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ОСОБЕННОСТИ КВАЛИФИКАЦИИ ПРОИЗВЕДЕНИЙ ИЗОБРАЗИТЕЛЬНОГО И ФОТОГРАФИЧЕСКОГО ИСКУССТВА КАК УСЛОВИЕ ЗАЩИТЫ ПРАВ И ЗАКОННЫХ ИНТЕРЕСОВ ИХ АВТОРОВ В СОВРЕМЕННОМ ЗАКОНОДАТЕЛЬСТВЕ РОССИИ И ГЕРМАНИИ

THE SPECIFICS OF WORKS OF FINE AND PHOTOGRAFIC ART QUALIFICATION AS A CONDITION FOR PROTECTION OF RIGHTS AND LEGAL INTERESTS OF THEIR AUTHORS IN CONTEMPORARY LEGISLATION OF RUSSIA AND GERMANY

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Аннотация. Настоящее исследование позволяет выявить зависимость защиты прав авторов произведений изобразительного и фотографического искусства от того, как именно квалифицируется создаваемый ими объект авторского права, согласно применимому законодательству.

Ключевые слова: авторское право, защита авторских прав, сравнительный правовой анализ, интеллектуальная собственность, авторское право на фотографии, авторское право на картины

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Abstract. This present research helps to ascertain, that there is a relation between rights defense for the authors of creative works in the field of photography and fine arts with the specifics of qualification in accordance with the applicable legislation of the works which are created by such authors.

Keywords: Copyright, copyright defense, comparative legal analysis, intellectual property, copyright for photography, copyright for paintings

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INTRODUCTION

Over the past years, the legal provisions regulating copyright have been actively reforming, and these changes considerably affect the rights of authors of works of fine and photographic art. Nowadays, copyright rules are fully incorporated into the fourth part of the Civil Code of the Russian Federation and continue to develop taking into account the change and complication of legal relations in the field of creative activity. Despite the positive dynamics, there is a significant number of legal relations in connection with the creation and use of works of photographic and visual art, which need to improve legal regulation.

Besides, Russia has been adjusting national copyright law within a considerable time period, including works of fine and photographic art, in accordance with the world standards stipulated by the Partnership and Cooperation Agreement between the Russian Federation and the EU countries, which aims to promote political, trade, economic and cultural cooperation between Russia and the EU, as well as in connection with Russia's entry into the World Trade Organization. In addition, in recent years, active attempts have been made in the international arena to strengthen control over the copying, publication and movement of information in digital form, including works of fine and photographic art.

For legal science and scholarship, which is addressed mostly to the national law, the use of comparative law is extremely important, since it helps to establish the ways to solve the same problem in different countries, and allows expanding the horizons of legal research — to take into account the positive and negative experience of foreign countries.

German legal science and scholarship have a rich tradition and experience in multilateral copyright studies for photographic and artistic works, as well as an extensive base of practical material that can be used to develop directions for improving Russian legislation in this area.

MAIN PART

Works of Fine Art

Russian legislation (paragraph 1 of article 1259 of the Civil Code of the Russian Federation [1]) distinguishes the following copyright objects as a separate group: works of painting, sculpture, graphics, design, graphic stories, comics and other works of fine art. Separate groups include works of decorative, applied and scenography art, as well as photographic works and works obtained in ways similar to photography.

The German Copyright Law refers to works of fine art a fairly wide group of objects: subparagraph 1, paragraph 1 § 2 of UrhG (Urheberrechtsgesetz — German Law for the Copyright 09.09.1965 with amendments from 23.07.2021 [3]) covers, in addition to works of fine art, architectural structures, works of applied art and projects (drafts) of such works.

Such a broad qualification of this copyright object can be explained by the fact that the German legislator applies the concept of "work of fine art" as a generic. This general concept refers to works of "pure" fine art, works of applied art, as a special case — architectural structures, as well as drafts and drawings of these works [45, p. 53]. In practice, German lawyers include painting, graphics, plastic forms, sculpture, as well as similar objects of modern art. The scenery also belongs to this group [21]. Houses, churches, stadiums, towers, squares qualify as architectural works if they represent a personal intellectual achievement [41, p. 17]. The legislation of the Russian Federation separates works of decorative, applied and scenographic art, as well as works of architecture, urban planning and garden and park art, including in the form of projects, drawings, images and layouts from works of fine art, which entails a different set of powers for authors of such works (this separation is demonstrated particularly in paragraph 1 of article 1259, articles 1291, 1294 of the Civil Code of the Russian Federation). In particular, the authors of works of decorative, applied and scenographic art are deprived of the "droit de suite" (right to follow) and the right to access, which seems to us not entirely logical. From our point of view, works of decorative, applied and scenographic art would be more appropriate to include in the group of works of fine art, since the main difference between these works from works of fine art is the possibility of their applied use, which does not diminish their artistic value. With the wording in force in Article 1259 of the Civil Code of the Russian Federation, a painting made on canvas will have a greater level of protection than a painting made,

for example, on the cover of a box or on a vase, so it seems to us that such a restriction of the level of protection of a work is not fully justified, depending on which medium it received its objective expression. The inclusion of works of decorative, applied and scenography art in the group of works of fine art would help to resolve this issue and resolve these contradictions that exist in this area of regulation. This approach is also present in the Russian legal scholarship [39].

The subject of art does not have to consist from a long-term material: it can also be created from short life material — from chocolate or marzipan, from oil, sand, snow or ice. For example, for German legislation as an object of copyright can be qualified tattoo [40] and masks [49, p. 114], in Russian legislation — makeup [10], packaging and appearance of confectionery [11].

The category "work of fine art" in German law includes all two — or three-dimensional constructions that express their aesthetic content through means such as color, line, volume, space and boundaries [46, p. 39]. Such approach of UrhG, which puts all works that use similar expressive means to the concept of "works of fine art", the German lawyer Dr. Winfried Billinger connects with the difficulties of distinguishing different types of these works in certain cases [46, p. 60].

