphic design cannot be a reason to qualify such a work as non-creative.[49]

As I can see, protection is only granted to works of design if they possess distinctive characteristics. A conclusion on whether a disputed design is creative must be based on the examination of individual elements, their mutual arrangement, their distance from one another, etc., but not on the overall similarity or dissimilarity of this design to another. The stylistic similarity of two designs cannot *per se* be evidence that one of them is not creative.[50] Nor can the confusing similarity of designs be *per se* evidence of violation of exclusive rights.[51]

In disputes over *works of architecture, urban planning and landscaping,* functionality and general standards are factors that come into play much less frequently today. On the one hand, it is not a design documentation as a whole that is granted protection but the design itself (e.g., in an architectural project, the architectural design and the 'architectural part' of the documentation). Neither functional nor technological nor engineering solutions can be copyrightable *per se*.[52]

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[48] *See*, e.g., Постановление Девятого арбитражного апелляционного суда от 8 сентября 2014 года № 09АП-32019/2014-ГК по делу № А40-20099/2014 [Postanovlenie Devjatogo arbitrazhnogo apelljacionnogo suda ot 8 sentjabrja 2014 goda № 09AP-32019/2014-GK po delu № A40-20099/2014 [Resolution of the Ninth Arbitrazh Court of Appeal No. 09AP-32019/2014-GK of September 8, 2014, on Case No. A40-20099/2014]], upheld by Постановление Суда по интеллектуальным правам от 12 декабря 2014 года № С01-1268/2014 [Postanovlenie Suda po intellektual'nym pravam ot 12 dekabrja 2014 goda № S01-1268/2014 [SIP Resolution No. S01-1268/2014 of December 12, 2014]].

[49] Ruling No. VAS-9457/13 of the Supreme Court of Arbitrazh of the Russian Federation of September 2, 2013, on case A40-92833/2011.

[50] Постановление Девятого арбитражного апелляционного суда от 3 сентября 2015 года № 09АП-14070/2015-ГК по делу № А40-5706/14 [Postanovlenie Devjatogo arbitrazhnogo apelljacionnogo suda ot 3 sentjabrja 2015 goda № 09AP-14070/2015-GK po delu № A40-5706/14 [Resolution of the Ninth Arbitrazh Court of Appeal No. 09AP-14070/2015-GK of September 3, 2015, on Case No. A40-5706/14]].

[51] *See*, e.g., Постановление Суда по интеллектуальным правам от 1 июля 2015 года № С01-468/2015 по делу № А76-2656/2014 [Postanovlenie Suda po intellektual'nym pravam ot 1 ijulja 2015 goda № S01-468/2015 po delu № A76-2656/2014 [SIP Resolution No. S01-468/2015 of July 1, 2015, on Case No. A76-2656/2014]] (website designs) and Постановление Суда по интеллектуальным правам от 18 мая 2015 года № С01-265/2015 по делу № А76-12136/2014 [Postanovlenie Suda po intellektual'nym pravam ot 18 maja 2015 goda № S01-265/2015 po delu № A76-12136/2014 [SIP Resolution No. S01-265/2015 of May 18, 2015, on Case No. A76-12136/2014]] (furniture design).

[52] Постановление Суда по интеллектуальным правам от 22 июля 2014 года № С01-661/2014 по делу № А40-97747/2012 [Postanovlenie Suda po intellektual'nym pravam ot 22 ijulja 2014 goda № S01-661/2014 po delu № A40-97747/2012 [SIP Resolution No. S01-661/2014 of July 22, 2014, on Case No. A40-97747/2012]].

In a dispute over an architectural design, the architectural solution underlying a disputed design must be compared with the solution underlying the earlier design in order to detect possible unauthorized borrowing, regardless of the character of the existing or planned physical embodiment of either solution.[53]

However, architectural solutions are only required to meet comparatively low standards in order for them to be protectable. Coincidences in the 'architectural parts' of documentation on two construction projects are sufficient to qualify one of the architectural designs as a deliberate replication of the other and a violation of exclusive rights. Differences and possibilities of parallel creation are not taken into account.[54] In one case, the defendant claimed that they had had no access to the architectural solution that was partially replicated by their own solution and that it was non-unique solutions that coincided. But the court neither verified those claims nor checked whether the coinciding solutions were public domain content (an architectural solution is essentially an idea). This means that a disputable work that is likely to have an insignificant creative aspect receives quite extensive protection with consequent risks of monopolization of public domain content.[55]

Another trend that remains is that of setting minimal standards of copyrightability for *works of cartography*.[56] Until now, the SIP has denied protection to maps that stated facts purely and simply. Only maps that are stylized depictions and are products of creative effort are copyrightable. Therefore, the fact that two maps record the same factual data does not represent a violation of exclusive rights.[57] Maps based purely on geodetic data are considered the results of technical work and are not copyrightable.[58] However, in a recent judgment, the Supreme Court said that

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53 *Id*.

54 Постановление Суда по интеллектуальным правам от 18 декабря 2015 года № С01-383/2014 по делу № А60-10618/2011 [Postanovlenie Suda po intellektual'nym pravam ot 18 dekabrja 2015 goda № S01-383/2014 po delu № A60-10618/2011 [SIP Resolution No. S01-383/2014 of December 18, 2015, on Case No. A60-10618/2011]].

55 On the other hand, in some cases lower courts set relatively high creativity standards for architectural works. See, e.g., Апелляционное определение Московского областного суда от 16 апреля 2014 года по делу № 33-6628/2014 [Apelljacionnoe opredelenie Moskovskogo oblastnogo suda ot 16 aprelja 2014 goda po delu № 33-6628/2014 [Moscow Regional Court's Appellate Judgment of April 16, 2014 on Case No. 33-6628/2014]].

56 *See*, e.g., Постановление Суда по интеллектуальным правам от 30 сентября 2015 года № С01-803/2015 по делу № А56-55409/2014 [Postanovlenie Suda po intellektual'nym pravam ot 30 sentjabrja 2015 goda № S01-803/2015 po delu № A56-55409/2014 [SIP Resolution No. S01-803/2015 of September 30, 2015, on Case No. A56-55409/2014]].

57 Постановление Суда по интеллектуальным правам от 12 августа 2015 года № С01-632/2015 по делу № А56-55404/2014 [Postanovlenie Suda po intellektual'nym pravam ot 12 avgusta 2015 goda № S01-632/2015 po delu № A56-55404/2014]].

