Comparative Analysis of Architect Copyright Legal Regulation in Russia and the USA

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ABSTRACT: Based on a comparative analysis of copyright regulation in Russia and the USA, the article discusses the issues related to the concept of architectural work, their types, exclusive, personal non-property and other rights. The proposals are being formulated to improve the legal framework of architect copyright, taking into account the positive experience of the United States in this area.

Keywords: architectural work, copyright, exclusive rights, personal non-property rights, other rights of an architect.

INTRODUCTION

Architecture is a form of art. Works of art, in accordance with the provisions of the fourth part of the Civil Code of the Russian Federation (hereinafter - the Civil Code), are subject to legal protection. During the period from 1993 to 2006, the Law of the Russian Federation "On Copyright and Related Rights", the art. 7 of which has attributed the works of architecture to the objects of copyright for the first time in the latest legislative practice of our country. Due to the adoption of part four of the Civil Code of the Russian Federation, which is entirely devoted to the relations arising in connection with the creation and use of intellectual activity results, the mentioned law was repealed. This can be regarded as a step backward in the legal regulation of specific copyright relations. The current Civil Code, along with the general provisions that are applied to any results of intellectual activity, takes into account the features of a number of them to one degree or another, including the features of their rights, and in particular, the copyrights for inventions,

utility models, industrial designs, but not the authors of works of architecture, although the latter are no less important than, for example, industrial designs. Filling this gap seems relevant given the ongoing mass construction of housing in the country, the construction of social and cultural facilities. The task of domestic legal science is to develop recommendations on the legal regulation of architect work results, taking into account the positive experience gained in this area of public relations in foreign countries (Nuriyev et al, 2018).

The most interesting is the experience of the United States, which is a recognized leader in the field of intellectual property protection. In this country, the Law on Copyright was adopted and entered into force on January 1, 1978, the list of protected works of which includes the works of architecture (§ 102) (An Act for the general revision of the Copyright Law). The Law defines its purpose, objects of copyright, copyright notices, registration of works, work copying procedure, the duration of copyright, including those that arose before the Law came into force, limitations and protection of copyright, the transfer of works to the public domain, the recognition of works as "ownerless." This article analyzes similar legal institutes that regulate copyrights in Russia and the United States, identifies their strengths and weaknesses, identifies the possibilities of the proven US legal norm application to the regulation of architects' rights in Russia. The methodological basis of the article consists of general scientific and special methods. The following general scientific methods were used: dialectic, logical, analysis and synthesis, induction and deduction, etc. The following private scientific methods of cognition were used: formal legal, comparative legal, and systemic-structural.

RESULTS

The Civil Code of the Russian Federation does not provide legal criteria by which the result of intellectual activity could be attributed to a work of art. It is indicated only that a work should be the result of the author's creative activity. The RF Civil Code does not explain the meaning of creative activity. Judicial practice is extremely contradictory in this matter. In our opinion, a work of architecture is a combination of new or original architectural and spatial images and ideas fixed in an objective form. Certain ideas, concepts, architectural designs and solutions that not embodied on a tangible medium are not subject to legal protection. It seems that either the criterion of novelty or the criterion of originality is sufficient to attribute the result of an architect's work to a work of architecture.

A work of architecture is new if the combination of its essential features that determine the external and internal form was not previously known (has not been achieved by anyone) (for example, in terms of the compositional solution of architectural object forms, its scale, proportions, volumes, and texture). A work of architecture is original, if not repeated with parallel creativity, stands out from the general series (for example, in terms of an architectural object outline, the color scheme of its formative elements, artistic and aesthetic characteristics, functional organization, special relationships with the external environment, structural and engineering solutions and used materials (Shishkina, 2019; Fathi, & Dastoori, 2014).

The originality of a work of architecture is specifically addressed in the US Copyright Act. The provisions of this Law apply only to original copyright works. According to the decision of the US Supreme Court in the case of Feist v. Rural, the

requirement of "originality" means that a work must be done independently by an author, and not copied from other works and, besides, it must have a certain level of creativity (a modicum of creativity). The ways of this level determination and the description of its nature were left by the US Supreme Court to the discretion of lower courts, which, like Russia, can only guess about it.