In Russian copyright, all these objects differentiated. From our point of view, works of decorative, applied and scenography art would be more appropriate to include in the group of works of fine art. With the wording in force in Article 1259 of the Civil Code of the Russian Federation, a painting made on canvas will have a greater level of protection than a painting made, for example, on the cover of a box or on a vase, so it seems to us that such a restriction of the level of protection of a work is not fully justified, depending on which medium it received its objective expression. The inclusion of works of decorative, applied and scenography art in the group of works of fine art would help to resolve this issue and resolve these contradictions that exist in the described area of regulation.

In support of this conclusion, the following definition of S.A. Sudarikov can be cited: "Works of applied art are works of fine art expressed in applied goods produced in an industrial, craft or artisanal way" [37]. Thus, S.A. Sudarikov directly refers works of decorative and applied art to works of fine art.

Drafts of works of fine art are subject to legal protection in both Russia and Germany. The author does not lose this privilege even if he later does not implement this sketch [38, p. 52]. Anyone who finishes someone else's work is recognized as a processor under German law [49, p. 102] (§ 23 UrhG). The very concept of fine art ("Kunst") in German law is not clearly defined [45, p. 52; 50, p. 80], but judicial practice, if it is necessary to distinguish "pure" fine art from its other types, proceeds from the purpose of the created work [45, p. 53]. It is generally accepted that a work of fine art has only aesthetic content, and a work of applied art — also a functional purpose [42, p. 555]. Professor Heinz Püschel notes that the most difficult thing in such situation is to distinguish works of art from other aesthetic achievements [47, p. 29], as it can be extremely difficult to decide whether this work (especially in the field of industrial forms) belongs to the arts and crafts or can only be regarded as an object of industrial property (Geschmacksmusterrecht zugängliches Produkt).

Moreover, if this object also has novelty as a model or sample, it can also be protected in this capacity in addition to copyright [44; 45, p. 88].

Despite the possibility of such a double protection, German copyright is close to the French concept of "unité de l'art" — art remains art, no matter how it is used. Based on this principle, works of fine and applied art are put in the same position [42, p. 557].

Russian doctrine also stands on the position of multiple protection of works of art in the field of copyright and patent law. For example, the drawing may form the basis of a trademark or be the creation of the creator of an industrial model as an object of patent law [38, p. 84]. S.A. Subbotina notes [36] the frequent recommendation to register the packaging of products, if original, as volume trademarks or industrial designs, but justifies the possibility of protecting such images as only as a work of fine art (without additional registration as a trademark), and in the form of an object of copyright or patent law at the choice of the copyright holder (when registering as a trademark). However, despite the above principle of double protection, in judicial practice there are cases of delineation of the methods of protection of the work depending on its use: for example, the judicial division of the Supreme Court of the Russian Federation [7] in 2010, the work of fine art, which is the basis of the trademark, was deprived of protection as a work of copyright for the reason that this work was used for commercial purposes. However, the recent Russian judicial practice overcomes this approach and supports the author of the result of creative activity. In particular, at the end of 2022, in a similar situation, the Intellectual Rights Court defended the author's rights regarding the design of the product label and the photographs created by the same author, collecting compensation from the defendant for the illegal use of these objects [15].

The "double status" of works of fine art is also connected with the fact that in Russian law objects-carriers of copyright works may not belong to the field of intellectual property law. Thus, objects that give shape to a work are often cultural values. In this case, they are subject to legislation on culture [38, p. 84; 30].

Graffiti is also recognized as a work of fine art under German and Russian law. A feature of this copyright object is that such a work is often in conflict with the ownership of the building on which it is located. Therefore, the owner has the right to eliminate graffiti from the object of his property [46, p. 47]. At the same time, like any other object of copyright, graffiti enjoys the right to inviolability in the sense that this work should not be distorted, although it can be completely destroyed [46, p. 226].

The unlawful or offensive content of a work of fine art or the creative act itself does not affect the existence of copyright protection. Thus, the caricature depicting the former Prime Minister Franz Joseph Strauss in the form of a pig serves as an example of the simultaneous presence of both copyright and the composition of the criminal offense (BVerfGE 75, 369 = NJW 1990, 3026) [49, p. 113]. The immoral content of the work of art does not question the possibilities of author's protection in the Russian doctrine of law [38, p. 81].

An example of an illegal creative act is the application of graffiti on the cars of an electric train traveling from Lesnoy Gorodok to Moscow, on the fact of which a criminal case was initiated under the article "Vandalism" [52]. According to the Moscow 24 information channel, coloring train cars is a subspecies of graffiti art called Whole Car or TrainWriting. Unauthorized drawings are the subject of irritation of the authorities of many cities of the world, while legal graffiti is gaining popularity in Moscow — following the United States and Europe. This fact can be confirmed by the decision of Moscow Mayor Sergei Sobyanin to decorate underground passages and facades of houses in Moscow with graffiti [51].

Considering the fact that an architectural work in accordance with the German legal norms is classified as a work of fine art, a concept "Panoramafreiheit" deserves our attention. The concept is formulated in UhrG § 59 and grants the right to distribute and publicly reproduce works which are permanently on public roads, streets or squares, by means of painting or graphics, by means of light image or film. For buildings, this right can be applied to the appearance only. However, in a case of using the image of a building by making posters, the German Supreme Court took the side of the author and decided about the need to obtain permission from the creator of the architectural work for the production of posters with the image of such work (BGH, 05.06.2003 — I ZR 192/00 — Hundertwasserhaus).

Works of Photographic Art

Both German and Russian legislation absolutely coincide with the name of the group of protected objects of photographic art: "photographic works and works obtained by methods similar to photography" (subparagraph 5, paragraph 1 § 2 UrhG, paragraph 9, article 1259 of the Civil Code of the Russian Federation).

But, despite the semblable similarity of the protected object, there are significant differences in its regulation by Russian and German law.

In particular, the object "photography", unified for the Russian legislator, splits in German law into several concepts that are quite unusual for domestic legal literature.

