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CONTENT OF THE CONCEPT "CREATIVE LABOR" IN THE RUSSIAN DOCTRINE AND JUDICIAL PRACTICE

CONTEÚDO DO CONCEITO "TRABALHO CRIATIVO" NA DOUTRINA RUSSA E PRÁTICA JUDICIÁRIA

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ABSTRACT

Objectives: Copyright law applies not to all results of human intellectual activity, but only to those that meet certain criteria of protectability. Proceeding from this, it is of theoretical and practical importance to study the approaches of the doctrine and judicial practice to the disclosure of work protectability criteria. As a rule, if the criteria are specified in the law, their content is usually not disclosed. For this reason, the clarification of the essence of the criteria falls on judicial practice and civil doctrine.

Methodology: The study employs formal-legal and systemic-structural methods, content analysis of various publications, and comparative-legal methods.

Results: Author has determined the criterion of "originality" in the Russian civil doctrine and judicial practice.

Contributions: The content of the criterion of originality is formulated and recommendations are given for the specification of terminology in the Russian legislation.

Keywords: creative labor; originality; work of authorship; copyright law.

RESUMO

Objetivos: A lei de direitos autorais não se aplica a todos os resultados da atividade intelectual humana, mas apenas àqueles que atendem a certos critérios de proteção. A partir disso, é de importância teórica e prática estudar as abordagens da doutrina e da prática judiciária à divulgação dos critérios de tutela do trabalho. Via de regra, se os critérios são especificados na lei, seu conteúdo geralmente não é divulgado. Por isso, o esclarecimento da essência dos critérios recai sobre a prática judiciária e a doutrina civil.

Metodologia: O estudo emprega métodos formal-jurídicos e sistêmico-estruturais, análise de conteúdo de diversas publicações e métodos jurídico-comparativos.

Resultados: O autor determinou o critério de "originalidade" na doutrina civil russa e na prática judiciária.

Contribuições: O conteúdo do critério de originalidade é formulado e são feitas recomendações para a especificação da terminologia na legislação russa.

Palavras-chave: trabalho criativo; originalidade; obra de autoria; lei de direitos autorais.

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INTRODUCTION

The requirement of originality of a work of authorship is recognized by the prevailing opinion of researchers in different countries as a necessary condition for copyright protection. However, copyright law so far lacks consensus on what should be understood under the originality of a work.

The present study attempts to investigate what is understood by the criterion of “originality” in the Russian civil doctrine and judicial practice in order to compare the resulting conclusion with the approach developed in the copyright law of the European Union. The paper explores doctrinal approaches to the understanding of the content of the concepts of “creative labor” and “originality” as criteria for the protectability of works of science, literature, and art; analyzes the existing judicial practice on this legal problem, including the resolutions of the Intellectual Rights Court, the Supreme Court of the Russian Federation; proposes the author’s approach to understanding the “originality” of a work and, on its basis, offers a codification of this concept in the Russian legislation; aligns the proposed codification with the understanding of originality in the copyright law of European Union.

METHODS

The study of the content of the concept of “originality” in copyright law uses traditional for the theoretical and applied legal research general scientific, private scientific, and special methods: the formal-legal, systemic-structural, content analysis of various publications, and the comparative-legal method.

To ensure the reliability of the theoretical provisions developed, the current civil legislation of Russia and the Directives of the European Union are used.

In order to achieve objectivity and comprehensiveness of the study, the works of Russian and foreign scientists in the field of intellectual property law are explored.

RESULTS AND DISCUSSION

The key international agreements in the field of copyright are the Berne Convention for the Protection of Literary and Artistic Works (September 9, 1886) (hereinafter referred to as the Berne Convention) and the World Copyright Convention (Geneva) of September 6, 1952, which establish the fundamental provisions on copyright protection of literary,

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scientific, and artistic works. However, they do not offer a precise list of criteria for the protection of works of science, literature, and art.

In particular, in Art. 2 of the Berne Convention, the term “literary and artistic works” covers all works of literature, science, and art. This article establishes the requirement that the work must be presented in an objective form. In addition, it sets out the rule that collections of literary and artistic works are subject to protection when they are the result of intellectual creativity (in the selection and arrangement of materials), yet the content of the criterion for protection – the result of intellectual creativity – is not disclosed. At the same time, it can hardly be argued that “it is generally accepted that the Berne Convention entails that only ‘original’ works qualify for protection” (World Intellectual Property Organization, 2004; Böhler, 2017).

