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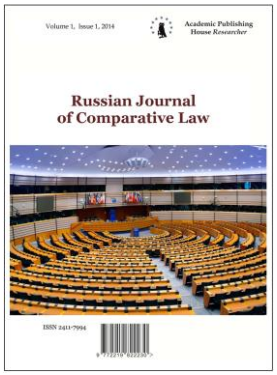

On the Issue of Parallel Creation in Russia and Other Countries

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Abstract

Attitude to parallel creation and its results, i.e. concurrent works, differs among various jurisdictions: from non-recognition (e.g. Italy) to recognition under certain conditions (e.g. Spain, Germany, United Kingdom, United States).

The predominant view on the subject in Russian legal doctrine is the decisive non-recognition of the very possibility of parallel creation in copyright law; however, there are isolated opinions that run contrary to this well-established scholarly tenet, as well as legal practice which does not recognize concurrent works in the Russian Federation.

In the context of a general relaxation of criteria for the copyrightability of authors' works, individual court rulings, and attitudes of some Russian scholars, the prospects of granting official recognition to parallel creation and the copyrightability of concurrent works should be viewed as adverse – mainly because of the contradictions between this kind of approach to protectability and the concept of exclusive copyright which arises at the moment when a work is created, and serves to protect unique works that cannot be replicated independently.

Keywords: intellectual property, copyright, trans-border disputes, parallel creation, concurrent works, protectability, copyrightability, photographic work, work of design, musical work.

1. Introduction

A number of contemporary scholars have noted that harmonization processes in European copyright law as well as the US legal practice have resulted in a perceptible tendency toward assessing the copyrightability of works depending on whether or not they are the "products of intellectual activities" of their authors. This approach in many cases supplants the one that had been universally acknowledged until very recently; the latter defines a copyrightable work based on a different criterion: as one that is a "creative product" (Bently, Sherman, 2004: 970). In Russian legal system, changes are also occurring in the evaluation the copyrightability of works: in accordance with the Resolution of the Plenary Sessions of the Supreme Arbitrage Court and the Supreme Court, a copyrightable product "...shall only be the product that has been developed by creative effort" (Postanovlenie Plenumov, 2009). The tendency toward a simplified approach to assessing the protectability of copyright works leads to a general relaxation of requirements to originality of the works and in certain countries results in the national copyright protection of works with a low degree of creativity and concurrent works (Lutkova, 2016: 5-16).

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2. Material and methods

This research is based on the material as follows:

- international treaties in the domain of copyright protection;
- legal enactments and documents of court practice of other countries (Germany, Italy, United Kingdom, United States) pertinent to trans-border copyright relationships;
- Russian legal enactments and documents of court practice pertinent to trans-border copyright relationships.

The research is based on the entire spectrum of general methodology relevant to private law subjects. Along with that, this paper uses specific scholarly methods, such as the formal legal method and the comparative law method.

3. Discussion

The concepts of "parallel creation" and "concurrent works" that are used in the legal practice of different countries have been neither mentioned in law enactments nor substantially defined. In a most generic sense, which is hardly ever being discussed or disputed, either in the doctrine or in practice, parallel creation is deemed to be the process of intellectual activity that is being pursued individually and separately by more than one person and that leads each of these persons to the creation of independent works which are substantially similar to each other or even identical. These substantially similar or identical works are called concurrent works.

The attitude to parallel creation and, accordingly, to its results (concurrent works) differs among European jurisdictions. In Italian legal doctrine, concurrent works are predominantly not recognized as copyrightable. This stance is based on the reasoning as follows: *firstly,* the protection of concurrent works would bring chaos into the system of copyright law, as the author of the first work would then have to demonstrate the proofs of not only the identity of the concurrent work with his own, but also the malicious intent of the concurrent author; *secondly,* the copyrightability of concurrent works would indirectly lead to an extended duration of copyright compared to one that is currently mandated by law (Kashanin, 2007: 75).

In some European jurisdictions (Germany, Spain), the possibility of parallel creation is recognized, and concurrent works are considered copyrightable. For example, in Spanish legal doctrine and practice, a work shall be considered concurrent and granted copyright protection in the event that it is be possible to prove that there has been no illicit borrowing, which means conscious copying of the substance from the original work or imitation of the original author's style (De Miguel Asensio, 2012: 983). In Germany, a concurrent work shall also be copyrightable; however, it shall only enjoy protection in the event that the author of the concurrent work has avoided copyright infringement not only intentionally (direct copying), but also accidentally, as a result of an unconscious desire to imitate the original work (inadvertent copying). Thus, German law will only grant protection to a work in the event that it is established that the author has been unable to get previously familiar with the original work – and has created his work independently from the author of the original. In the meantime, this approach is being criticized by representatives of the German doctrine as being in conflict with copyright exclusivity (Kashanin, 2007: 83).