58 Постановление Суда по интеллектуальным правам от 25 августа 2014 года № С01-543/2014 по делу А12-18806/2013 [Postanovlenie Suda po intellektual'nym pravam ot 25 avgusta 2014 goda № S01-543/2014 po delu № A12-18806/2013 [SIP Resolution No. S01-543/2014 of August 25, 2014, on Case No. A12-18806/2013]].

geodetic and cartographic activities may involve both technical work and scientific research, i.e., creative effort. This means that the coordinates systems of the State Geodetic Network and maps based on them may be copyrightable.[59] This represents a drastic lowering of creativity standards for cartographic content.

Creativity standards have also been lowered in relation to *photographs,* with neither the *vorgegebenheit* ('pre-givenness') factor nor the possibility of independent parallel creation being taken into account. It is the dominant principle that any photograph or video recording is creative work, that the author of a photograph or video recording is to automatically and unconditionally acquire copyright to it regardless of its esthetic value, unless the exclusive rights to it are challenged successfully.

The following operations represent a photographer's creative work: choice of exposure; the spatial positioning of the person or object to be photographed; the photographer's own spatial positioning; the choice of lighting and/or adjustment of the photographer or object of photography to available lighting; the choice of the light filter for the camera lens; setting the shutter speed; aperture control; setting the definition level; film development (for film cameras); and photoshopping (for digital cameras).[60]

3.3. Factors Ruling Out the Creative Character of a Work. Public Domain Content

With the significant lowering of creativity standards and consequent risks of monopolization of public domain content and overprotection, one would have expected that a wider range of works would be denied protection and that a more

[59] Определение Верховного Суда РФ от 8 апреля 2015 года № 306-ЭС14-5432 по делу № А12-18806/2013 [Opredelenie Verhovnogo Suda RF ot 8 aprelja 2015 goda № 306-ES14-5432 po delu № A12-18806/2013 [Supreme Court Judgment No. 306-ES14-5432 of April 8, 2015, on Case No. A12-18806/2013]]; *see* also Обзор судебной практики по делам, связанным с разрешением споров о защите интеллектуальных прав. Секция 60 (утвержден Президиумом Верховного суда Российской Федерации 23.09.2015) [Obzor sudebnoj praktiki po delam, svjazannym s razresheniem sporov o zashhite intellektual'nyh prav. Sektsija 60 (utv. Prezidiumom Verhovnogo Suda RF 23.09.2015) [Section 60 of *Review of Judicial Practice in Dealing with Disputes on the Protection of Intellectual Rights,* approved by the Presidium of the Supreme Court on September 23, 2015]].The subsequent practice of the SIP has complied with this judgment of the Supreme Court (*see* Постановление Суда по интеллектуальным правам от 9 декабря 2015 года № С01-1034/2015 по делу № А08-1560/2014 [Postanovlenie Suda po intellektual'nym pravam ot 9 dekabrja 2015 goda № S01-1034/2015 po delu № A08-1560/2014 [SIP Resolution No. S01-1034/2015 of December 9, 2015, on Case No. A08-1560/2014]]).

[60] Постановление Суда по интеллектуальным правам от 21 марта 2014 года № С01-506/2013 по делу № А56-27251/2013 [Postanovlenie Suda po intellektual'nym prvam ot 21 marta 2014 goda № S01-506/2013 po delu № A56-27251/2013 [SIP Resolution No. S01-506/2013 of March 21, 2014, on Case No. A56-27251/2013]]; Апелляционное определение Московского городского суда от 26 июня 2014 года по делу № 33-23351 [Apelljacionnoe opredelenie Moskovskogo gorodskogo suda ot 26 ijunja 2014 goda po delu № 33-23351 [Moscow City Court judgment of June 26, 2014, on Appeal Case No. 33-23351]].

sophisticated methodology would be developed to detect public domain content in intellectual property.[61]

However, neither has happened. In many cases, the rigid application of the creativity presumption under Clause 28 of Resolution 5/29 and the thesis of irrelevance of the novelty, uniqueness and originality criteria leave no room for claims that public domain content has been used.[62]

One outcome of this practice is the significant reduction in the number of rulings that deny protection to a work for the above reasons, that deal with factors excluding the creative character of a work, and that are attempts to develop protection to a level where there is an optimum balance between monopolized intellectual property and public domain content and there remain guarantees of sufficient resources for third parties to create new works.

Another effect is that the range of content identifiable as belonging to the public domain has narrowed as a result of a methodological revision. For instance, the SIP gives a narrow interpretation of Subclause 4 of Clause 6 of Article 1259 of the Civil Code by arguing that it only applies to media reports and does not apply to possible creative characteristics of such reports.[63]

Courts argue that the reasons for content to be qualified as non-creative include the informational character of a text;[64] the possibility of qualifying identical elements in two works as parts of their subject matter[65] or as methods, ideas or effects of actions

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[61] In the past, in denying protection to works, courts have either cited the thesis in Clause 5 of Article 1259 of the Civil Code that expression of general ideas in a work is uncopyrightable or qualified a work or an element of it as a simple record of events or facts and hence unprotectable under Subclause 4 of Clause 6 of Article 1259, or simply cited what was assumed to be evidence of the non-creative character of a work.

[62] *See,* e.g., Постановление Суда по интеллектуальным правам от 18 декабря 2015 года № С01-383/2014 по делу № А60-10618/2011 [Postanovlenie Suda po intellektual'nym pravam ot 18 dekabrja 2015 goda № S01-383/2014 po delu № A60-10618/2011 [SIP Resolution No. S01-383/2014 of December 18, 2015, on Case No. A60-10618/2011]]; Постановление Суда по интеллектуальным правам от 24 апреля 2015 года № С01-257/2015 по делу № А40-19843/2014 [Postanovlenie Suda po intellektual'nym pravam ot 24 aprelja 2015 goda № S01-257/2015 po delu № A40-19843/2014 [SIP Resolution No. S01-257/2015 of April 24, 2015, on Case No. A40-19843/2014]]; Постановление Суда по интеллектуальным правам от 24 апреля 2015 года № С01-658/2014 по делу № А12-30345/2013 [Postanovlenie Suda po intellektual'nym pravam ot 24 aprelja 2015 goda № S01-658/2014 po delu № A12-30345/2013 [SIP Resolution No. S01-658/2014 of July 29, 2014, on Case No. A12-30345/2013]].

[63] Постановление Суда по интеллектуальным правам от 25 ноября 2014 года № С01-1132/2014 по делу № А40-96413/2012 [Postanovlenie Suda po intellektual'nym pravam ot 25 nojabrja 2014 goda № S01-1132/2014 po delu № A40-96413/2012 [SIP Resolution No. S01-1132/2014 of November 25, 2014, on Case A40-96413/2012]].