From our understanding, within the meaning of Art. 2 of the Berne Convention, the criteria for the protectability of a work are: 1) creation through creative labor and 2) expression in an objective form. At the same time, the question of what should be understood by creative labor in copyright law remains unanswered. For this reason, different legal systems use different approaches to disclosing the content of this fundamental concept of copyright.

Let us consider the view of the Russian lawmakers, doctrine, and judicial practice on the conditions of protectability of works. According to Article 1257 of the Civil Code of the Russian Federation (hereinafter – the Civil Code of the Russian Federation), “the author of a work of science, literature, or art is recognized as a citizen by creative labor of whom it was created”. Thus, according to the legislators’ idea, a work is subject to copyright protection provided that it is created by creative labor of a citizen. Accordingly, the object of copyright protection is the result of the creative labor of a citizen expressed in any objective form. Thus, in determining the protectability of the result of intellectual activity, we should assess not the created result, but the nature of the work of a citizen on creating it.

This approach is adopted in the Russian doctrine of copyright. Nevertyheless, the problem of specifying the parameters of the creative nature of labor as a criterion of protectability of the results of intellectual activity remains one of the most complicated. Rather common opinion boils the characteristics of creative labor down to the originality of the created result. For example, E.P. Gavrilov (2018) suggests that “any work of science, literature, or art is protected by copyright only if it is original”, with originality being defined as “the uniqueness, inimitability of a work”.

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Meanwhile, a number of Russian scholars propose criteria for the protectability of the result of intellectual activity that relate both to the nature of the activity itself and to its result. According to V.A. Belov (2003), the attributes of creativity in copyright should be divided into two groups: 1) characteristics of the activity itself: a) activity of only natural persons; b) independent activity; c) intellectual nature; 2) characteristics of the result of the activity: a) qualitatively new, i.e. unique, product, b) original product, c) the presence of an objective form. Thus, the researcher poses more stringent requirements to the protected result of intellectual activity (work) than the legislator: 1) the creative nature of the work; 2) the novelty and originality of the created result; 3) the presence of an objective form. A. Yu. Kopylov (2019; 2021), holding the position that when the evaluation of the result of intellectual activity "should be guided by a comprehensive approach ... allowing to take into account both individual characteristics of an individual, manifested in their personal creativity as a complex psycho-emotional process, and the originality of the work". This view is shared by R.S. Rakhmatulina (2020) who proposes to introduce into Russian legislation the criterion of originality for works of science, literature, and art. Herein, the criterion of "originality" is disclosed by the researcher through the following parameters: 1) the author's own contribution to the creation of works; 2) inimitability; 3) uniqueness (Rakhmatulina, 2020).

Thus, along with the creative nature of labor and the objective manifestation of its result, researchers offer an additional (third) attribute of a "work of authorship" – the originality of the result of work. In this, originality implies a unique (inimitable) result of the author's work.

The main objection to this position is that the criteria for the protectability of the result simultaneously put forward two requirements: 1) the creative nature of the work and 2) the originality of the created result. At the same time, the requirement to the result of intellectual activity itself does not correspond to the letter and meaning of the current Russian legislation on copyright: from articles 1257 and 1259 of the Civil Code of the Russian Federation one cannot deduce that the created result must necessarily be original (unique, unusual). Other articles of the chapter 70 of part IV of the Civil Code of the Russian Federation also do not specify any requirements to the result of creative activity itself. This argument is supported by A.G. Matveev: "There is no... provision in the Civil Code that works of science, literature, and art are protected by copyright on the condition that they are creative or original" (Matveev, 2020).

However, we are not quite convinced that any original result necessarily presents a result of creative work and thus a copyrighted work. Furthermore, original results may

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come from the work of not only physical persons but also of the objects of civil law, for example, an artificial intelligence or an animal object. Meanwhile, this kind of activity is not generally recognized by scientists as creative in the sense of copyright.