Thus, the Law on Author's and Related Rights of Germany distinguishes works of photographic art (Lichtbildwerke — subparagraph 5, paragraph 1 § 2 UrhG) in the sense of personal intellectual creation [41, p. 17] and regular photographs (Lichtbilder — § 72 UrhG). The main legal difference between these objects is the duration of the protection period. Works of photographic art according to § 64 UrhG, along with other objects of copyright, are protected 70 years after the death of the author. Simple photographs are guarded only 50 years from the moment of origin.

The practical distinction between works of photographic art and simple photographs is fraught with some difficulties. For example, in a work of photographic art, reality is not only photographed, but also emphasized in its individuality. The creative compositional solution may be to define the boundaries of the frame, the distribution of light and shadow, exposure, subsequent improvement of the frame by retouching or small photomontage [49, p. 119]. At the same time, a work of photographic art, despite some differences in production, is recognized as individual television frames [20, p. 470, 472], as well as film or video frames, and it is always assumed that this individual frame also contains the necessary artistic solution.

Digital paintings created on a computer are neither works of photographic art, nor simple photographs, since they are not obtained from radiation energy. German judicial practice classifies them as works of fine art [28].

Simple photographs and works obtained in a similar way are images that are created by means of light or other radiation energy and, above all, are fixed chemically or digitally. The protection of a simple photo does not depend on its fixation, for example, on a film negative [49, p. 332]. Images of virtual objects made using a computer through electronic programs are not simple photographs according to German judicial practice [23]. In some cases, such images, according to German courts, do not contain sufficient creative input.

Purely mechanical reproductions, such as those obtained in the process of photocopying or creating a facsimile, are not objects of German copyright. They are a simple reproduction even when the original format is changed [17]. Otherwise, it would be possible to extend the security period of a simple photograph by re-photo-

graphing as long as desired. Such situations should be delimited when the museum photographs restored works of fine art at certain intervals, which gives rise to a new copyright object every time.

For the protection of photography under German law, the purpose for which the photography was performed does not matter. If it was made for advertising, but does not contain personal spiritual creation, it is protected as a simple photo, and if this photo meets the requirements of paragraph 2 § 2 of UrhG, it is protected as a work of photographic art [18]. Photographs depicting scientific works also refer to works of photographic art [47, p. 30], by protected German copyright.

As mentioned above, Russian judicial practice indicates that the results of creative activity are subject to protection "regardless of the purpose and dignity of the works, as well as the methods of their expression" [12]. However, in Russia, despite the provisions of paragraph 1 of Art. 1259 of the Civil Code of the Russian Federation, which speaks about the protection of works, including works of fine art and photographs, regardless of their dignity and purpose, judicial practice is formed [7], testifying to the refusal of copyright protection for the work of art, if it is part of a trademark whose purpose is to be used commercially as a means of individualizing goods.

As in the case of works of fine art, double protection of photography is allowed — as an object of copyright and as a brand. On 31 March 2010, the German Federal Court, [19] in deciding whether the registration of Marlene Dietrich's photograph as a stamp was possible, ruled that registration as a trademark or data which is used for any purpose other than advertising, without the purpose of describing the goods and services concerned, should not be prohibited by reason of such use alone. Russian judicial practice [9] also indicates that a citizen's photograph can be used both unchanged (format) and on another scale or color, with its application to goods, with the inclusion of a trademark or service mark in the composition.

COPYRIGHT OWNERS FOR WORKS OF FINE AND PHOTOGRAPHIC ART IN RUSSIA AND GERMANY

In accordance with Art. 1257 of the Civil Code of the Russian Federation, a citizen whose creative work it was created is recognized as the author of a work of science, literature or art. § 7 UrhG adheres to the same position.

The legislation of both countries emphasizes the obligation of personal creative contribution to the creation of the work (Article 1228 of the Civil Code of the Russian Federation, Article 2 § 2 UrhG). The creative contribution to the work, its presence, absence and scale is a defining moment for the availability and quality of legal protection for the authors of the works in question.

For the author of a work of fine art, Russian and German legislation does not establish the necessary minimum of creative contribution, and provides them with protection regardless of the significance of creation (Article 1259 of the Civil Code of the Russian Federation). Russian judicial practice recognizes the results of creative activity to be protected "regardless of the purpose and dignity of the works, as well as the methods of their expression" [12]. However, despite this principle, there are court decisions [7] indicating a refusal to protect the copyright for a work of art if it is part of a trademark, the purpose of which is to use it commercially as a means of individualizing goods.

In particular, the importance of creative activity for determining the possibility of protection by domestic copyright was considered in detail by V.Ya. Jonas [32], proving the need for such to create any new copyright object.

Despite the fact that the protection of a work of fine art does not depend on the size of the creative contribution, German judicial practice ambiguously covers this issue. In particular, even those who create works with "insignificant contribution" are recognized by the authors of works of fine art (German doctrine uses the term "kleine Münze" — "small coins" in this case) [27]. For example, the Supreme Court of Berlin recognized the author of the drawing with jumping trout the right to demand remuneration for such a work, although he classified such a work as "kleine Münze" [24]. Logos for a mobile phone, in turn, were also recognized as a kind of works of fine art related to the "kleine Münze", but did not receive the qualification of a copyright object. Thus, it can be concluded that in Germany the court in some cases decides whether the artist's creative contribution to a work of fine art is of sufficient value to provide such a work with protection for as an object of copyright when classified as "kleine Münze" [27].

The problem of creative contribution to the work on the part of the photographer was relevant from the very moment when the art of photography was born. While the presence of the artist's creative contribution to the work was not in doubt among lawyers, the presence of a significant technical component in the process of making photographs made many legal scholars very critical of the possibility of recognizing the photographer as a copyright subject [29; 48, p. 331]. This position was also enshrined in the legislation of the time when photography arose and the authors of photographic works tried to achieve recognition by the legislator of their copyright.

Thus, P. Miller, recognizing photography as an object of copyright, noted that "the main provisions of photo-

graphic property differ from those of artistic property only to the extent that the first lacks a personal element (the creator's spiritual connection with creation)" [34].