[64] Постановление Федерального арбитражного суда Московского округа от 10 сентября 2012 по делу № А40-83853/11-51-730 [Postanovlenie Federal'nogo arbitrazhnogo suda Moskovskogo okruga ot 10 sentjabrja 2012 po delu № A40-83853/11-51-73 [Resolution of the Federal Court of Arbitrazh of the Moscow District of September 10, 2012, on Case A40-83853/11-51-730]].

[65] Апелляционное определение Московского городского суда от 18 апреля 2014 года по делу № 33-12780 [Apelljacionnoe opredelenie Moskovskogo gorodskogo suda ot 18 aprelja 2014 goda po delu № 33-12780 [The Moscow City Court judgment of April 18, 2014, on Appeal Case No. 33-12780]].

that were needed for the creation of a work;[66] the general availability of a work;[67] the existence of identical works created by a significant number of persons;[68] use of universally known facts as the basis for a work;[69] the purely functional or technical character of content; the use of a strict algorithm based on statutory standards for the creation of a work;[70] and the use of techniques that are normally used in creating any work of decorative or applied art.[71]

This is not the full list. Court rulings citing such factors tend to be extremely casuistic and the judgments they contain cannot always be used in similar disputes. If any content was widely known[72] and popular[73] before its publication under the claimant's name, it cannot be refused protection for that reason alone.

There is also the problem of indirect monopolization of public domain content, i.e., situations where some specific content may take only one standard form or a limited number of standard forms, and so protecting such content, which may have been created independently and may even be novel, would limit public

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66 Постановление Суда по интеллектуальным правам от 8 мая 2015 года № С01-320/2015 по делу № А40-84902/2014 [Postanovlenie Suda po intellektual'nym pravam ot 8 maja 2015 goda № S01-320/2015 po delu № A40-84902/2014 [SIP Resolution No. S01-320/2015 of May 8, 2015, on Case No. A40-84902/2014]].

67 Решение Верховного суда РФ от 23 июня 2015 года № 5-КГ15-58 [Reshenie Verhovnogo suda RF ot 23 ijunja 2015 goda № 5-KG15-58 [Supreme Court Judgment No. 5-KG15-58 of June 23, 2015]].

68 Постановление Суда по интеллектуальным правам от 23 января 2015 года № С01-7/2014 по делу № А60-17048/2013 [Postanovlenie Suda po intellektual'nym pravam ot 23 janvarja 2015 goda № S01-7/2014 po delu № A60-17048/2013 [SIP Resolution No. S01-7/2014 of January 23, 2015, on Case No. A60-17048/2013]].

69 Постановление Суда по интеллектуальным правам от 12 августа 2015 года № С01-632/2015 по делу № А56-55404/2014 [Postanovlenie Suda po intellektual'nym pravam ot 12 avgusta 2015 goda № S01-632/2015 po delu № A56-55404/2014 [SIP Resolution No. S01-632/2015 of August 12, 2015 on Case No. A56-55404/2014]].

70 Постановление Суда по интеллектуальным правам от 22 июля 2014 года № С01-661/2014 по делу № А40-97747/2012 [Postanovlenie Suda po intellektual'nym pravam ot 22 ijulja 2014 goda № S01-661/2014 po delu № A40-97747/2012 [SIP Resolution No. S01-661/2014 of July 22, 2014, on Case No. A40-97747/2012]].

71 Постановление Девятого арбитражного апелляционного суда от 3 сентября 2015 года № 09АП-14070/2015-ГК по делу № А40-5706/14 [Postanovlenie Devjatogo arbitrazhnogo apelljacionnogo suda ot 3 sentjabrja 2015 goda № 09AP-14070/2015-GK po dely A40-5706/14 [Resolution of the Ninth Arbitrazh Court of Appeal No. 09AP-14070/2015-GK of September 3, 2015, on Case No. A40-5706/14]].

72 Постановление Суда по интеллектуальным правам от 29 июля 2014 года № С01-658/2014 по делу № А12-30345/2013 [Postanovlenie Suda po intellektual'nym pravam ot 29 ijulja 2014 goda № S01-658/2014 po delu № A12-30345/2013 [SIP Resolution No. S01-658/2014 of July 29, 2014, on Case No. A12-30345/2013]].

73 Определение Верховного Суда РФ от 9 сентября 2014 года № 30-АПГ14-6 [Opredelenie Verhovnogo Suda RF ot 9 sentjabrja 2014 goda № 30-APG14-6 [Supreme Court Judgment No. 30-APG14-6 of September 9, 2014]].

opportunities to make use of it.[74] This problem is still not yet clearly formulated in Russian judicial practice.

To sum up, the methodology for determining whether particular content belongs to the public domain is thin on the ground, and courts do not have any hard-and-fast guidelines for detecting factors ruling out the creative character of a work. I believe that this, on top of the exclusion of the possibility of parallel creation, often results in overprotection in the form of granting exclusive rights to standard or generally accessible, non-creative content, which, in turn, puts unjustified restrictions on genuinely creative activities. Moreover, it makes the legal status of genuinely creative authors unpredictable as it lays the basis for unintended copyright violations with consequent penalties.

3.4. Protection of Minor Works of Art and Literature and of Parts of Works. Scopes of Protection

The protection of minor works of art and literature and of parts of works such as the title of a novel or individual phrases acquires fundamental importance because, on top of the general lowering of creativity criteria, the exclusion of non-creative elements such as art techniques, individual words or set phrases from protectable categories makes it possible to avoid the monopolization of public domain content. A similar problem may arise in disputes over allegedly borrowed content if there are differences between two works and it is alleged that one of them, or part of it, is content that has been borrowed and revised.

In analyzing earlier Russian practice, I pointed out that, regardless of whether the author of such allegedly borrowed content was able to prove that they had created that content independently, courts would often deny it protection, arguing that the claimant had failed to prove that the content was the result of their independent creative effort and, therefore, met the novelty, originality or uniqueness criteria. This setting of a relatively high standard of protectability could have prevented the monopolization of public domain content.

The practice of recent years cannot be called either uncontradictory or consistent. Nevertheless, its rigid and unselective lowering of creativity criteria on top of inadequate methodology for detecting public domain content has brought two trends into being. One of them is the lowering of the protectability standards for minor works of art and literature or parts of such works, with no account taken of their possible originality, novelty or uniqueness or, alternatively, of their possible derivative character. The other is a tendency to monopolize generally accessible content, including ideas expressed in a work. This has resulted in works of low

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[74] In the United States, the chief means of averting such risks is 'merger doctrine' (see *Herbert Rosenthal Jewelry Corp. v. Kalpakian*, 446 F.2d 738, 742 (9 Cir. 1971); Melville Nimmer, David Nimmer, *Id.,* § 13.03 [B] [3]. In Germany, the method is the above-described doctrine on the range of an author's resources to create an original work (see Christina Berking, *Id*., at 75).

authorship receiving unjustifiably large scopes of protection, so that a court will quite often find that mere coincidence or similarity between two works represents a violation of copyright and will not even attempt to find out whether the work qualified as an unauthorized replication has involved any independent creative effort or whether the matching or similar content belongs to the public domain.