The presented view of the doctrine on the conditions of protectability of a work finds support in judicial practice. Specifically, in one case, the court points out that under the creative work it is customary to understand the mental activity that ended with the creation of a creatively independent result of science, literature, art. In this case, the two obligatory accompanying indicators of creative activity are “novelty” and “originality” of the work. Novelty of the object as an indicator of the result of activity testifies to the original thinking of the subject of this activity, the fact that the result is unexpected and never achieved by anyone before, and the fact that it is novel both for the author and for other persons. Originality in terms of copyright is a certain quality of a work of artistic value. The attribute of originality means that the work is unique, not repeated in parallel creation, and distinguishes this work from others (Resolution of the Court for Intellectual Rights on the case № A40-80402/2015, 2016). A similar conclusion is made by the court in another dispute, pointing out that drawings are objects of copyright, as they have signs of originality (uniqueness, inimitability) and individual characteristics, are created as a result of creative activity of a particular author (artist), and can potentially be used as independent objects of intellectual property (Resolution of the Court for Intellectual Rights on the case № A08-3825/2019, 2020). An analogous conclusion is made by the court in one more case: works of fine art – drawings – are protected objects of copyright since they have signs of originality (uniqueness, inimitability), individual characteristics created as a result of the creative work of a particular author (Resolution of the Court for Intellectual Rights on the case № A32-48015/2018, 2019).

In a case concerning the protection of the exclusive right to design, the judicial panel on civil cases of the Supreme Court of the Russian Federation recognized as fair the approach that copyright protection may be applied to an original work, reflecting the personality of the author. The highest court notes that to resolve the issue of granting legal protection to an object, it is necessary to establish whether the work is original, a result of intellectual creativity based on the fact that through this form, the author of the work originally expresses their creative abilities, making a free and creative choice that reflects their personality (29 Ruling of the Judicial Collegium for Civil Cases of the Supreme Court of the Russian Federation on the case № 5-KG21-14-K2, 2021; Ruling of the Judicial Collegium for Civil Cases of the Supreme Court of the Russian Federation on the case № 3-466/201931, 2021). Thus, the court reduces the creative labor on the creation of a work

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to the criterion of originality of the created result as a condition for the protectability of works of authorship. A work is considered to be original if it presents a reflection of the author's personality. Thus, in the Russian judicial doctrine begins to form an approach, according to which the protected result of the activity of the author must be original in the sense that it is a reflection of theis personality. Of course, a challenging question immediately arises: on the basis of what criteria can it be concluded that the author has reflected their personality in the work? It appears that these criteria can only be of an estimative nature.

To summarize the above, we can draw a conclusion that despite the clear indication of the law that it is not the result but the nature of the author's work on its creation that is to be evaluated (Art. 1257 of the Civil Code of the Russian Federation); the legal position expressed in the Resolution of the Plenum of the Supreme Court of the Russian Federation of April 23, 2019 № 10 "On application of Part Four of the Civil Code of the Russian Federation", according to which the mere lack of novelty, uniqueness and (or) originality of the result of intellectual activity cannot indicate that such result was not created by creative labor and, therefore, is not an object of copyright; and the position of the Supreme Court of the Russian Federation formed when considering specific cases (Ruling of the Judicial Collegium for Civil Cases of the Supreme Court of the Russian Federation on the case № № 5-KG15-58, 2015), judicial practice is increasingly inclined to assess the result of labor, and thus to recognize the originality of the result of intellectual activity as a constitutional feature of the work, equating it to the attribute of "creative labor".

It is certainly difficult to share the idea of recognizing the originality of a work as a criterion of its protectability. After all, according to the direct ruling of the law, the requirement of creativity in copyright law refers not to the result of the author's activity but to the mental activity itself, which by its nature must be creative. In this case, it does not matter whether the result of the author's creative work is original: the law, in case the result of creative work is expressed in any kind of objective form, recognizes it as a work of authorship and will take it under its protection. However, although the law does not specify so explicitly, one can hardly consider that every original result is necessarily a work of authorship. In our view, a non-original result of creative work can constitute a work of authorship, while an original result cannot always be recognized as a work of authorship. Thus, the originality of the result of mental activity understood in the sense of "uniqueness" and "inimitability" cannot serve as a parameter of a work of authorship.

Thus, it must be admitted that the Russian doctrine still does not have a satisfactory solution, recognized by the dominant opinion of scientists, to the question of what should

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be understood under creative labor in copyright, i.e. what legal criteria should characterize the concept of “creative labor”.