In addition to the problem of architect work result attribution criteria to creative activity, there has been the following debate in Russia for a long time: can buildings and structures be considered as the works of architecture or not? The views of the supporters of one or another approach to the indicated problem at different times were reflected in the legislation. So, the Federal Law of November 17, 1995 No. 169-FL "On Architectural Activities in the Russian Federation", the paragraph 2 of the Art. 6 to 2008 had the norm (until 2008) indicating that the object of copyright concerning the works of architecture, along with their other types, is an architectural object. Subsequently, the legislator adjusted this norm, excluding the mention of an architectural object from the list of architecture types.

An active supporter of classifying buildings and structures as the types of architecture works is A.P. Sergeev, who believes that buildings and structures are the main objective form in which a work of architecture is embodied (Sergeev, 2004; Shatilova, et al 2018). K.D. Shestakova also recognizes a building constructed by an architectural project as an object of copyright (Shestakova, 2010). A similar position is supported by N. V. Slesaryuk, indicating that "apart from the process of building a structure, the use of an architectural project loses all meaning" (Slesaryuk, 2012).

According to V.N. Lisitsa, an architectural object represented by a building, structure, a complex of buildings and structures, as well as their interior and landscaping objects, created on the basis of an architectural project, is "an objective form of expression of a work of architecture" (Lisitsa, 2009). Objecting to the named authors, D.K. Hautov writes the following: "Works of architecture and urban planning should have an objective form of expression. The form of expression of such works is the project. The building (structure) constructed according to the project cannot be a work of architecture or an object of copyright" (Hautov, 2011; Peres, et al, 2018). A. Dumanskaya, O.P. Popova (Dumanskaya & Popova, 2013), R. Merzlikin (Merzlikina, 2015), O. Ershov (Ershov, 2009) adhere to the same position. They also believe that "a building (structure) constructed according to the project cannot be a work of architecture or an object of copyright".

In our opinion, the possibility of classifying buildings and structures that differ in novelty or originality as the works of architecture is presented in paragraph 1, Art. 1259 of the RF Civil Code. Pointing to such types of architectural works as projects, drawings, images, mock-ups, the legislator uses the wording "including", which gives reason to talk about its broad interpretation. Accordingly, a number of other objects can be additionally attributed to architectural works, and in particular, models, drawings, sketches, plans, three-dimensional computer images, etc. Architectural objects cannot be excluded from this list, especially since they are indicated directly in a number of articles of the RF Civil Code. This, for example, is mentioned in subparagraph 1, paragraph 1, Article 1273 of the RF Civil Code, prohibiting the reproduction of legally published works of architecture "in the form of buildings and similar structures" for personal use; Section 2, Art. 1292 of the RF Civil Code, stating that "the author of a work of architecture has the right to demand to provide the opportunity to take photos and videos of a work from the owner of an original work, unless otherwise provided by a contract."; Section 2, Art. 1276 of the RF

Civil Code, which allows for "bringing to the public in the form of images of architecture", "located in a place open to public access, or visible from this place."

We also refer to paragraph 2, Art. 1294 of the RF Civil Code, granting the author of a work of architecture the right to supervise "the construction of a building or a structure or other implementation of the corresponding project. "Obviously, in this case, no changes can be made to the building under construction without the author's consent (an architect). It follows that the legislator proceeds from the idea of conformity of an architect's plan embodied in a project with the ways it will be implemented in reality. We add to this that the legal protection of projects and drawings in the absence of legal protection for the buildings and structures created on their basis makes the legal protection of the former meaningless.