As regards creativity standards for parts of works, courts of general jurisdiction have normally been more demanding than arbitrazh courts. On the one hand, *titles of works of literature* and *individual phrases* that may be used independently are considered creative and original, and hence copyrightable.[75] *Separate words* are not considered copyrightable.[76]

On the other hand, the SIP qualifies titles of literary works as protectable if they cannot be qualified as either borrowed content or publicly accessible content or deliberate replications.[77]

Special, comparatively high standards are set for *characters in works of art and literature.* Copyright disputes over characters are some of the SIP's most frequent cases. Until recently, minimal creativity standards had been set for characters – they were usually granted protection under Clause 7 of Article 1259 of the Civil Code. However, the Supreme Court said in a judgment that a claim for the protection of a character as an element of a work must be based on proof that such a character is an independent result of intellectual effort. For instance, protection may be given to the hero of a novel that possesses a set of characteristics distinguishing him or her from the other characters in it and making him or her original and recognizable.[78] Nevertheless, there is no record of lower courts checking characters for such characteristics.[79]

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[75] *See* Определение Верховного суда РФ от 23 июня 2015 года № 5-КГ15-58 [Opredelenie Verhovnogo suda ot 23 ijunja 2015 goda № 5-KG15-58 [Supreme Court Judgment No. 5-KG15-58 of June 23, 2015]] (Judgment of the Civil Cases Division).

[76] *See* Определение Верховного суда РФ от 13 октября 2012 года № 29-АПГ12-4 [Opredelenie Verhovnogo suda ot 13 oktjabrja 2012 goda № 29-APG12-4 [Supreme Court Judgment No. 29-APG12-4 of October 13, 2012]] (Judgment of the Administrative Cases Division).

[77] Постановление Суда по интеллектуальным правам от 14 мая 2015 года № С01-277/2015 по делу № А40-51226/2014 [Postanovlenie Suda po intellektual'nym pravam ot 14 maja 2015 goda № S01-277/2015 po delu № A40-51226/2014 [SIP Resolution No. S01-277/2015 of May 14, 2015, on Case No. A40-51226/2014]].

[78] Обзор судебной практики по делам, связанным с разрешением споров о защите интеллектуальных прав. Пункт 9 (утвержден Президиумом Верховного суда Российской Федерации 23.09.2015) [Obzor sudebnoj praktiki po delam, svjazannym s razresheniem sporov o zashhite intellektual'nyh prav. Punkt 9 (utv. Prezidiumom Verhovnogo Suda RF 23.09.2015) [Clause 9 of *Review of Judicial Practice in Dealing with Disputes on the Protection of Intellectual Rights,* approved by the Presidium of the Supreme Court on September 23, 2015]]; Определение Верховного суда РФ от 11 июня 2015 года № 309-ЭС14-7875 по делу № А50-21004/2013 [Opredelenie Verhovnogo suda ot 11 ijunja 2015 goda № 309-ES14-7875 po delu № A50-21004/2013 [Supreme Court Judgment No. 309-ES14-7875 of June 11, 2015, on Case No. A50-21004/2013]].

[79] Постановление Суда по интеллектуальным правам от 4 августа 2015 года № С01-948/2014 по делу № А50-21004/2013 [Postanovlenie Suda po intellektual'nym pravam ot 4 avgusta 2015 goda № S01-948/2014 po delu № A50-21004/2013 [SIP Resolution No. S01-948/2014 of August 4, 2015, on the case No. A50-21004/2013]], on which the Supreme Court issued the above-cited judgment is an exception.

Drawings showing literary characters that are likely to be confused with each other cannot be qualified as violations of exclusive rights. Such criterion does not apply here in the sense it is used in trademark disputes. If two drawings are similar but are not identical coherent systems of images, the copyright to the original drawing cannot be considered violated.[80] At the very least, a court would have to find out which specific elements, e.g., the character's image or the theme, had been borrowed and base its qualification on this.[81] As I can see, relatively low creativity standards are set for a newly created character to be protectable (the existence of differences).

Essentially the same principles are used for *photographs*. The majority of copyright disputes over photographs stem from the replication of photographs. Elements of a photograph cannot be the sources of such disputes, and a photograph is protectable if it is not an exact copy of another. So photographs receive minimal scopes of protection.[82]

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[80] Постановление Суда по интеллектуальным правам от 25 декабря 2015 года № С01-1076/2015 по делу № А51-5983/2015 [Postanovlenie Suda po intellektual'nym pravam ot 25 dekabrja 2015 goda № S01-1076/2015 po delu № A51-5983/2015 [SIP Resolution No. S01-1076/2015 of December 25, 2015, on Case No. A51-5983/2015]].

[81] Постановление Суда по интеллектуальным правам от 30 июля 2014 года № С01-670/2014 по делу № А40-108107/2013 [Postanovlenie Suda po intellektual'nym pravam ot 30 ijulja 2014 goda № S01-670/2014 po delu № A40-108107/2013 [SIP Resolution No. S01-670/2014 of July 30, 2014, on Case No. A40-108107/2013]].