In its Note on the Photographer's Copyright to the State Duma of 11 Russian Photographic Societies back in 1910, they sought equality of the photographer's copyright with the creators of other works of art [31, p. 1]. The authors of The Note rightly noted that "photography is a fine art that is equal to others, and must be equalized with them by law" [31, p. 5].

In the need for copyright recognition by photographers, they also referred to the fact that when several persons shoot the same plot, the pictures are always different, and each of them carries a bright fingerprint of the author's personality, so the link to "mechanical methods" of obtaining images should cease to play the role of denying the artistry of such works.

It was not easy to recognize the photographer as the author in Germany. During the development of the 1870 copyright bill, it was decided not to include rights for photographers in it, since photography was considered just a craft requiring only technical skill, and therefore, like the works of other crafts, it could not be subject to special protection, and her works should be provided to general use [6, p. 143].

Currently, discrimination against the authors of photographs has been eliminated in Russian legislation. They are equalized in their rights with the authors of all other works of art (paragraph 1 of article 1259 of the Civil Code of the Russian Federation), which cannot be said about German law. The isolation of "photographs without artistic content" (Lichtbild — § 72 UrhG) puts photographers in an unequal position, producing photographs that are quite comparable in artistic strength and expressiveness. It seems not entirely fair to attribute, for example, all photographs produced on vacation or with a family to the concept of "simple photographs" — that is, those that are devoid of sufficient artistic content. Based on these provisions of German law, we can directly talk about the existing discrimination of photographers working as individuals. If the general rule of copyright provides the same protection of creativity to any person, including one incapacitated under civil law, then § 72 UrhG frankly diminishes the level of protection of the photographer who created the simple photo. In the articles of Russian lawyers, ideas have recently appeared about the delimitation of "everyday" photographs from original photographs [35].

It remains unclear on what grounds the issue of the artistic content of photographs in German practice is being resolved: usually applicants for the right to be called the author of a work of photographic art present diplomas on the education of a photographer and documents that the author works professionally as a photographer, which, however, does not always serve as decisive evidence. In its decision in the case of photographs of works of fine art, the Supreme District Court of Düsseldorf ruled that "photography, which offers nothing more than artisan impeccable reproduction of the depicted object, is not a work of art and in the case where the depicted object, in turn, is a work of high rank" [26]. This position of the court is disputed in German legal literature. For example, Henrik Lement in his book "Photographing Objects of Art" and Professor Gerhard Pfennig in a review of this book [43, p. 625] refer to the fact that the process of shooting an art object, especially a three-dimensional one, may require a lot of creative effort from the photographer to reveal the true essence of this work, so it is highly doubtful to classify absolutely all photographs depicting other works of art as simple photographs.

As the author of simple photography, television and cameramen defended themselves in German law until 2002, if it was a separate frame. These individual shots are protected regardless of the copyright of the entire film [20, p. 470, 472]. This norm was contained in § 91 UrhG [50, p. 1087] and was abolished due to the fact that the German legislator wished to eliminate discrimination against operators and give them the rights of authors of works of photographic art.

Of interest is also the problem of protecting the motive of photography, which was most widely developed in German judicial practice in 2006–2008. The ambiguity of this problem is that the protection of the plot of photography runs counter to the fundamental principle of delimitation of form and idea for both German and Russian copyright [53]. That is, in any work of art it is the objective expression, the form of any idea, but not the thought or idea itself that is defended. In the case of rephotography of the same plot, the question arises of whether this is its free use or a dependent subsequent creation in the sense of § 23 UrhG.

A clear distinction in this case is especially difficult, since in the case of photography, the form and idea merge together, and the artistic level of photography often depends more on the choice of plot than on the way it is expressed. The decisions of German courts in this area balance between the provision of legal protection for creative photographs and the need to protect the freedom of the plot. Excessive copyright protection could be deplorable for photographers: a plot once used in a photo would be closed to other authors.

According to Russian judicial practice, "only an individual can be the creator of a work, while its status does not matter" [4]. In this case, there was a dispute about the authorship of an individual entrepreneur on a graphic work. There are no obstacles to compensation for the moral

damage of an individual entrepreneur, the copyright for the photographic work of which was violated [16].

However, based on the paragraph of the second article 6 Federal Law of 18.12.2006 No 231-FZ "On the Enactment of Part Four of the Civil Code of the Russian Federation" [2], the copyright of legal entities that arose before the 03.08.1993 (before the entry into force of the Law on Copyright and Related Rights) ceases seventy years after the publication or creation of the work. The rules of part four of the Civil Code of the Russian Federation apply to the relevant legal relations by analogy. Moreover, according to the Resolution of the Plenum of the Supreme Court of the Russian Federation No 5, the Plenum of the Supreme Court of the Russian Federation No 29 [13], such legal entities are considered authors of works for the purposes of law enforcement. Nevertheless, this does not mean the recognition of the relevant legal entities by authors with the entire complex of intellectual rights to the work. Personal non-property rights to the corresponding works belong to individuals.

Some features of the distribution of rights to images of cartoon characters are described in paragraph 12 of the Review of Judicial Practice in Cases Related to the Resolution of Disputes on the Protection of Intellectual Rights (approved by Presidium of the Supreme Court of the Russian Federation on September 23, 2015) [5]. The rights to characters in audiovisual works — animated films created before August 3, 1992, belong to the company that shot the cartoon, that is, the film studio (or its successor). Individuals who took part in the creation of cartoons during the specified period do not have exclusive rights to cartoons and their characters.

The owner of the exclusive right to the character of the animated film as part of the work is the owner of the exclusive right to the animated film, i.e. to the entire work as a whole.

Copyright for an audiovisual work, and, therefore, for characters of animated films — actors in the work, is recognized by a legal entity — the enterprise that shot the film, which met the requirements of Part 1 of Art. 486 of the RSFSR Civil Code in 1964, which was in force at the time of the creation of animated films.