The abovementioned legal provisions indicate the inconsistency of the legislator concerning the determination of architecture work types. On the one hand, he does not mention buildings and structures as such in a special article 1259 of the RF Civil Code on copyright objects, although the importance of buildings and structures directly claims this, and on the other, he speaks about them rather than projects, drawings, images and mock-ups in subsequent articles, which are emphasized in the aforementioned article 1259. In the United States, the legislator is more consistent in this regard. America has the largest number of architecture work types than in other countries. Here, the protected works of architecture are drawings, preliminary plans, sections, facades, floor plans, construction plans, general building models, the models of internal supports, appearance models, building photo montages, computer images of a structure, and constructed structures (The Visual Artists Rights Act of 1990, Javelin Invs., 2007; Hearing before the H. Comm. on the Judiciary, 101st Cong, 1990).

Unlike Russia, where there are no official interpretations of the terms "building" and "construction", such terms are officially interpreted in the United States. The Copyright Office understands them as "permanent and stationary structures intended for human habitation, such as residential buildings and office buildings, as well as other permanent and stationary structures designed to accommodate people which include, but are not limited to churches, museums, gazebos and garden pavilions" (37 CFR § 202.11 (b) (2)). The works of architecture other than buildings, such as bridges, dams, road junctions, recreational vehicles, mobile homes that are not intended for permanent residence of people (37 CFR § 202.11 (d) (1)) are not subject to protection. According to Russian legislation on a work of architecture, its author has intellectual rights, which are divided into exclusive, personal non-property and other rights (Article 1226 of the RF Civil Code). The United States Copyright Act does not know such a thing as intellectual property and does not adhere to such a gradation. It mainly refers to the exclusive and some of the personal non-property rights that are called "moral rights" in the USA, as well as some of the rights that are related to others in Russia.

The origin of the term "intellectual rights" in Russian law requires a separate explanation. The fact is that contrary to world practice intellectual property in Russia is not understood to be the rights related to literary, artistic and other results of intellectual activity in the production, scientific, literary and artistic fields, as follows from the paragraph "VIII", Art. 2 of the Stockholm Convention of 1967 on the establishment of the World Intellectual Property Organization, signed by the USSR in 1970, and as the results of intellectual activity protected by law (Article 128 of the RF Civil Code and paragraph 1, Article 1225 of the RF Civil Code).

Thus, according to the RF Civil Code, intellectual property in our country is the works of science, literature, art, and not the rights to them. The indicated approach required the Russian legislator to introduce a general concept of "intellectual rights", the totality of these rights forms the author's intellectual property right to a work, however, since the law does not establish any classification criteria for intellectual property as works, not only works are subject to protection, but also all the results of this activity, regardless of their dignity, purpose and method of expression (paragraph 1, article 1259 of the RF Civil Code). This leads to the fact that the Russian judicial practice in some cases recognizes copyright even to individual words and phrases, including those that existed in Russian or a foreign language even before the creation of a work by an author, but were creatively rethought by him and became widely known precisely in connection with the works of certain authors (see, for example, the Decision of the Federal Antimonopoly Service of the Ural District (October 4, 2012) concerning the case No. A76-22385/2011).

The United States, when signing the Stockholm Convention, did not interpret its provisions in the understanding different from the meaning contained in it, therefore, a new terminology related to intellectual rights did not arise. The exclusive rights that make the part of intellectual rights are interpreted by the Civil Code of the Russian Federation as property rights, which in all cases, except for the case of official work, belong to their authors, in contrast to other rights that may belong to authors only in the cases specified by the law specifically. With this in mind, the exclusive author's right for a work of architecture under Russian law is that only he owns the right to use it at his discretion in any form and in any way that does not contradict the law, and to dispose of this right, in particular, transfer it to another person who becomes his legal copyright holder (Art. 1229, Art. 1270 of the RF Civil Code). Exclusive rights are reserved for the author throughout his life and 70 years after his death.

Paragraph 2, Art. 1270 of the RF Civil Code provides a list of ways to use a work, some of which can be applied to such architectural works as models, sketches, drawings, projects, drawings, and plans. The thing is about the reproduction, distribution, public display, rental, import, processing, practical implementation of an architectural project, bringing a work of architecture to the public. Paragraph 1, Art. 1294 of the RF Civil Code additionally indicates the author's right to use his work of architecture by developing documentation for construction. At the same time, the architectural project and the construction documentation based on it can be reused only with the consent of the project author. Other provisions in relation to the development of documentation and its reuse may be provided by a contract.