Disputes concerning the competition between the original and concurrent works oftentimes occur in the legal practice of the United Kingdom and the United States. A "copying doctrine" has been developed in these countries in order to establish the copyrightability of a concurrent work. The copying doctrine helps ascertain whether the concurrent work has been developed in course of a creative process or is an illicit use of someone else's intellectual property. If the court finds that the concurrent work has resulted from the illicit use of the original work (full or partial copy), the right of the original author shall be deemed infringed, and the concurrent work shall be considered unprotectable. Conversely, if the court concludes that no copying has occurred, the concurrent work shall be deemed protectable. The criteria for establishing the fact of copying vary across different kinds of disputed works; these peculiarities are to be found in American and British court enactments (Biriukov, Galushko, 2018).

A ruling by the UK Intellectual Property Enterprise Court in re *Bodo Sperlein Ltd v Sabichi Ltd & Anor*, 2015 (Bodo Sperlein, 2015) can be a good example of this. The *Sabichi* company (defendant), a manufacturer of porcelain dishes, had copied design from another porcelain manufacturer, a company named *Bodo Sperlein* (plaintiff). The design is a rather abstract pattern

which consists of red twigs with round berries and no leaves. The defendant's line of defense was based on the fact that the simple pattern consisting of twigs and berries had been designed independently from *Bodo Sperlein*. The winning plaintiff based his case for the restitution of his infringed copyright on the fact that his *Red Berry* limited collection of dishes had been very successful on the market for the two preceding years, which meant that the defendant had undoubtedly been familiar with that pattern and therefore had little difficulty copying it, aspiring to attain the plaintiff's success.

The court's ruling is quite interesting in that it describes the legal actions that, according to the judge, are required for establishing the fact of illicit copying of a work such as pattern design. Thus, the ruling indicates that in the absence of direct proof of copying, the plaintiff has to establish and produce to the court another proof that makes the fact of copying obvious based on the similarity between the work of the plaintiff and that of the defendant. In many cases (this dispute is one of such cases), the fact of copying becomes apparent first and foremost on the basis of comparative analysis of the defendant's work and the publicly accessible design of the plaintiff (Bodo Sperlein Ltd., 2015).

Apart from that, the ruling emphasizes that the more convincingly the situation reminds of copying that follows from the similarity between the original work and the one in dispute, the more convincing should be the proof in favor of independent creative process aimed at the development of the concurrent work. The proof of creating the disputed design should normally be supported by an independent designer (expert). The independent designer should advise the court on what particularly has been done by each of the two parties in dispute and in which sequence. He or she will also indicate one or more projects derived from the projects of the plaintiff / defendant which were accessible on the date of supposed copying and which could reasonably serve as inspiration for the concurrent author. Otherwise, the expert may establish that the concurrent designer did not have access to any information concerning the design which, according to the plaintiff, has been copied (Bodo Sperlein Ltd., 2015).

Apart from that, the rulings of the UK and US courts may contain references to some other activities that need to be performed when dealing with protectability disputes:

- examine three possible hypotheses concerning possible signs of the concurrent author's involvement in the illicit copying of the original: "conscious copying", "sub-conscious copying", or "indirect copying";

- in the event that any of these forms of copying of the original is established, it should be defined how substantial is the part that has been illicitly copied from the original work.

Thus, in November 2014 the UK Intellectual Property Enterprise Court carried a ruling in re *John Kaldor Fabricmaker UK Ltd v Lee Ann Fashions Ltd*, 2014 (John Kaldor, 2014). In 2012, the plaintiff supplied fabric for dresses with a certain pattern to the defendant in accordance with a contract between them; however, the project did not materialize, and the fabric remained unused. In the meantime, the designer Lee Ann won a contract with another manufacturer of clothes, a company named *Marks & Spencer*, on behalf of which it developed a fabric design on her own. A year later, dresses made from this fabric were put on sale, and the plaintiff thought that the design (pattern) of that fabric follows (with minor changes) the design of the fabric that had been sent out by the plaintiff to the designer Lee Ann in 2012 for the project that was never carried out. The defendant told the court that she had not remembered the pattern on the plaintiff's fabric and developed the design in dispute completely on her own. The court ruled in favor of the designer Lee Ann, as it did not find sufficiently convincing evidence of the fact that the original and concurrent designs are so similar that it might be possible to establish any form of copying – conscious, sub-conscious, or indirect. As it was ruled that Lee Ann had not copied the design, the question of whether the copied part had been substantial, was withdrawn.