[82] *See*, e.g., Определение Высшего арбитражного суда РФ от 10 сентября 2012 года № ВАС-9300/12 по делу № А60-39303/2010 [Opredelenie Vysshego arbitrazhnogo suda RF ot 10 sentjabrja 2012 goda № VAS-9300/12 po delu № A60-39303/2010 [Ruling No. VAS-9300/12 of the Supreme Court of Arbitrazh of the Russian Federation of September 10, 2012, on Case No. A60-39303/2010]]; Постановление Суда по интеллектуальным правам от 18 января 2016 года № С01-1286/2014 по делу № А40-169281/2013 [Postanovlenie Suda po intellektual'nym pravam ot 18 janvarja 2016 goda № S01-1286/2014 po delu № A40-169281/2013 [SIP Resolution No. S01-1286/2014 of January 18, 2016, on Case No. A40-169281/2013]]; Постановление Суда по интеллектуальным правам от 12 ноября 2015 года № С01-910/2015 по делу № А40-98130/2014 [Postanovlenie Suda po intellektual'nym pravam ot 12 nojabrja 2015 goda № S01-910/2015 po delu № A40-98130/2014 [SIP Resolution No. S01-910/2015 of November 12, 2015, on Case No. A40-98130/2014]]; Постановление Суда по интеллектуальным правам от 20 ноября 2012 года № 8953/12 по делу № А40-82533/11-12-680 [Postanovlenie Suda po intellektual'nym pravam ot 20 nojabrja 2012 goda № 8953/12 po delu № A40-82533/11-12-680 [SIP Resolution No. 8953/12 of November 20, 2012, on Case No. A40-82533/11-12-680]]; Постановление Суда по интеллектуальным правам от 7 сентября 2015 года № С01-739/2015 по делу № А34-7366/2014 [Postanovlenie Suda po intellektual'nym pravam ot 7 sentjabrja 2015 goda № S01-739/2015 po delu № A34-7366/2014 [SIP Resolution No. S01-739/2015 of September 7, 2015, on Case No. A34-7366/2014]]; Постановление Суда по интеллектуальным правам от 15 июня 2015 года № С01-484/2015 по делу № А57-2146/2014 [Postanovlenie Suda po intellektual'nym pravam ot 15 ijunja 2015 goda № S01-484/2015 po delu № A57-2146/2014 [SIP Resolution No. S01-484/2015 of June 15, 2015, on Case No. A57-2146/2014]]; Постановление Суда по интеллектуальным правам от 26 мая 2015 года № С01-403/2015 по делу № А57-14087/2014 [Postanovlenie Suda po intellektual'nym pravam ot 26 maja 2015 goda № S01-403/2015 po delu № A57-14087/2014 [SIP Resolution No. S01-403/2015 of May 26, 2015, on Case No. A57-14087/2014]]; Постановление Суда по интеллектуальным правам от 30 сентября 2015 года № С01-757/2015 по делу № А43-23561/2014 [Postanovlenie Suda po intellektual'nym pravam ot 30 sentjabrja 2015 goda № S01-757/2015 po delu № A43-23561/2014 [SIP Resolution No. S01-757/2015 of September 30, 2015, on Case No. A43-23561/2014]].

There are more complicated cases where it is impossible to establish whether one photograph is an exact copy of another, for instance, if both were taken from the same position. There have been rulings on such cases where one photograph was qualified as a violation of copyright, which meant a greater degree of protection than protection from exact replication.[83]

Protection of elements of works of *design* is controversial. On the one hand, similarities and coincidences or the copying of elements are not enough for exclusive rights to be declared violated.[84] On the other hand, if an original design has differences from a design whose copyright status is disputed, it is not enough to consider the latter an independent creation. The reproduction of characteristics of the original design in the disputed one may be evidence of violation of exclusive rights[85] but it does not in and of itself preclude the latter design from being protectable.[86]

So the degree of originality of designs is supposed to betaken into account in copyright disputes.

However, in recent years an increasingly common practice has been to give large scopes of protection to works or elements of works that were either of insignificant creative value or replicated generally accessible designs or elements, or expressed ideas that were expressed in earlier works. For example, the use of a *sentence* similar to an earlier sentence in structure, vocabulary and general content has been qualified as a violation of exclusive rights in some cases.[87] Coincidences between elements

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[83] Постановление Первого арбитражного апелляционного суда от 7 июня 2012 года № 01АП-2140/2012 по делу № А11-7029/2011 [Postanovlenie Pervogo arbitrazhnogo apelljacionnogo suda ot 7 ijunja 2012 goda № 01AP-2140/2012 po delu № A11-7029/2011 [Resolution of the First Arbitrazh Court of Appeal No. 01AP-2140/2012 of June 7, 2012, on Case No. A11-7029/2011]].

[84] *See* Постановление Суда по интеллектуальным правам от 1 июля 2015 года № С01-468/2015 по делу № А76-2656/2014 [Postanovlenie Suda po intellektual'nym pravam ot 1 ijulja 2015 goda № S01-468/2015 po delu № A76-2656/2014 [SIP Resolution No. S01-468/2015 of July 1, 2015, on Case No. A76-2656/2014]] (website designs); Постановление Суда по интеллектуальным правам от 18 мая 2015 года № С01-265/2015 по делу № А76-12136/2014 [Postanovlenie Suda po intellektual'nym pravam ot 18 maja 2015 goda № S01-265/2015 po delu № A76-12136/2014 [SIP Resolution No. S01-265/2015 of May 18, 2015, on Case No. A76-12136/2014]] (furniture designs).

[85] Постановление Девятого арбитражного апелляционного суда от 8 сентября 2014 года № 09АП-32019/2014-ГК по делу № А40-20099/2014 [Postanovlenie Devjatogo arbitrazhnogo apelljacionnogo suda ot 8 sentjabrja 2014 goda № 09AP-32019/2014-GK po delu № A40-20099/2014 [Resolution No. 09AP-32019/2014-GK of the Ninth Arbitrazh Court of Appeal of September 8, 2014, on Case No. A40-20099/2014]], which was upheld by Постановление Суда по интеллектуальным правам от 12 декабря 2014 года № С01-1268/2014 [Postanovlenie Suda po intellektual'nym pravam ot 12 dekabrja 2014 goda № S01-1268/2014 [SIP Resolution No. S01-1268/2014 of December 12, 2014]].

[86] Определение Высшего Арбитражного суда РФ от 2 сентября 2013 года № ВАС-9457/13 по делу № А40-92833/2011 [Opredelenie Vysshego Arbitrazhnogo suda RF ot 2 sentjabrja 2013 goda № VAS-9457/13 po delu № A40-92833/2011 [Ruling No. VAS-9457/13 of the Supreme Court of Arbitrazh of the Russian Federation of September 2, 2013, on case A40-92833/2011]].

[87] Определение Московского городского суда от 3 ноября 2015 года № 4г/8-11086/2015 [Opredelenie Moskovskogo gorodskogo suda ot 3 nojabrja 2015 goda № 4g/8-11086/2015 [Moscow City Court Judgment No. 4g/8-11086/2015 of November 3, 2015]].

of architectural solutions are considered sufficient for assertions that a violation of exclusive rights has taken place while differences are ignored and no attempts are made to find out whether the replications represent content that belongs to the public domain and is unprotectable.[88] The understanding of an architectural solution as an idea provides the basis for the monopolization of public domain content since ideas are not usually considered protectable.[89]

Works of cartography are another source of controversial practice. On the one hand, similarities between maps due to their recording the same factual data cannot result in copyright violation verdicts.[90] This means that the scope of protection of maps depends on the degree of their originality, with no protection being considered for elements belonging to the public domain. However, there has been a practice of giving protection to coordinates published by the State Geodetic Network and to maps based on them, and this makes it possible to monopolize public domain content, and, moreover, give it a large scope of protection.[91]

To sum up, the degree of individuality of any content is hardly ever linked to the scope of protection it is given in Russian judicial practice. Moreover, there is an obvious trend to give extensive protection to works of low authorship with the result that courts consider similarity between two works to be a sufficient reason for a judgment that a copyright violation has taken place and do not try to find out how much of the replicated work is original or belongs to the public domain or is standard information.