Article 6 of the Federal Law of December 18, 2006 No 231-FZ indicates that the copyright of legal entities arose before August 3, 1993, that is, before the entry into force of the Law of the Russian Federation of July 9, 1993 No 5351-I "On Copyright and Related Rights", terminated after seventy years from the date of the legitimate publication of the work, and if it was not made public — from the day the work was created. The rules of part four of the Civil Code of the Russian Federation apply to the relevant legal relations by analogy. For the purposes of their application, such legal entities are considered the authors of the works.

14.07.2022, the production designer of the animated (cartoon) film was included in the authors of the audiovisual work (clauses 4, 1 of article 1263 of the Civil Code of the Russian Federation).

Only an individual can be considered the author of a work of fine art or a photographic work in German law, which is also enshrined in judicial practice, in particular in the decision of the Berlin District Court of May 10, 1989 [25]. In this decision, the court determined that the ability to be an author or photographer in the sense of § 2 and 72 UrhG belongs only to individuals. A legal person may be the holder of the rights to use simple photographs that were taken by the satellites used by him only if the individual who is the author or photographer transfers such rights to him. A legal entity that uses satellites does not have the right to require the indication of its name in accordance with § 13 of the UrhG when publishing photographs taken by its satellite.

At the same time, under Russian law, a legal entity, in the presence of a dispute over the right to use a work of fine art or part of it, must prove the fact that the rights to the work were transferred to it, even if such a work was created as part of an official assignment. This is confirmed by judicial practice, in particular in the decisions of the Supreme Arbitration Court of the Russian Federation. So, in 2000, the Supreme Arbitration Court of the Russian Federation ruled [14] that copyright for a work created in the order of fulfilling an official assignment in a scientific or other organization belongs to the author of the work. If the author's property rights were transferred to them by a legal entity, he can freely defend his violated right to use the work. For example, the existence of an exclusive license from a legal entity and the fact that there was no agreement between the heiress of the author of the work of fine art "Zhnitsa" and the distillery on the use of a fragment of this work on the labels of manufactured products allowed the legal entity — the owner of the rights to the work — to claim compensation for its violated right [8]. There are precedents for the protection of rights by legal entities and in the case of photographs — for example, in the process of considering the case in several instances, OOO "PKP Zavod Vysokotechnologichnogo Oborudovanija" was able to defend its right to recover compensation from another legal entity in connection with the placement of controversial photographs on the defendant's website without the consent of the plaintiff [6]. In accordance with paragraph 23 of the Review of the practice of resolving disputes related to the protection of foreign investors by courts (approved by the Presidium of the Supreme Court of the Russian Federation on 12.07.2017), a foreign legal entity also can demand compensation in its favor for copyright infringement in a Russian court, but in this case it is obliged to confirm its status as a foreign legal entity.

If we are talking about photographic works created during the performance of official duties, but in addition to agreements with the employer, in the absence of evidence that the photographs were taken by the employee as part of the performance of official duties and official assignment, the employee has the right to claim compensation for violation of the exclusive right to the works created by him [5].

CONCLUSION

As we can see, law enforcement is moving towards an increasingly clear acceptance of the fact that creative work and the results of creative activity are subject to protection. The collected compensation for copyright infringement is increasingly significant and stable and a systematic decline in their level is gradually becoming a thing of the past. Thus, once adopted by the courts, the reduction in compensation for the illegal use of photographic works to 10 thousand rubles was replaced by a different approach and in modern Russian realities such compensation can reach more than 600 thousand rubles for 5 photographs [6].

I would also like to note the tendency of Russian law enforcement practice to protect workers who create creative works during working hours, but in addition to contractual obligations to the employer.

German law continues to maintain to some extent discriminatory norms in relation to simple photographs, unlike works of photographic art, and we see here some vices of possible protection of those authors whose works will be qualified as simple photographs.

In Russian law, in turn, some restrictions are subject to artists who create objects of decorative and applied art, deprived of such rights that are granted to authors of works of fine art, for example, access rights and rights to follow.

Therefore, in connection with the facts set out in this Article, it can be concluded that the protection of the rights of authors of works of fine and photographic art in Russia and Germany, the set of such rights, opportunities and the degree of protection of the legitimate interests of authors are inextricably linked with the qualification of the works created by them, which confirms the importance of legal clarity in establishing clear principles of such qualifications at the legislative level and in the formation of law enforcement practice.

СПИСОК ИСТОЧНИКОВ

Законодательство

1. Гражданский кодекс Российской Федерации (часть четвертая) от 18.12.2006 № 230-ФЗ (ред. от 05.12.2022).
2. Федеральный закон от 18.12.2006 № 231-ФЗ (ред. от 02.07.2013) «Овведении в действие части четвертой Гражданского кодекса Российской Федерации».
3. UrhG — Urheberrechtsgesetz — Закон ФРГ от 09.09.1965 об авторском праве с изменениями от 23.07.2021.

Судебная практика

4. Информационное письмо Президиума Высшего арбитражного суда Российской Федерации от 28 сентября 1999 г. № 47 Обзор практики рассмотрения споров, связанных с применением закона Российской Федерации «Об авторском праве и смежных правах», п. 3.
5. Обзор судебной практики по делам, связанным с разрешением споров о защите интеллектуальных прав (утв. Президиумом Верховного Суда РФ 23 сентября 2015 г.), п. 25.
6. Определение Верховного Суда РФ от 20.12.2021 N 307-ЭС21-24363 по делу N А56-100197/2019.
7. Определение Высшего Арбитражного суда РФ от 23 июля 2010 г. № ВАС-9279/10.
8. Определение Высшего Арбитражного суда РФ от 29 мая 2012 г. № ВАС-6206/12 «Об отказе в передаче дела в Президиум Высшего Арбитражного суда Российской Федерации».
9. Определение Московского городского суда от 22.06.2011 по делу № 33-19056.
10. Определение Санкт-Петербургского городского суда от 20.06.2012 № 33-8794.
11. Постановление Девятого арбитражного апелляционного суда от 08.09.2009 № 09АП-13024/2009 по делу № А40-7200/09-110-86.
12. Постановление Пленума Верховного суда Российской Федерации от 19 июня 2006 г. № 15 о вопросах, возникших у судов при рассмотрении гражданских дел, связанных с применением законодательства об авторском праве и смежных правах, п. 20.
13. Постановление 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».
14. Постановление Президиума ВАС РФ № 295/00 от 18.04.2000 // Арбитражная практика 2002. № 9. С. 56–64 — Применение законодательства, регулирующего вопросы интеллектуальной собственности (по материалам дел, рассмотренных Арбитражным судом Свердловской области, кассационной и надзорной инстанциями в 2000-2001 гг.).
15. Постановление Суда по интеллектуальным правам от 19.12.2022 № С01-2093/2022 по делу № А40-136226/2020.