The resolution of disputes on concurrent photographs in the UK and US courts also has its own specific features. It would be interesting to examine the dispute between the *Temple Island Collection Ltd* company, a manufacturer of souvenirs, and the *New English Teas* company on copyright infringement concerning the use of a picture of a red bus on the grey background of a London embankment. The photograph of the bus moving along the Westminster Bridge against the backdrop of the Parliament building and Big Ben was taken in 2005 by Justin Fielder, Managing director at *Temple Island Collection Ltd*. The photograph was later digitally edited. In 2010, the plaintiff noticed a picture showing a red bus moving along the same Westminster Bridge

towards the House of Parliament on the grey background – on a tea box that the defendant used for packing his brand product (English tea); that picture was bearing a strong resemblance to his own photograph. Although the photographs did not look identical, the plaintiff stated that his copyright to his picture made in 2005 had been infringed.

Upon hearing the dispute in re *Temple Island Collection Ltd v New English Teas Ltd & Anor* (Temple Island, 2011), the England and Wales Patents County Court (Russell, Cohn, 2012) ruled in favor of the plaintiff, using both the arguments similar to those mentioned above from the rulings of another British intellectual property court and its own arguments. Thus, the court ruling defines the composition of a photograph as the source of originality which depends on the camera angle plus both the elements brought in intentionally by the photographer and those that deliberately occurred in a certain place at a certain moment – and therefore became part of the picture. The resulting composition is a combination of all these factors; each of them will appear specific in different cases and at different times. However, in the long run, the composition of the image may also be the result of mastery and effort (or intellectual creation) of the photographer, something that is protected by copyright in a photograph (see Item 27 of the Ruling).

The court established a causal relationship between the details of the plaintiff's work and the defendant's work and concluded that these details had been copied. The ruling emphasizes that in this instance of an obvious similarity between the original and concurrent works, as well as apparent accessibility of the plaintiff's work to the defendant, the burden of proof should lie with the defendant. However, the defendant failed to present any convincing evidence that the elements of his work had not been borrowed from the plaintiff's work, or that their idea had not been influenced by the plaintiff's work (see Item 55 of the Ruling).

The court has also noted in its ruling that the defendant had been referring to an incomplete likeness between the elements of the original and disputed photographs and, in particular, directed the court's attention to the comparison of the general composition of both pictures: The River Thames was absent from the disputed picture, and the two pictures were dissimilar both horizontally and vertically. However, the court ruled that these differences fail to refute the fact of copying, as the works bear an obvious similarity: it is by no mere coincidence that both works depict Big Ben and the House of Parliament in grey colors, a red bus moving along the bridge from the right to the left, and empty white sky. The court saw the cause of this similarity in the of the plaintiff's work being copied by the defendant (see Item 56 of the Ruling).

This ruling with regard to the pictures of a red bus on a London bridge is debatable, and it has been widely criticized by legal practitioners; however, it has been really carried and become a precedent.

Another peculiarity regarding concurrent photographs is presented in the ruling of the United States Court of Appeals for the Ninth Circuit on a 2003 dispute in re *Ets-Hokin v. SKYY Spirits Inc.* (Ets-Hokin, 2003), which reaffirmed an earlier ruling by a lower court. Commercial photographer Joshua Ets-Hokin sued the *SKYY Spirits Inc.* company when another photographer created a picture of a product manufactured by that company (a bottle of vodka), which was bearing a substantial resemblance to a commercial photograph of the same product that the plaintiff had taken a few years prior to that. The court did not uphold his claim as it decided that the resemblance between the pictures taken by different photographers was inevitable. The court ruled that there are not so many ways of photographing a bottle of vodka, and the copyright should not prevent the *Skyy* company from creating other commercial works on the basis of its own products. Nevertheless, the originality of the concurrent photograph had been achieved, according to the judges, by placing the shades around the objects at different angles compared to the original photograph.