An attempt by the Russian lawmaker to provide an exhaustive list of ways to use the work seems counterproductive, unduly constraining the author. The focus on this is also visible from the content of the Art. 1285 of the RF Civil Code, which instructs the author to transfer exclusive rights and their entire complex provided by law under the agreement, and not some part of them, which runs counter to the principle of freedom of contract enshrined in Art. 421 of the RF Civil Code. In the United States, the author's restrictions are minimal. Thus, the Law on Copyright refers to the following exclusive rights applicable to the authors of architecture works: distribute, display and prepare a design work (§ 102 (a) (8). The parties may independently determine all other exclusive rights in the contract (Hearing before the H. Comm. on the Judiciary, 101st Cong, 1990). Moreover, in the USA, all exclusive rights to a work, as well as some of them, and even just one, can be alienated under the contract.

If an architect has registered his work (a design project) and received the corresponding certificate, then, according to § 120 (a) of the Copyright Law, he cannot prevent the construction of a building with such a registered design. If the building is viewed from places accessible to the public, then the copyright holder cannot prohibit the manufacture, distribution or public display of paintings, photographs, other images of the building, making of sketches, graphic images, etc. A copyright holder cannot also prohibit the owners from re-planning, changing the external and internal appearance of a building. The Institute for the Registration of Works of Architecture is unknown to Russian civil law. In the United States, this institution, although not a condition for copyright protection, contributes to such protection. The presence of a registration certificate issued by the Copyright Office of the Library of Congress (United States Copyright Office) allows us to prove that an architectural object indicated in the certificate is protected as a copyright object, that the author of the work is a very specific person, that the time of the work creation falls on exactly a certain date, that the property rights to the work belong to the right holder named in the certificate.

Therefore, a presumption is established in the United States, that a registered work is protected by copyright, and all third parties are warned of responsibility for the illegal use of this intellectual property. Accordingly, a potential copyright infringer will not be able to challenge the plaintiff's appeal concerning such rights in court. Besides, registration allows to appeal to the court with a request to issue a preliminary order banning the unauthorized use of a work even before the trial ("injunction").

It should be added that US Customs automatically receive information about this immediately after copyright registering, which prevents the illegal movement of counterfeit copies of works across the border. If registration is made within three months after the publication of the work or before copyright infringement, the copyright holder will be compensated for losses (including actual losses incurred as the result of copyright infringement, and the infringer's profit resulting from such infringement), as well as legal expenses, otherwise legal costs will not be reimbursed (Copyright protection in the US).

It seems that in terms of exclusive right regulation and work registering, the experience of the United States could be used in Russian conditions. This would significantly limit the compilation in the field of architecture and thereby parasitizing of mediocrity on the talent of gifted architects, and would protect the rights of truly talented architects. Significant discrepancies between Russia and the USA exist in the legal regulation of personal non-property ("moral") rights.

In the Civil Code of the Russian Federation, only the right of authorship and the right of the author to the name are explicitly called personal non-property rights. The right of authorship is the right to be recognized as the author of a work of architecture (Article 1265 of the RF Civil Code); the author's right to a name is the right to use or permit the use of a work of architecture under one's own name, under an assumed name (a pseudonym) or without indicating a name, that is, anonymously (Clause 1, Article 1265 of the RF Civil Code).