16. Постановление Суда по интеллектуальным правам от 29 сентября 2014 г. № С01-142/2014 по делу № А60-48473/2013.
17. BGH (1. Zivilsenat) Urt. v. 08.11.1989 I ZR 14/88 // GRUR 1990, 669, 673 — Bibelreproduktion.
18. BGH Urt. v. 3. November 1999 — I ZR 55/97 — Werbefotos — OLG Duesseldorf // ZUM. 03/2000. S. 233.
19. BGH Urt. v. 31.03.2010 — I ZB 62/09 — Marlene Dietrich Bildnis II / MIR 08/2010.
20. BGH, GRUR 1962, S. 470, 472 — AKI.
21. BGH, GRUR 86, 458 — Oberammergauer Passionsspiele I.
22. BVerfGE 75, 369 = NJW 1990, 3026
23. KG Berlin 2. Zivilsenat Urt. v. 12.12.2019 2 U 12/16 Kart. Teil: Gründe: 1, 4
24. KG, Urt. v. 26.09.2000 — 5 U 4026/99 // NJW. 2002, Heft 8, 621 — Bachforelle.
25. LG Berlin, Urt. v. 0.05.1989 — 16 O 33/89 // GRUR. 1990, 270 — Satellitenfoto.
26. OLG Düsseldorf 20. Zivilsenat, Urt. v. 13.02.1996 — 20 U 115/95 // GRUR 1997, S. 51.
27. OLG Hamburg Az. 5 U 148/03.
28. OLG Hamm Urt. v. 24.08.2004 — 4 U 51/04 — Urheberrechtlicher Schutz von Grafiken auf einer Website

Научная литература

29. *Беляцкин С.А.* Новое авторское право в его основных принципах. По изданию 1912 г. (Санкт-Петербург: Изд-во Л.В. Гутмана).
30. *Боннер А.Т.* Правовые споры, связанные с произведениями искусства // Законодательство. 2007. № 7. С. 69–79.
31. Записка об авторском праве фотографа Государственной думе от 11 Русских фотографических обществ. Санкт-Петербург, 1908. 32 с.
32. *Ионас В.Я.* Критерий творчества в авторском праве и судебной практике. М.: Юрид. лит., 1963. 137 с. С. 9.
33. *Канторовичъ Я.А.* Авторское право на литературные, музыкальные и художественные произведения. Петроградъ, 1916. 792 с. С. 274.
34. *Миллер П.* Фотографическая собственность // Журн. гражданского и уголовного права, 1883, кн. 9, с. 94 (цит. по: Законы гражданские с разъяснениями Правительствующего Сената и комментариями русских юристов / составил И.М. Тютрюмов [Книга пятая]. М.: Статут, 2004. 444 с. (Классика российской цивилистики).
35. *Свиридова Е.А.* Свободное использование произведения как объекта авторского права. М.: Юркомпани, 2014. Правовая база «ГАРАНТ».
36. *Субботина С.А.* Можно ли защитить оригинальный дизайн упаковки или продукта как объект авторского права? // Пищевая промышленность: бухгалтерский учет и налогообложение. 2010. № 5. С. 1.
37. *Судариков С.А.* Право интеллектуальной собственности. М.: Проспект, 2010. 368 с. § 2.5.
38. *Хохлов В.А.* Авторское право: законодательство, теория, практика. М.: ИД «Городец», 2008. 288 с.
39. *Шостак И.В.* Особенности правового регулирования произведений декоративно-прикладного и сценографического искусства в РФ // Интеллектуальная собственность. Авторское право и смежные права. 2019. № 4. С. 15–22.
40. *Duvigneau J., Philipp A.* Urheberrechtlicher Schutz von Tätowierungen // ZUM 07/1998, p. 535.
41. *Eisenmann Hartmut, Jautz Ulrich.* Grundriss Gewerblicher Rechtschutz und Urheberrecht. Mit 56 Fällen und Lösungen. 7, überarbeitete und aktualisierte Auflage. Heidelberg; München; Landsberg; Berlin: P.F. Müller, Verlagsgruppe Hüthig Jehle Rehm GmbH, 2007. 389 s.
42. *Koschtial Ulrike* (Dr., LL.M., Rechtsanwältin in München) "Zur Notwendigkeit der Absenkung angewandten Kunst im deutschem Urheberrecht" // GRUR 2004 Heft 7. S. 555–562.
43. *Lehment Henrik.* Das Fotografieren von Kunstgegenständen. Besprochen von Prof. Dr. Gerhard Pfennig. Schriften zum deutschen und internationalen Persönlichkeits — und Immaterialgüterrecht Bd. 20, V&R unipress, Göttingen 2008, 235 s. // UFITA Archiv für Urheber — und Medienrecht. Stömpfli Verlag AG Bern. S. 624–627.
44. *Lettl Tobias* (o. Professor an der Uni Potsdam) Urheberrecht. Verlag p.H.Beck München 2008. S. 53. § 2 UrhG Rn 81.
45. Mestmächer/Schulze. Kommentar zum deutschen Urheberrecht. 44. AL/Mai 2007.
46. Praxiskommentar zum Urheberrecht/Dr. Artur-Axel Wandtke und Dr. Winfried Billinger. 2. Auflage. München: Verlag p.H.Beck, 2006. 1912 s.
47. *Püschel Heinz.* Prof. em. Dr. jur. habil. Urheberrecht im Überblick. Eine Einführung in das Urheberrechtsgesetz — mit der Richtlinie der EG über den Rechtsschutz von Computerprogrammen. Haufe, 1991. 192 s.
48. *Runge Kurt.* Dr. jur. Urheber — und Verlagsrecht. Bonn; Hannover; Stuttgart: Ferdinand Dümmlers Verlag, 1953. 1048 s.
49. *Schack Haimo.* Urheber — und Urhebervertragsrecht. 4, neubearbeitete Auflage. 2007. Mohr Siebeck. 577 s.
50. Urheberrechtsgesetz. Urheberrechtswahrnehmungs gesetz. Kunsturhebergesetz. Kommentar / Dr. Thomas Dreier. München: Verlag p.H.Beck, 2004. S. 80. Rn 149.