Similar criteria of protectability are used by American judges in resolving disputes on concurrent musical works. However, in this case the criteria are more abstract by nature, as the author of the new musical work has obviously had access to previously performed musical works, a fact that needs to be taken into consideration. In this case, two elements must coincide for the fact of copyright infringement with regard to the original musical work to be established: "(a) a sufficient degree of objective similarity between the original work and the alleged infringement; and (b) some causal connection between the plaintiff's and the defendant's work" (Day, 1963). For establishing the non-protectability of the concurrent work, the court must prove that it has been entirely or substantially copied from the original work. If the court concludes that the work

has been created by the concurrent author on his own, independently from the original work, this will constitute no copyright infringement (Day, 1963).

Thus, the appellate court judge in re *Francis Day & Hunter Ltd v Bron* ruled that the sufficient degree of similarity between musical works implies "that an ordinary reasonably experienced listener might think that perhaps one had come from the other" and that the "proof of similarity between the alleged infringing work and the original, coupled with the proof of access to the original, did not raise any irrebuttable presumption of copying, but at most raised a prima facie case for the defendant to answer" (Day, 1963).

Disputes on the copyrightability of concurrent musical works are widespread in the USA; however, one could hardly expect occasional full similarity between the original musical work and the concurrent one in this domain of copyright works, as the degree of creativity in musical works is qu high. Disputes mostly arise in relation to significant or partial similarity, as well as sampling (remaking) (Giannini, 1990: 510; Campbell, 1993; Grand Upright Music, 1991).

In Russian law, there are no special regulations that would govern parallel creation and concurrent works.

Most scholars in Russian legal doctrine do not recognize the very possibility of parallel creation in copyright law and, accordingly, the protectability of concurrent works. Thus, the classification of intellectual property types suggested by professor Dozortsev is based on the key component for each type: form or content, which defines the possibility of a concurrent work to be created by another author unrelated to the original author. The researcher has concluded (based on an audiovisual work) that it is almost absolutely impossible to legitimately create concurrent works which are being protected on the basis of their form – in contrast to the works which are being protected on the basis of their content: the latter can be re-created as a result of parallel creation, because their protection is based on their essence (Dozortsev, 2003: 42-43).

A similar approach is shared by the majority of Russian scholars (Gavrilov, Gorodov, Grishayev, Kashanin, Morgunova and others) who insist that copyrighted works are unique and therefore cannot be produced anew as a result of the parallel creation of different persons. They rightfully note that no "copyright collisions" between the works of different authors can take place; if they ever happen, this means that either some material has been borrowed illicitly, or both works are non-original and/or non-unique, which causes similarity between them; therefore, such works cannot be protected by copyright law (Gavrilov, 2010: 20; Gavrilov, Gorodov, Grishaev, 2009; Morgunova, Pogulyaev, Korchagina, 2010).

Russian court enactments also demonstrate an unequivocal trend toward the non-recognition of parallel creation as a possible way of creating a work. The term of "parallel creation" is only mentioned in judicial rulings in the negative form, as an indication that a product of intellectual activity is neither unique nor original, which means such a work cannot be copyrighted (Opredelenie, 2005). "Parallel creation" is also mentioned in the materials of forensic practice as a form of intellectual activity that oftentimes leads journalists, columnists, commentators, and other professionals to the creation of non-original reports of events or facts that are purely informative by nature, i.e. devoid of originality and therefore non-copyrightable (Opredelenie, 20/03/2012).

The Vyborg Rayon Court of the City of Saint Petersburg ruled on March 12, 2012, in re No. 2-177/2012; the ruling was confirmed by the decision of the Belgorod Oblast Court of 2012 (Opredelenie, 20/06/2012): No Alex Alen was suing Daria V. Petukhova and claiming her own recognition as the author of a visual art work (creative make-up) as well as protection of her copyright; the defendant contended that the disputed item was a concurrent work which had been developed as a result of her own individual (parallel) creation without resorting to the original make-up made by the plaintiff or any other works of the latter. The defendant insisted that "each make-up is an independent work based on elements of common use" (Opredelenie, 20/06/2012). However, neither the text of the ruling delivered by the Rayon Court nor that of the definition carried by the Oblast Court touch upon the topics of parallel creation and concurrent works, therefore it is impossible to determine the attitude of the judges toward the issue. The court defined the actions of the defendant as "the reproduction (copying) of a visual art work (make-up performed by the plaintiff), because the basic elements used in the above-mentioned make-ups are confusingly similar" (Opredelenie, 20/06/2012).

At the same time, there are isolated opinions in Russian doctrine that run contrary to the well-established scholarly tenet as well as the legal practice which does not recognize concurrent works in the Russian Federation.