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88 Постановление Суда по интеллектуальным правам от 18 декабря 2015 года № С01-383/2014 по делу № А60-10618/2011 [Postanovlenie Suda po intellektual'nym pravam ot 18 dekabrja 2015 goda № S01-383/2014 po delu № A60-10618/2011 [SIP Resolution No. S01-383/2014 of December 18, 2015, on Case No. A60-10618/2011]].

89 Постановление Суда по интеллектуальным правам от 14 сентября 2015 года № С01-669/2015 по делу № А60-7894/2014 [Postanovlenie Suda po intellektual'nym pravam ot 14 sentjabrja 2015 goda № S01-669/2015 po delu № A60-7894/2014 [SIP Resolution No. S01-669/2015 of September 14, 2015, on Case No. A60-7894/2014]].

90 Постановление Суда по интеллектуальным правам от 12 августа 2015 года № С01-632/2015 по делу № А56-55404/2014 [Postanovlenie Suda po intellektual'nym pravam ot 12 avgusta 2015 goda № S01-632/2015 po delu № A56-55404/2014 [SIP Resolution No. S01-632/2015 of August 12, 2015 on Case No. A56-55404/2014]].

91 Обзор судебной практики по делам, связанным с разрешением споров о защите интеллектуальных прав. Пункт 60 (утвержден Президиумом Верховного суда РФ 23 сентября 2015 года) [Obzor sudebnoj praktiki po delam, svjazannym s razresheniem sporov o zashhite intellektual'nyh prav. Punkt 60 (utverzhden Prezidiumom Verhovnogo suda RF 23 sentjabrja 2015 goda) [Clause 60 of *Review of Judicial Practice in Dealing with Disputes on the Protection of Intellectual Rights,* approved by the Presidium of the Russian Federation Supreme Court on September 23, 2015]]; Определение Верховного суда РФ от 8 апреля 2015 года № 306-ЭС14-5432 по делу № А12-18806/2013 [Opredelenie Verhovnogo suda ot 8 aprelja 2015 goda № 306-ES14-5432 po delu № A12-18806/2013 [Russian Federation Supreme Court Judgment No. 306-ES14-5432 of April 8, 2015, on Case No. A12-18806/2013]]; Постановление Суда по интеллектуальным правам от 9 декабря 2015 года № С01-1034/2015 по делу № А08-1560/2014 [Postanovlenie Suda po intellektual'nym pravam ot 9 dekabrja 2015 goda № S01-1034/2015 po delu № A08-1560/2014 [SIP Resolution No. S01-1034/2015 of December 9, 2015, on Case No. A08-1560/2014]].

De facto, this gives green light to the monopolization of public domain content.[92]

3.5. Burden of Proving the Creative Character of a Work. Standard of Proof

Until 2012, Russian courts had, on the whole, consistently applied the creativity presumption as prescribed by Clause 28 of Resolution 5/29. Claimants have not been required to prove the creative character of typical works of high authorship. But in disputes over works of low authorship, courts have quite often, on their own initiative, challenged the claimant to prove that such a work was creative regardless of whether the defendant provided evidence of the opposite.

In recent years, the SIP has been trying to end this practice. It has become normal for a court to order that the burden of proof be divided pursuant to Clause 14 of Resolution No. 15 of the Plenary Session of the Supreme Court of June 19, 2006, 'On Issues Arising in Courts in the Course of Civil Litigations in Connection with the Enforcement of Legislation on Copyright and Related Rights.' Clause 14 requires that the claimant prove their ownership of copyright and/or related rights and the unauthorized use of such rights by the defendant.[93] The work in question would be presumed to be creative under Clause 28 of Resolution 5/29, while the defendant

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[92] In the German system, the protection scope mechanism enshrined in § 24 of *UrhG* is used for such purposes. *See* Eugen Ulmer, *Id.* 265 ff. The U.S. system uses similar originality evaluation procedures – content is qualified as a replication if it has essential similarities to earlier content. See *Feist Publications, Inc. v. Rural Telephone Service Co*., 499 U.S. 340, 361 (1991).

[93] *See,* e.g., Определение Верховного суда РФ от 23 июня 2015 года № 5-КГ15-58 [Opredelenie Verhovnogo suda RF ot 23 ijunja 2015 goda №5-KG15-58 [Russian Federation Supreme Court Judgment No. 5-KG15-58 of June 23, 2015]]; Постановление Суда по интеллектуальным правам от 9 февраля 2016 года № С01-1176/2015 по делу № А33-24660/2014 [Postanovlenie Suda po intellektual'nym pravam ot 9 fevralja 2016 goda № S01-1176/2015 po delu № A33-24660/2014 [SIP Resolution No. S01-1176/2015 of February 9, 2016, on Case No. A33-24660/2014]]; Постановление Суда по интеллектуальным правам от 4 февраля 2016 года № С01-1217/2015 по делу № А50-3186/2015 [Postanovlenie Suda po intellektual'nym pravam ot 4 fevralja 2016 goda № S01-1217/2015 po delu № A50-3186/2015 [SIP Resolution No. S01-1217/2015 of February 4, 2016, on Case No. A50-3186/2015]]; Постановление Суда по интеллектуальным правам от 14 января 2016 года № С01-1060/2014 по делу № А19-18151/2014 [Postanovlenie Suda po intellektual'nym pravam ot 14 janvarja 2016 goda № S01-1060/2014 po delu № A19-18151/2014 [SIP Resolution No. S01-1060/2014 of January 14, 2016, on Case No. A19-18151/2014]]; Постановление Суда по интеллектуальным правам от 16 декабря 2016 года № С01-1040/2015 по делу № А32-36970/2014 [Postanovlenie Suda po intellektual'nym pravam ot 16 dekabrja 2016 goda № S01-1040/2015 po delu № A32-36970/2014 [SIP Resolution No. S01-1040/2015 of December 16, 2015, on Case No. A32-36970/2014]]; Постановление Суда по интеллектуальным правам от 15 декабря 2015 года № С01-985/2014 по делу № А76-1534/2014 [Postanovlenie Suda po intellektual'nym pravam ot 15 dekabrja 2015 goda № S01-985/2014 po delu № A76-1534/2014 [SIP Resolution No.S01-985/2014 of December 15, 2015, on Case No. A76-1534/2014]]; Постановление Суда по интеллектуальным правам от 22 июля 2015 года № С01-546/2015 по делу № А40-145318/2014 [Postanovlenie Suda po intellektual'nym pravam ot 22 ijulja 2015 goda № S01-546/2015 po delu № A40-145318/2014 [SIP Resolution No. S01-546/2015 of July 22, 2015, on Case No. A40-145318/2014]].