Let us attempt to answer this question. Based on the concept “form of expression of an idea” we propose to refer to the imagined set of abstract symbols (words, sounds, lines, colors, etc.), which is created through human intellectual labor and expresses a certain idea (feeling), as well as and taking into account that the law does not require from the author creativity in expressing the created form of expression of an idea in an objective form, we believe it possible to conclude that the requirement of creative nature of labor in force refers to *human mental activity of creating a form of expression of an idea (feeling)*.

Thus, the criterion of “creative labor” must be applied to labor associated exclusively with the creation of an imaginary (conceivable) form of expression of an idea. Since it is a question of the creative nature of work, it is clear that such work cannot consist in the mechanical repetition (borrowing, copying) of the form of expression of an idea created by another person. Hence, it follows that the author must expound (explain) an idea by their own (personal) mental labor, the result of which will be an independent (individual) form expressing a certain complete thought. Proceeding from this, we are inclined to consider the creative labor on creating a work of authorship to correspond to a person’s own mental work on create a form expression of a completed idea (feeling) (Vitko, 2016). Thus, creative labor in copyright law is one’s own mental labor to create a form expressing a finished idea.

It is worth to note that a similar viewpoint is expressed in the science of copyright law. I.A. Zenin (2015) argues that “in practice, the criterion of creativity is fully rightfully reduced to establishing the fact of independent creation of the result of intellectual labor. In other words, any mental labor is by general rule recognizes as creative”. This, however, would suggest that any results of mental labor should be subject to copyright protection, for example, the phrases “it rained,” “it snowed,” etc., which we do not believe to be correct.

Nevertheless, judicical practice shows many examples of judges pointing to the independence of the work of persons (“authors”) and, on this basis, qualifying the disputed result as a work of authorship, while ignoring the nature of the activity: 1) whether it is mental at all, 2) and, if so, whether it is aimed at creating a form of expression of a particular idea (feeling).

For example, in a number of cases, stating that the law does not impose any special requirements necessary to recognize photographs as objects of copyright, the Court for Intellectual Rights concluded that the author already has copyright rights for a work (any photograph) due to the fact of creating it regardless of the artistic value of the image. In

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disputes relating to the illegal use of photographs, the court has taken the approach that the process of creating any photograph or video recording is a creative activity, since it represents the fixation of various reflections of a constantly changing reality by technical means. Does this not follow that even the result of mechanical labor can be the object of copyright? For example, in one case, a court found a video recording of a cheese-making conveyor to be an audiovisual work of authorship. Concidering the nature of the video documentation of the production process, it seems to us that there is more thought and creativity in the labor of the plowman going after the plow than in such “intellectual” activity. In this case, the court essentially formed a legal approach that recognizes any result of independent activity as a work of authorship, including, it seems, even the result of mechanical, not only mental, but also physical labor.

We believe that E.A. Morgunova (2008) is right in concluding that a video recording is not an audiovisual work of authorship, since “an audiovisual work of authorship as an object of copyright is the result of creative labor usually created according to a specific script. The mechanical recording of sounds and images produces a video recording”.

Adhering to the view that the criterion of creative labor in copyright law is the person’s own work on expressing an idea, i.e. the creation of a form of expression of an idea through personal mental labor, one cannot agree with the above view of the court on the content of the creativity of an author, in particular, in the creating of photographic or an audiovisual works of authorship. It appears that such an approach cannot but undermine the concept of creativity in copyright law. For this reason, the view on creativity as any independent intellectual work of a person in copyright law is in dire need of finalization with respect to the very essence of the creative labor of an author: it is not any mental labor that can be recognized as creative but only a person’s mental labor on expressing an idea (feeling).

This position allows to agree with the court’s conclusion that the main criterion for recognizing a result of work as an object protected by copyright is the indepdendent effort of the author (co-authors) on creating this result, which result in a work of authorshio that differs from other works of the kind. Furthermore, it would not be superfluous to add that the creative labor of an author consists in creating an imagined form of expression of an idea (feeling).