As early as during the "Soviet" period of legal doctrine, the adherents of the idea of recognizing parallel creation insisted: "It is totally obvious that, as our society develops, the number of works is growing dramatically. This, in turn, leads to the fact that entirely dissimilar works should even theoretically become increasingly more rare" (Ionas, 1972: 21).

Modern scholars who adhere to the theory of the possibility of legitimate parallel creation (Ionas, Labzin, Metov, Sviridova), admit that "the creative activities of two independent authors may yield identical results" (Labzin, 2007); they emphasize that "although the probability of this happening is extremely low, it should not be ruled out completely" (Sviridova, 2014: 74). The advocates of this idea specify that the possibility of parallel creation does not concern works with a traditionally high degree of creativity. Thus, one cannot write any of Fyodor Dostoyevsky's novels or compose Sergey Prokofiev's music in parallel to their authors. However, they maintain that copyright law does not rule out the protection of simpler and more replicable works that are also products of creative process, although their artistic value is not so significant. For example, a photograph of a famous architectural structure such as the Moscow Kremlin or the Eiffel Tower has most probably already been taken by someone at some moment in time virtually from any standpoint.

There is also a statement to be found in the modern Russian legal doctrine that holds that Russian copyright law objectively covers both the works with low replication probability and high degree of creativity – and those with high replication probability and low degree of creativity. The latter include computer software, databases, catalogues, reference books, maps, photographs, works of design, architectural projects, work titles, commercial slogans etc. (Metov, 2015: 181).

It appears that if we accept the possibility of protecting the results of parallel creation, we need to develop the criteria that define legitimately created parallel works as well as the criteria that draw the line between legitimately created works and plagiarism. The scholars that adhere to the idea of parallel creation do not offer any such criteria, apart from one arguable exception. It is being suggested to compare the original work and the concurrent one by using the concepts of identity and confusing similarity that have been developed for industrial property law: the identity of two items means full resemblance of their elements; confusing similarity denotes mutual association of the items in general, including unprotected elements, despite certain differences (Prikaz, 2009). In addition to that, a special role of experts in assessing the "similarity" between the original and disputed works and, accordingly, in resolving the issue of possible copyright infringement is being emphasized. Obviously, these suggested mechanisms are not sufficient, and in the event that parallel creation is officially recognized, a particular algorithm will be required for resolving the disputes concerning the protectability of concurrent works. Probably, Russian scholars expect to draw upon the experience of other countries when it is necessary; however, this paper shows that this experience varies in different countries and at different times.

4. Results

The issue of recognizing parallel creation and copyrightability of concurrent works is closely related to and follows from the problem of recognizing the protectability of works with a low degree of creativity. In the modern copyright law of many European countries and the United States, the recognition of protectability of works with a low degree of creativity and, accordingly, the practice of copyrighting concurrent works is a sustainable trend which largely serves the interests of commercial relationships. The trend toward recognizing the copyrightability of works with a low degree of creativity can also be observed in Russian doctrine, and even more so in the legal practice – even in spite of the fact that many types of works which are recognized as copyrightable according to Civil Code, traditionally belong to the category of works with a low degree of creativity (computer software, geographical maps, photographic works etc.).

One positive aspect of such trend for the Russian Federation could consist in a potential harmonization of Russian law with European and American law regarding the classification of copyrighted works, a fact that could facilitate the regulation of trans-border copyright relationships. However, this conclusion can only be made with a great degree of suggestion and exaggeration due to the fact that the extent of harmonization in this sphere is unpredictable and

may eventually turn out to be quite low in view of the initially substantial difference between the fundamentals of copyright law in different countries (Biriukov, 2017).

Potentially adverse consequences of this trend toward the relaxation of requirements to copyrightability in the Russian Federation and the recognition of parallel creation appear to be far more significant.

5. Conclusion

In summary, it should be noted that if we are taking into account not the existing trend but rather the real possibility of parallel creation and concurrent works being recognized officially, this fact should be assessed as adverse. It hardly seems possible to effectively protect the original work and the concurrent one with the mechanisms of copyright law because, in contrast to the industrial property law, the authorship of a person with regard to a particular work rules out the possibility of authorship of another person with regard to the same (or identical) work. At present, Russian doctrine rightfully does not recognize the possibility of parallel works (and parallel creativity as the process of creating them) for the reason that these results of intellectual activities run contrary to the concept of exclusive copyright which arises from the very moment when a work is created and serves to protect unique items that cannot be replicated independently.

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