Regarding all other rights, the Civil Code of the Russian Federation has an important clarification, namely that only those rights that are inalienable and non-transferable (paragraph 2, Article 1228 of the RF Civil Code) can be considered as personal non-property. Based on this criterion, architects' personal moral rights may also be considered: the right to the inviolability of a work and work protection from distortion (Clause 1, Article 1266 of the RF Civil Code); the right to publish the work (Clause 1, Article

1268 of the RF Civil Code); the right to recall the work before its publication with compensation for losses incurred to the injured party (Clause 1, Article 1269 of the RF Civil Code); the right to exercise copyright control over the development of documentation for construction and the right of architectural supervision for a building or a structure construction or other implementation of the corresponding project (paragraph 2, Article 1294 of the RF Civil Code); the right to demand the right to participate in the implementation of the project from the customer of the architectural project (paragraph 3, Article 1294 of the RF Civil Code).

The legal regime of the stated rights is different. With regard to the right of authorship and the right of the author to a name, the law emphasizes that the waiver of them is void (clause 1, article 1265 of the RF Civil Code), although the waiver of other personal non-property rights is also excluded. If all personal non-property rights are valid indefinitely, then only the right of authorship, the right of the author to the name and the right to the work inviolability are protected indefinitely (paragraph 1, article 1267 of the RF Civil Code). Thus, we can conclude that the legal protection of all other rights terminates after their use by the author of the work (when he exercised the right to publish the work; exercised the right to recall the work; took part in the implementation of the architectural project, etc.).

In the United States, moral rights are described in the Artists Rights Act (Visual Artists Rights Act, Title 17 U.S.C. § 106A) (The Visual Artists Rights Act of 1990). This Law extends to the works of visual art: paintings, graphics, illustrations and photographs, existing in a single copy or issued in circulation of no more than two hundred copies created personally by the author or with his personal signature. A reservation has been made with respect to photographs: they must be taken for the purpose of public display (§ 101). The validity of moral rights to these works, unlike Russia, is limited by the author's life. In the case of co-authorship, this period ends with the death of the last of the co-authors. Thus, the effect of moral rights is significantly shorter than the effect of property rights that remain for 70 years after the author's death (Copyright Term Extension Act 1998), and in relation to joint works until the death of the last co-author, plus another 95 years.

The Law on the Rights of Artists includes the right to authorship recognition (the right of attribution) and the right of protection from intentional destruction, distortion and other infringements of a work that could harm the author's reputation (the right of integrity) to the moral rights. The right of authorship includes the right to claim the authorship of a work, a ban on the use of the author's name in relation to a work that he did not create, a ban on indicating the author's name on his work in case of unlawful changes to this work (§ 106A (a) (1)). The Law does not say anything about the right to use a work under a pseudonym or anonymously. However, when a work is registered, it can be registered both under a pseudonym and anonymously.

The right to protect a work from intentional destruction, distortion and other infringement is accompanied by an indication that this is not a natural change in the work over time or its installation for display. Thus, such an approach cannot be fully recognized as the right to a work inviolability. The law on the rights of artists allows the possibility of "moral right" rejection, which is not allowed in Russia. The corresponding written document on this subject must clearly indicate the work, the method of its use and the moral law the author refuses. If a work is created by a group of authors, then the rejection

of at least one of them from moral law means the rejection of all co-authors from it (§ 106 A (e) (1)).

As for the right of authorship to the works not related to works of art, it is protected under the rules of protection against unfair competition on the basis of § 43 (a) of the Lanham Trademark Act of 1946 (15 U.S.C. § 1125 (a)). American courts apply the provisions of this Law to authorship and the author's right to the name by analogy, in which the "trademark" is the author's name. An analogue of the Russian right to publish a work in the United States is the “right to first publishing” of a work. However, this right in the American law and order always related to property rights, although it defended the same interests as non-property rights. Thus, it cannot be called the replacement of his right to disclosure. At the time of the Artist Right Law adoption, several US states had their own laws on the protection of personal non-property rights of authors. So, in California, the California Art Preservation Act was adopted in 1979, prohibiting any modification of a work of fine art, which is consistent with the right to inviolability of the work in its Russian sense. The law provides for a fifty-year period of moral right protection after the author's death. In many ways, similar protection is granted to the authors of works by the Artist Authorship Rights Act, which was adopted in New York in 1984.