Публицистика

51. В подземных переходах Москвы появятся легальные граффити // Москва-24. — URL: http://www.m24.ru/articles/9011 (дата обращения: 23.02.2013).
52. Подростков будут судить за граффити на поезде // Москва-24. — URL: http://www.m24.ru/articles/12213 (дата обращения: 23.02.2013).
53. *Winfried Billinger, Katharina Gargers von Boehm.* Der Blick ist frei. Nachgestellte Fotos aus urheberrechtlicher sicht // GRUR 2008, Heft 1. S. 24–30.

REFERENCES

Legislation

1. Grazhdanskii kodeks Rossiiskoi Federatsii (chast chetvertaya) ot 18.12.2006 N 230-FZ (red. ot 05.12.2022) (Civil Code of the Russian Federation (part 4)).
2. Federalnii zakon ot 18.12.2006 No 231-FZ (red. ot 02.07.2013) "O vvedenii v deistvie chasti chetvertoi Grazhdanskogo kodeksa Rossiiskoi Federatsii".
3. Urheberrechtsgesetz vom 9. September 1965 (BGBl. I S. 1273), das zuletzt durch Artikel 25 des Gesetzes vom 23. Juni 2021 (BGBl. I S. 1858) geändert worden ist.

Court Precedents

4. Informatsionnoe pismo Prezidiuma Visshego arbitrazhnogo suda Rossiiskoi Federatsii ot 28 sentyabrya 1999 g. No 47. Obzor praktiki rassmotreniya sporov, svyazannikh s primeneniem zakona Rossiiskoi Federatsii "Ob avtorskom prave i smezhnikh pravakh".
5. Obzor sudebnoi praktiki po delam, svyazannim s razresheniem sporov o zashchite intellektualnikh prav (utv. Prezidiumom Verkhovnogo Suda RF 23 sentyabrya 2015 g.)
6. Opredelenie Verkhovnogo Suda RF ot 20.12.2021 No 307-ES21-24363 po delu No A56-100197/2019.
7. Opredelenie Visshego Arbitrazhnogo Suda RF ot 23 iyulya 2010 g. No VAS-9279/10.
8. Opredelenie Visshego Arbitrazhnogo Suda RF ot 29 maya 2012 g. No VAS-6206/12 "Ob otkaze v peredache dela v Prezidium Visshego Arbitrazhnogo Suda Rossiiskoi Federatsii".
9. Opredelenie Moskovskogo gorodskogo suda ot 22.06.2011 po delu No 33-19056.
10. Opredelenie Sankt-Peterburgskogo gorodskogo suda ot 20.06.2012 No 33-8794.
11. Postanovlenie Devyatogo arbitrazhnogo apellyatsionnogo suda ot 08.09.2009 No 09AP-13024/2009 po delu No A40-7200/09-110-86.
12. Postanovlenie Plenuma Verkhovnogo suda Rossiiskoi Federatsii ot 19 iyunya 2006 g. No 15 "O voprosakh, voznikshikh u sudov pri rassmotrenii grazhdanskikh del, svyazannikh s primeneniem zakonodatelstva ob avtorskom prave i smezhnikh pravakh".
13. Postanovlenie Plenuma Verkhovnogo Suda RF No 5, Plenuma VAS RF No 29 ot 26.03.2009 "O nekotorikh voprosakh, voznikshikh v svyazi s vvedeniem v deistvie chasti chetvertoi Grazhdanskogo kodeksa Rossiiskoi Federatsii".
14. Postanovlenie Prezidiuma VAS RF No 295/00 ot 18.04.2000 // Arbitrazhnaya praktika. 2002. No 9. S. 56–64 — Primenenie zakonodatelstva, reguliruyushchego voprosi intellektualnoi sobstvennosti (po materialam del, rassmotrennikh Arbitrazhnim sudom Sverdlovskoi oblasti, kassatsionnoi i nadzornoi instantsiyami, v 2000–200 gg.).
15. Postanovlenie Suda po intellektualnim pravam ot 19.12.2022 N S01-2093/2022 po delu N A40-136226/2020.
16. Postanovlenie Suda po intellektualnim pravam ot 29 sentyabrya 2014 g. No S01-142/2014 po delu No A60-48473/2013.
17. BGH (1. Zivilsenat) Urt. v. 08.11.1989 I ZR 14/88 // GRUR 1990, 669, 673 — Bibelreproduktion
18. BGH Urt. v. 3. November 1999 — I ZR 55/97 — Werbefotos — OLG Duesseldorf // ZUM 3/2000. S. 233.
19. BGH Urt. v. 31.03.2010 — I ZB 62/09 — Marlene Dietrich Bildnis II // MIR 08/2010.
20. BGH, GRUR 1962, S. 470, 472 — AKI.
21. BGH, GRUR 86, 458 — Oberammergauer Passionsspiele I.
22. BVerfGE 75, 369 = NJW 1990, 3026
23. KG Berlin 2. Zivilsenat Urt. v. 12.12.2019 2 U 12/16 Kart. Teil: Gründe: 1, 4.
24. KG, Urt. v. 26.09.2000 — 5 U 4026/99 // NJW 2002, Heft 8, 621 — Bachforelle.
25. LG Berlin, Urt. v. 30.05.1989 — 16 O 33/89 // GRUR 1990, 270 — Satellitenfoto.
26. OLG Düsseldorf 20. Zivilsenat, Urt. v. 13.02.1996 — 20 U 115/95 // GRUR 1997. S. 51.
27. OLG Hamburg Az. 5 U 148/03.
28. OLG Hamm Urt. v. 24.08.2004 — 4 U 51/04 — Urheberrechtlicher Schutz von Grafiken auf einer Website.