Thus, creative labor in the copyright law refers to one’s own mental labor on expressing an idea (feeling). Since an idea can be expressed exclusively by means of thinking activity, the indication of the type of labor – mental labor – seems excessive, and, in the end, creative labor is reduced to *a person’s own work on expressing an idea*

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(feeling). This definition does not require the expressed idea to be original. This view is shared, for instance, by Hariani Krishna and Hariani Anirudh (2011) stating that the work need not be original in the sense that it must involve any original or inventive thought. In other words, there is no necessity that the work is “novel” as expected in patents. What copyright protects is the expression of an idea and all that is expected is that expression is not copied from another work. Let us note that the courts of Great Britain used to adhere to the “Sweat of the Brow” doctrine, according to which working “with the sweat of the brow” is enough to give originality to a work of art (Rahmatian, 2013). Thus, in Collis v Cater (1898), it was held that copyright subsisted in a dry list of ordinary medicines sold by a chemist, arranged in alphabetical order, which had required labour, or expense and trouble, but no literary skill, in its compilation.

Certainly, there arises a question of whether the offered criterion of “own work on the expression of an idea” exhausts all content of the concept of “creative labor”. In our opinion, the proposed criterion of “own work on the expression of an idea” understood as the creation of a form of expression of an idea by one’s own mental work clearly reveals the meaning of the concept “creative labor” and, therefore, is more precise in comparison with such attributes of creative labor as “independent intellectual labor” and “original result of work”.

It appears to be not too bold to claim that the criterion put forward is objective, since, for example, in the case of a dispute over the borrowing of a work or part thereof, the conclusion will be based on comparing the disputed form of an expression of an idea with the form created by another author in order to identify the same (similar) parts in them. In the absence of repetition (borrowing) of a form of expression of an idea created by the creative labor of another author, the disputed form, if it conveys a complete thought, is recognized as created by a personal and thus creative work within the implications of Art. 1257 of the Civil Code of the Russian Federation. On the contrary, the judgment on the originality of the form of expression of an idea is largely subjective.

Thus, the creative nature of labor is evidenced by such an attribute of human mental labor as the creation of a form of expression of an idea by one’s own labor, leading to the originality of the author’s creation and, thus, to the essential difference from the works of other authors, since the created form has an “own self” in it. And vice versa, the results of labor that lack individuality resemble mannequins, which all look the same.

B.S. Antimonov and E.A. Fleishits (2015), examining the conditions of copyrightability of the results of mental labor, arrive to the conclusion that the results of labor not protected by copyright are those that “lack creativity, lack an expression of the

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author's individuality". A similar position is taken by V.I. Koretskii (1959) who argues that a work qualifies for copyright protection if it is the product of the creative labor of the author, who creates the work through their own efforts and not commissions it to others, even if under their own direction and supervision; this work must differ significantly from other similar works and be overridden by the stamp of the author's individuality. In addition, to cite V.A. Dozortsev (2005), "a work of authorship must carry a trace of the author's personality, be the result of personal, individual, unique creative labor".

In this vein, it seems impossible not to recognize that since "each person is individual, the form of their work is objectively inimitable and, in this sense, inevitably unique" (Mikhailov, 2019). All this reinforces our conviction that the result of one's own mental labor of expressin an idea is always individual, characteristic of each genuine creator and, therefore, authentic, and in this sense, original. Let us reiterate once again that a work is original in the sense that it results from the author's own labor in comprehending and expressin ideas (feelings).

Following this conclusion, we believe that the first clause of Art. 1257 of the Civil Code of the Russian Federation, which reads: "The author of a work of science, literature, or art is considered to be a citizen, whose creative work resulted in its creation", could be rephrased as follows: "The author of a work of science, literature, or art is considered to be a citizen, whose independent intellectual labor created it".

We assert that codification of the criterion of "originality" understood in the sense of the author's personal intellectual labor will become a step towards convergence with European copyright law, as this approach is implemented in a number of Directives of the European Parliament and the Council of the European Union. In particular, arts. 1 (3) of Directive 2009/22/EC of April 23, 2009, on the legal protection of computer programs states that a computer program shall be protected if it is original, i.e. if it is of the author's intellectual creation. For photographic works, Article 6 of Directive 2006/116/EC of December 12, 2006, on the term of protection of copyright and certain neighbouring rights has a similar provision: "Photographs which are original in the sense that they are the author's own intellectual creation shall be protected in accordance with Article 1". The same approach is stated in Article 3(1) of Directive 96/9/EC (1996), on the legal protection of databases.