It was indicated above that the structure of intellectual rights provided by the Civil Code of the Russian Federation and applicable to works of architecture, has other rights, and according to the legislator, they cannot be attributed to either exclusive or personal non-property. According to the Civil Code of the Russian Federation, these are the following rights: the right to follow, consisting in the possibility of receiving deductions from the resale amount of a work of fine art (Article 1293 of the RF Civil Code); the right of access to a work of fine art for the purpose of its reproduction (Article 1292 of the RF Civil Code); the right to remuneration for an official work (Article 1295 of the RF Civil Code); the right to use technical means of copyright protection for a work (Article 1299 of the RF Civil Code). If in relation to the majority of the listed rights their assignment to other rights does not raise objections, then this cannot be said about the right of access, since, according to the Art. 1292 of the RF Civil Code, it belongs to the author exclusively and cannot be transferred to anyone. It is a deep secret what guided the legislator, who pointed to the right of access, as related to other author's rights.

In the USA, the right of authors to access their works is not directly mentioned anywhere, although a lot of attention has been paid to the issues of their copying in American law.

The right to follow is generally unknown to US law. Architects cannot get a fair income from the results of their creative activity in circulation, expressed in projects, drawings, sketches, models, and mock-ups. This should be recognized as a major flaw in the legal regulation of intellectual property in America. Unlike Russian law, which provides for the possibility for an architect to receive remuneration for a work created by him in the course of fulfilling his official duties, including the time of its use by the employer and the decision to keep the work secret, in the United States the creator of a work of architecture (design-project) does not acquire the right to remuneration, and generally does not acquire any rights to it. All copyrights to the official work belong to the employer (Krylov, 2019). An exception is the case when the author personally paid tax on the result of his work, since in this case he will not be considered an employee according to § 201 (b) of the US Law on Copyright (Cmty for Creative Non-Violence, 490 U.S. at 730; Aymes v).

According to § 302 (a) of the Copyright Law, exclusive rights to an official work are protected for 120 years from the date of its creation or 95 years from the date of publication, that is, significantly longer than the exclusive rights belonging to the author of the work and other copyright holders (García-Santillán, 2019) .Regarding the technical means of work protection, it should be noted that the United States was the first state where this issue received detailed legal regulation. In 1998, the Digital Millennium Copyright Act (1998) was adopted here, which aims to provide effective protection measures against the circumvention of technological measures used by copyright holders to protect their works (Digital Millennium Copyright Act).

The Article 1221 of the Law in question regulates two types of measures: the measures to prevent unauthorized access to the copies of works and the measures to prevent unauthorized copying and distribution of works, as well as other actions that violate the exclusive rights of authors. The Law provides criteria to determine that a particular device or service is intended to circumvent technical measures for a work protection (Kulikov-Kostyushko, 2005). The law allows circumvention of technical protection measures that control copying only if it is carried out for personal purposes and is not of a commercial or public nature. In Russia, the law regulating the right to use technical means of copyright protection has to be developed yet. In the meantime, the applied measures of such protection are successfully dispensed without any serious consequences for their initiators. The Internet also has numerous suggestions to increase the originality of copied fragments of copyright works up to 100%, which the existing Anti-Plagiarism computer programs cannot cope with. The fight in Russia against this evil is not conducted at all.

CONCLUSION

The legal regulation of copyright in Russia and the United States has its advantages and disadvantages. The positive aspects of Russian law should include detailed regulation of personal non-property rights, as well as such rights as the right to follow, the right of access and the right to remuneration for a work, which significantly contributes to the protection of architects' copyright in this part. The positive aspects of US law that could be applied in Russia include the possibility of architects to register their works, which facilitates the protection of their violated or contested rights in courts; an open list of exclusive rights, which allows architects to formulate additional exclusive rights, taking into account the progress in construction and building materials; the possibility of concluding agreements on the alienation of part of exclusive rights, and not their entire complex, which provides architects with greater freedom in implementation of their creative activity results; detailed regulation of work copying and the measures of their technical protection, which makes it difficult to manufacture counterfeit works of architecture.

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