would have to prove either that they had made legal use of the claimant's work or that the latter was non-creative.[94]

The burden of proving the creative character of a work is extremely rarely put on its author or their heirs. This only happens when it is suspected that a disputed work is non-creative – either due to established practice, or due to it coming under an unprotectable category, or due to the requirement of proof of protectability (Clause 3, Subclause 4 of Clause 6 and Clause 7 of Article 1259 of the Civil Code),[95] or on the strength of specific circumstances and evidence (this involves loose interpretations of the claimant's duty to prove lawful ownership of copyright).[96]

However, more and more often, defendants are having to prove the creative character of their work (usually by proving they created it independently) if it contains similarities to parts of the claimant's work.[97]

However, these are only occasional situations determined by specific features of cases and do not reflect any stable rules on the placement of the burden of proof.

Nor do there exist any hard-and-fast *standards of evidence* for the creative or non-creative character of a work. In some cases, courts themselves determine whether

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[94] Постановление Суда по интеллектуальным правам от 18 января 2016 года № С01-1286/2014 по делу № А40-169281/2013 [Postanovlenie Suda po intellektual'nym pravam ot 18 janvarja 2016 goda № S01-1286/2014 po delu № A40-169281/2013 [SIP Resolution No. S01-1286/2014 of January 18, 2016, on Case No. A40-169281/2013]]; Постановление Суда по интеллектуальным правам от 10 сентября 2015 года № С01-675/2015 по делу № А40-105604/2013 [Postanovlenie Suda po intellektual'nym pravam ot 10 sentjabrja 2015 goda № S01-675/2015 po delu № A40-105604/2013 [SIP Resolution No. S01-675/2015 of September 10, 2015, on Case No. A40-105604/2013]].

[95] *See* Определение Верховного суда РФ от 11 июня 2015 года № 309-ЭС14-7875 по делу № А50-21004/2013 [Opredelenie Verhovnogo suda RF ot 11 ijunja 2015 goda № 309-ES14-7875 po delu № A50-21004/2013 [Russian Federation Supreme Court Judgment No. 309-ES14-7875 of June 11, 2015, on Case No. A50-21004/2013] (a literary character); Постановление Суда по интеллектуальным правам от 23 января 2015 года № С01-7/2014 по делу № А60-17048/2013 [Postanovlenie Suda po intellektual'nym pravam ot 23 janvarja 2015 goda № S01-7/2014 po delu № A60-17048/2013 [SIP Resolution No. S01-7/2014 of January 23, 2015, on Case No. A60-17048/2013]] (price indices).

[96] Апелляционное определение Московского областного суда от 16 апреля 2014 года по делу № 33-6628/2014 [Apelljacionnoe opredelenie Moskovskogo oblastnogo suda ot 16 aprelja 2014 goda po delu № 33-6628/2014 [Appellate Judgment of the Moscow Regional Court of April 16, 2014, on Case No. 33-6628/2014]].

[97] Определение Верховного суда РФ от 23 июня 2015 года № 5-КГ15-58 [Opredelenie Verhovnogo suda ot 23 ijunja 2015 goda № 5-KG15-58 [Russian Federation Supreme Court Judgment No. 5-KG15-58 of June 23, 2015]]; Постановление Суда по интеллектуальным правам от 19 января 2016 года № С01-1109/2015 по делу № А40-156890/2013 [Postanovlenie Suda po intellektual'nym pravam ot 19 janvarja 2016 goda № S01-1109/2015 on case № A40-156890/2013 [SIP Resolution No. S01-1109/2015 of January 19, 2016, on Case No. A40-156890/2013]];

Постановление Суда по интеллектуальным правам от 18 декабря 2015 года № С01-383/2014 по делу № А60-10618/2011 [Postanovlenie Suda po intellektual'nym pravam ot 18 dekabrja 2015 goda № S01-383/2014 po delu № A60-10618/2011 [SIP Resolution No. S01-383/2014 of December 18, 2015, on Case No. A60-10618/2011]; Решение Арбитражного суда Владимирской области от 3 июля 2013 года по делу № А11-7029/2011 [Reshenie Arbitrazhnogo suda Vladimirskoj oblasti ot 3 ijulja 2013 goda po delu № A11-7029/2011 [Ruling of July 3, 2013, of the Arbitrazh Court of Vladimir Region on Case No. A11-7029/2011]].

a work is creative or whether it contains borrowed elements,[98] while, in others, they either insist that this should be the responsibility of the litigants[99] or seek external expert assessment.[100]

In addition, as proof of the creative character of works, courts today accept contracts commissioning such works and documents certifying the authors' fulfillment of their commitments under such contracts.[101] The reason for this is the

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98 *See,* e.g., Постановление Суда по интеллектуальным правам от 8 мая 2015 года № С01-320/2015 по делу № А40-84902/2014 [Postanovlenie Suda po intellektual'nym pravam ot 8 maja 2015 goda № S01-320/2015 po delu № A40-84902/2014 [SIP Resolution No. S01-320/2015 of May 8, 2015, on Case No. A40-84902/2014]]; Постановление Суда по интеллектуальным правам от 12 августа 2015 года № С01-632/2015 по делу № А56-55404/2014 [Postanovlenie Suda po intellektual'nym pravam ot 12 avgusta 2015 goda № S01-632/2015 po delu № A56-55404/2014 [SIP Resolution No. S01-632/2015 of August 12, 2015 on Case No. A56-55404/2014]]; Определение Московского городского суда от 3 ноября 2015 года № 4г/8-11086/2015 [Opredelenie Moskovskogo gorodskogo suda ot 3 nojabrja 2015 goda № 4g/8-11086/2015 [Moscow City Court Judgment No. 4g/8-11086/2015 of November 3, 2015]]; Апелляционное определение Московского городского суда от 18 апреля 2014 года по делу № 33-12780 [Apelljacionnoe opredelenie Moskovskogo gorodskogo suda ot 18 aprelja 2014 goda po delu № 33-12780 [Moscow City Court judgment of April 18, 2014, on Appeal Case No. 33-12780]].