Dr. Deming Liu (2014), commenting on the Infopak-Danske case (2009), in which the criterion of the author's own intellectual creation is developed, notes that in this case, the court explains that the requirement of own intellectual creation adopted by the Directives is based on the Berne Convention. From this we can conclude that the European

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Union has adopted the standard of originality prescribed by Article 2(5) of the Convention, which states: “Collections of literary or artistic works such as encyclopaedias and anthologies which, by reason of the selection and arrangement of their contents, constitute intellectual creations shall be protected as such, without prejudice to the copyright in each of the works forming part of such collections”.

Thus, the directives concerning computer programs, databases, and photographs state that a work is considered original if they are of the author’s own intellectual creation. This signifies that a work of authorship is original in a sense that it is created by the author’s personal labor. For example, Böhler Helen (2017) indicates that according to the current legislation and judicical practice of the European Union (Lindholm, Kaburakis, 2011), in order to be protected as an object of copyright, a work of authorship needs to meet the criterion of “originality”, i.e. present “a result of the author’s independent intellectual labor”. Rosati Eleanor (2013) believes that determining whether a work falls under copyright protection only requires that the work is original and not that it also fits into a certain category of works protected by copyright.

Quite agreeing with this approach, we believe that it requires clarification, since it is not enough to say that the protected product must be the result of the intellectual activity of the author, it is also necessary to indicate that in copyright, personal mental work of the author is aimed at comprehending and articulating an idea (feeling).

Herein, we do not deny that the result of mental activity can be original in the sense that it is “peculiar” or “unusual”, i.e. possess some exceptional characteristic, even some strangeness, when the author somehow quite unusually explains an idea, which may not even be considered of value, and yet not be a copyrightable creative result. For this reason, we do not support the disclosure of the notion of “creative labor” through the criterion of “originality” in the sense of “uniqueness, inimitability” referring to the result of labor (work). We are strongly convinced that the results of creative work, even in the absence of originality in the sense of “uniqueness”, “singularity”, may be subject to copyright protection.

Thus, the creative work in the copyright should be considered a person'' own (personal) work on the comprehension and expression of an idea (feeling) arisen, the result of which will certainly constitute an individual form of expression of an idea (feeling) protected by copyright. To put it briefly, a work of authorship is an independently expressed completed idea.

We suppose that such an approach does not undermine creativity in the creation of the author’s works as we associate personal work with the comprehension and

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expression of an idea (feeling). Thus, we do not dispute that the form of expression of an idea created by independent work can be original in the sense of “unusual”, but this attribute we do not put as a condition for the recognition of the result of personal mental work as a work of authorship.

In our opinion, the characteristic of “the author’s own work” narrows down the meaning of the word “original”, because independent work implies only the creation of a work by the own mental efforts of a particular person. As a consequence, the formula: “creative labor = independent mental labor,” leads to the recognition as a work of authorship of any result of mental labor. For this reason, it would be possible to agree with disclosing the nature of creative labor by means of the attribute “independent labor” provided that each person necessarily possesses a bright creative individuality in expressing their ideas. In such a case, any result of independent mental labor would inescapably be original and, if embodied in some objective form, be legally recognized as a work of authorship. Although we do not oppose the idea that each individual is unique, not every person is original in the expression of ideas, therefore, there is no reason to narrow down creative labor to the originality of the work, and the latter to independent work.

CONCLUSION

Directives of the European Parliament and of the Council of the European Union concerning computer software, databases, and photographs assert that a work is subject to copyright protection if it is original, in the sense that it is the author’s own intellectual creation.

In the Russian copyright doctrine, there is a rather common opinion that the criterion of creative labor is also the originality of the created result. In this case, however, originality is understood as “unusual”, “unique”.

According to our view, the requirement of the creative nature of labor in copyright law refers to the mental activity of a person to create an imagined (conceivable) form of expression of an idea (feeling). On this basis, we propose the criterion of creative labor – “personal work on the expression of an idea”, which is understood as the creation of the form of expression of an idea (feeling) by the personal work of an individual. Proceeding from the identified criterion, creative labor in copyright can be defined as the personal work of an individual on comprehending and expression the conceived idea (feeling) that results in a personal (one’s own) form of expression of an idea (feeling), which, in turn, is

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recognized as a work of authorship in the case that it is embodied in some objective form. Based on this conclusion, it appears expedient for the Russian legislation to recognize the criterion of “originality” interpreted in the sense of the author’s own intellectual creativity as a criterion for the concept of “work of authorship”.

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