Legal Doctrine

29. *Belyatskin S.A.* Novoe avtorskoe pravo v yego osnovnikh printsipakh. Po izdaniyu 1912 g.
30. *Bonner A.T.* Pravovie spori, svyazannie s proizvedeniyami iskusstva // Zakonodatelstvo. 2007. № 7. S. 69–79.
31. Zapiska ob avtorskom prave fotografa Gosudarstvennoi Dume ot 11 Russkikh Fotograficheskikh Obshchestv. 32 s.
32. *Ionas V.Ya.* Kriterii tvorchestva v avtorskom prave i sudebnoi praktike. M.: Yurid. lit., 1963. 137 s.

33. *Kantorovich Ya.A.* Avtorskoe pravo na literaturnie, muzikalnie i khudozhestvennie proizvedeniya. Petrograd, 1916. 792 s.
34. *Miller P.* Fotograficheskaya sobstvennost // Zhurn. grazhdanskogo i ugolovnogo prava. 1883. Kn. 9. S. 94 (tsit. po: Zakoni grazhdanskie s razyasneniyami Pravitelstvuyushchego Senata i kommentariyami russkikh yuristov / sostavil I.M Tyutryumov. [Kniga pyataya]. M.: Statut, 2004. 444 s. (Klassika rossiiskoi tsivilistiki).
35. *Sviridova Ye.A.* Svobodnoe ispolzovanie proizvedeniya kak obekta avtorskogo prava. M.: Yurkompani, 2014. Pravovaya baza "GARANT".
36. *Subbotina S.A.* Mozhno li zashchitit originalnii dizain upakovki ili produkta kak obekt avtorskogo prava? // Pishchevaya promishlennost: bukhgalterskii uchet i nalogooblozhenie. 2010. No 5.
37. Sudarikov S.A. Pravo intellektualnoi sobstvennosti. — M.: "Prospekt", 2010. — 368 s.
38. *Khokhlov V.A.* Avtorskoe pravo: zakonodatelstvo, teoriya, praktika. M.: ID "Gorodets", 2008. 288 s.
39. *Shostak I.V.* Osobennosti pravovogo regulirovaniya proizvedenii dekorativno-prikladnogo i stsenograficheskogo iskusstva v RF // IS. Avtorskoe pravo i smezhnie prava. 2019. No 4. S. 15–22.
40. *Duvigneau J., Philipp A.* Urheberrechtlicher Schutz von Tätowierungen // ZUM 07/1998. S. 535.
41. *Eisenmann Hartmut, Jautz Ulrich.* Grundriss Gewerblicher Rechtschutz und Urheberrecht. Mit 56 Fällen und Lösungen. 7., überarbeitete und aktualisierte Auflage. Heidelberg; München; Landsberg; Berlin: P.F. Müller, Verlagsgruppe Hüthig Jehle Rehm GmbH, 2007. 389 s.
42. *Koschtial Ulrike* (Dr., LL.M., Rechtsanwältin in München) „Zur Notwendigkeit der Absenkung angewandten Kunst im deutschem Urheberrecht" // GRUR 2004 Heft 7, S. 555–562.
43. *Lehment Henrik.* Das Fotografieren von Kunstgegenständen. Besprochen von Prof. Dr. Gerhard Pfennig. Schriften zum deutschen und internationalen Persönlichkeits — und Immaterialgüterrecht Bd. 20, V&R unipress, Göttingen 2008, 235 s. // UFITA Archiv für Urheber — und Medienrecht. Stömpfli Verlag AG Bern. S. 624–627.
44. *Lettl Tobias* (o. Professor an der Uni Potsdam) Urheberrecht. München: Verlag p.H.Beck, 2008. S. 53 § 2 UrhG Rn 81.
45. Mestmächer/Schulze. Kommentar zum deutschen Urheberrecht. 44. AL/Mai 2007.
46. Praxiskommentar zum Urheberrecht/Dr. Artur-Axel Wandtke und Dr. Winfried Billinger. 2. Auflage. München: Verlag p.H.Beck, 2006. 1912 s.
47. *Püschel Heinz,* Prof. em. Dr. jur. habil. Urheberrecht im Überblick. Eine Einführung in das Urheberrechtsgesetz — mit der Richtlinie der EG über den Rechtsschutz von Computerprogrammen. Haufe, 1991. 192 s.
48. *Runge Kurt,* Dr. jur. Urheber — und Verlagsrecht. Bonn; Hannover; Stuttgart: Ferdinand Dümmlers Verlag, 1953. 1048 s.
49. *Schack Haimo.* Urheber — und Urhebervertragsrecht. 4, neubearbeitete Auflage. 2007. Mohr Siebeck. 577 s.
50. Urheberrechtsgesetz. Urheberrechtswahrnehmungsgesetz. Kunsturhebergesetz. Kommentar / Dr. Thomas Dreier. München: Verlag p.H.Beck, 2004. S. 80. Rn 149.

Journal Articles

51. V podzemnikh perekhodakh Moskvi poyavyatsya legalnie graffiti // Moskva-24. — URL: http://www.m24.ru/articles/9011 (data obrashcheniya: 23.02.2013).
52. Podrostkov budut sudit za graffiti na poezde // Moskva-24. — URL: http://www.m24.ru/articles/12213 (data obrashcheniya: 23.02.2013).
53. *Winfried Billinger, Katharina Gargers von Boehm.* Der Blick ist frei. Nachgestellte Fotos aus urheberrechtlicher sicht // GRUR 2008, Heft 1, S. 24–30.