99 *See,* e.g., Постановление Суда по интеллектуальным правам от 1 июля 2015 года № С01-468/2015 по делу № А76-2656/2014 [Postanovlenie Suda po intellektual'nym pravam ot 1 ijulja 2015 goda № S01-468/2015 po delu № A76-2656/2014 [SIP Resolution No. S01-468/2015 of July 1, 2015, on Case No. A76-2656/2014]]; Постановление Суда по интеллектуальным правам от 1 июля 2015 года № С01-468/2015 по делу № А76-2656/2014 [Postanovlenie Suda po intellektual'nym pravam ot 1 ijulja 2015 goda № S01-468/2015 po delu № A76-2656/2014 [SIP Resolution No. S01-468/2015 of July 1, 2015, on Case No. A76-2656/2014]]; Постановление Суда по интеллектуальным правам от 19 января 2016 года № С01-1109/2015 по делу № А40-156890/2013 [Postanovlenie Suda po intellektual'nym pravam ot 19 janvarja 2016 goda № S01-1109/2015 po delu № A40-156890/2013 [SIP Resolution No. S01-1109/2015 of January 19, 2016, on Case No. A40-156890/2013]]; Постановление Суда по интеллектуальным правам от 18 декабря 2015 года № С01-383/2014 по делу № А60-10618/2011 [Postanovlenie Suda po intellektual'nym pravam ot 18 dekabrja 2015 goda № S01-383/2014 po delu № A60-10618/2011 [SIP Resolution No. S01-383/2014 of December 18, 2015, on Case No. A60-10618/2011]].

100 *See,* e.g., Определение Судебной коллегии по гражданским делам Верховного суда от 23 июня 2015 года № 5-КГ15-58 [Opredelenie Sudebnoj kollegii po grazhdanskim delam Verhovnogo suda ot 23 ijunja 2015 goda № 5-KG15-58 [Russian Federation Supreme Court Judgment No. 5-KG15-58 of June 23, 2015]]; Определение Судебной коллегии по гражданским делам Верховного суда РФ от 9 апреля 2013 года № 5-КГ13-2 [Opredelenie Sudebnoj kollegii po grazhdanskim delam Verhovnogo suda RF ot 9 aprelja 2013 goda № 5-KG13-2 [Russian Federation Supreme Court Judjment No. 5-KG13-2 of April 9, 2013]]; Постановление Суда по интеллектуальным правам от 18 декабря 2015 года № С01-383/2014 по делу № А60-10618/2011 [Postanovlenie Suda po intellektual'nym pravam ot 18 dekabrja 2015 goda № S01-383/2014 po delu № A60-10618/2011 [SIP Resolution No. S01-383/2014 of December 18, 2015, on Case No. A60-10618/2011]]; Постановление Суда по интеллектуальным правам от 26 февраля 2016 года № С01-1219/2015 по делу № А50-1262/2015 [Postanovlenie Suda po intellektual'nym pravam ot 26 fevralja 2016 goda № S01-1219/2015 po delu № A50-1262/2015 [SIP Resolution No. S01-1219/2015 of February 26, 2016, on Case No. A50-1262/2015]].

101 Постановление Суда по интеллектуальным правам от 15 июня 2015 года № С01-484/2015 по делу № А57-2146/2014 [Postanovlenie Suda po intellektual'nym pravam ot 15 ijunja 2015 goda № S01-484/2015 po delu № A57-2146/2014 [SIP Resolution No. S01-484/2015 of June 15, 2015, on Case No. A57-2146/2014]]; Постановление Суда по интеллектуальным правам от 21 сентября 2015 года № С01-557/2015 по делу № А10-343/2014 [Postanovlenie Suda po intellektual'nym pravam ot

above-described re-interpretation of copyrightability criteria that attaches more importance to proving a work to be the result of independent effort than to proving its creative character.

4. Principal Conclusions

Minimum standards of creativity for a piece of intellectual property to be copyrightable have been sharply reduced in Russian judicial practice in recent years. Usually, in order to obtain copyright to a work, its author needs to prove that it belongs to any of the types of work that are copyrightable under Russian law and that they have created it by their own efforts (sufficient proof of the latter would be that the work has been published under their name and it is not a copy of a work that has been published under someone else's name). Any work that meets these criteria is considered protectable on the strength of its presumed creative character under Clause 28 of Resolution 5/29. It is considered irrelevant to provide any further proof of its novelty, uniqueness or originality.

This makes the Russian practice comparable to the principles of the American sweat of the brow doctrine.

However, unlike foreign legal systems that set comparatively low standards of protectability, Russian courts have not evolved a mechanism to offset risks of monopolization of public domain content as a result of overprotection, and this is a problem. First of all, there is no practice of granting exclusive rights to a work that is similar to an earlier work but has been created independently. Secondly, the practice of refusing protection to non-unique, standard, generally known, and generally available content is disappearing. There exist court rulings granting copyright to the author of content that had been widely known before it was published under their name.[102] Thirdly, there is a tendency to give a large scope of protection to works of low authorship with the result that any similarity between two works is considered a case of copyright violation and no attempt is made to find out whether replications are original or standard and generally accessible content. This is the principle that any replication of a protected work or of any of its elements is qualifiable as a violation of copyright. It means that content belonging to the public domain is not identified as such and is not denied copyrightable status in replication disputes.

21 sentjabrja 2015 goda № S01-557/2015 po delu № A10-343/2014 [SIP Resolution No. S01-557/2015 of September 21, 2015, on Case No. A10-343/2014]]; Постановление Девятого арбитражного апелляционного суда от 29 октября 2015 года № 09АП-41914/2015-ГК по делу А40-70695/13 [Postanovlenie Devjatogo arbitrazhnogo apelljacionnogo suda ot 29 oktjabrja 2015 goda № 09AP-41914/2015-GK po delu № A40-70695/13 [Resolution No. 09AP-41914/2015-GK of the Ninth Arbitrazh Court of Appeal of October 29, 2015, on Case No. A40-70695/13]].

[102] Such rulings argue that the fact that content is not novel cannot be evidence that it is not the result of creative effort (Clause 28 of Resolution 5/29).

In effect, all this brings judicial practice close to a model where practically any content can be qualified as protectable if it belongs to any of the copyrightable types listed in Part 1 of Article 1259 of the Civil Code and was published under the name of a specific author, regardless of whether it was known before and included non-unique or generally accessible elements.

As a result, exclusive rights are granted to standard or generally accessible content – content that must belong to the public domain, – which puts unjustified restrictions on the creative activities of other authors.

Moreover, it makes legal status of other authors unpredictable as it establishes basis for unintended copyright violations that can be penalized.

The SIP is the chief motivator and vehicle of these changes. Sticking to these changes favored by arbitrazh courts rather than courts of general jurisdiction. The Supreme Court holds an intermediary position, occasionally applying the originality, novelty, and uniqueness criteria.

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