

# On the issue of Pre-Contractual Liability Qualification

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## ABSTRACT

The article is devoted to the study of the problem of the protectability of literary works and their components, expressed in the application of the doctrine of the protected form and unprotected content of a literary work as the main concept in domestic legislation and judicial practice. Within the framework of this article, the distinguished legally significant elements under Russian law, the criteria for their protection are analyzed. The author analyzes the influence of the teachings of I. G. Fichte on the protected form and unprotected content on the provisions of legislative acts regulating copyright protection, as well as cases of granting legal protection based on the criterion of the author's creative work, for example, in relation to such elements of a literary work as the name and character.

**Keywords:** copyright, literary work, legally significant elements of a literary work, protected form, unprotected content

The current legislation uses the concept "literary work" without defining it and without highlighting of essential features of the copyright object. Basing the analyses of domestic scientists' research, it can be concluded that a work is an expressed in objective form result of the author's creative action<sup>1</sup>. According to this definition it is obvious, that the conditions of the work's protection, elaborated by scientists in the field of copyright, are rather wide and indistinct. The first of such conditions are the objective form of the work's expressing (this "form" exactly is being considered in Part 3 Article 1259 Civil Code of Russian Federation (CC RF)). The second condition is the creative part of a literary work, or, according to the legislator, "the author's creative work". The division into constituent forms and contents is being explained in part 5 and part 7 Article 1259 CC RF through listing of legally significant elements of a literary work.

In the Soviet's legislature there were no obvious division of a work into its constituent elements, so, the whole literary work was considered to be the object to be protected. The condition of counting of a work to the copyrights objects was originality and creative independence of considering object. It can be supposed that despite of absence of legal state of theory about protected form and unprotected content in the Soviets legislature, this doctrine was practically applied by understanding of the concept's significance in legal science, and criteria, accepted by legislator for the legislative protection of the whole literary work, were valid for its constituent parts as well, considering additions of doctrinal researches.

Speaking about the period of copyrights forming in the Russian Federation, it is necessary to take attention to the expired nowadays Law of RF №5351-1 from 09.07.1993 "About copyright and related rights". In this law the doctrine of protected form and unprotected content is clearly traced. Turning to the text of the Article 6 of the mentioned law, previously the legislator can seem to form a norm of copyrights objects based on this theory with one reason only: using the terminology of J. Fichte — concepts of form and content<sup>2</sup>. But it is important to mention that either in this case, or in the current legislature the concept "the form" is being used in the other meaning, beyond the framework of the doctrine of protected form and unprotected content. The law means the objective form of the work, so its external form of expression. In reality, the parts 3 and 4 Article 6 of the Law show the influence of the doctrine about protected form and unprotected content. In these parts the legislator explains clearly the constituent elements, which aren't legally protected as copyright's objects, and stipulates, hat the part of a literary work, if it can be used independently and if it is a result of the author's creative work, is also considered to be an object of the copyright's object beside the whole work. The same approach is reflected in Part 21 Resolution of the RF Supreme Courts Plenum №15 from 19.06.2006 "About the questions, emerged at Courts while considering civil cases within the legislature about copyright and related rights": "copyright's objects can include the titles of the literary works, phrases and word collocations, and other parts of work which can be used independently and are creative and original"<sup>3</sup>.

<sup>1</sup> See for example Serebrovsky V.I. Issues of soviet copyright. Ed. P.E. Orlovsky. Moscow: Edition of USSR Academy of Sciences, 1956. P.30.

<sup>2</sup> Fichte J. Beweis der Unrechtmassigkeit der Buecgnachdrucks [Electronic resource] Berliner Monatsschrift. 1793. P. 443-482. URL: [http://copy.law.cam.ac.uk/cam/tools/requests/showRecord.php?id=record\\_d\\_1793](http://copy.law.cam.ac.uk/cam/tools/requests/showRecord.php?id=record_d_1793) (data of access 15/05/2021).

<sup>3</sup> The Resolution of the RF Supreme Courts Plenum No. 15 from 19.06.2006 "About the questions, emerged at Courts while considering civil cases within the legislature about copyright and related rights" [Electronic resource] URL: <https://rg.ru/2006/06/28/postanovlenie/html> (date of access: 16.08.2021).

So can be concluded, that since the Soviet's period the domestic legislator accept the doctrine of protected form and unprotected content and implemented it in the law, mentioned especially significant elements of a literary work, which are not subjected to copyright protection, and elements, subjected to protection. It is easy to understand that the doctrine about protected form and unprotected content is nowadays still actual for Russian legislation. The approach, elaborated in the RF Law №5351-1 from 09.07.1993 "About copyright and related rights", is duplicated in the valid part 4 CC RF without any changes. Considering the legal state of work's elements, the criteria of their protection are defined and approved in part 81 of the Resolution of the Supreme Courts Plenum №10 from 23/04/2019 "About application of the part 4 CC RF"<sup>4</sup>. According to the mentioned norm, only these elements are endowed with the state "protected", which possess the high grade of recognizability when being used beyond or separately from the whole literary work. Beside this, if separate elements of a certain work can be considered to be an independent result of creative work and if they are expressed in objective form, they are also defined as protectable.

The acceptance of the doctrine of protected form and unprotected content by Russian legislation can also be explained with the fact that this doctrine has been adopted by some international treaties, in which Russia is also a member. For example, according to the Article 2 Convention of the World Intellectual Property Organization (WIPO), Copyright treaty, from December 20<sup>th</sup>, 1996<sup>5</sup>, joining into force for Russia in 2009, the legal copyright protection extends to the form of expression, but not to ideas, principles, processes and methods<sup>6</sup>. Part 4 CC RF responds also to this conception, which is a practical realization of international law's norm on the governmental level and includes the principles, mentioned in part 2 Article 9 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)<sup>7</sup>. According to the mentioned Agreement, not the elements of the content (principles, methods of work and research, concepts and ideas), but their specific embodiment are to be protected. Meanwhile the document doesn't contain the definition of legally significant elements, leaving the legislator the right to define independently the criteria of protectability of particular parts of a certain literary work.

In such a way, the principle of the copyright's protection of the form of the work only, in the framework of the doctrine of protected form and unprotected content of the literary work, defined in Russian legislation, can be explained by the taking part by the state in some international agreements.

The necessity of division of the literary work into form and content can be explained first of all by the complicity of protection of the whole work while occurrence of conflicts, bounded with copyright's violation. Trying to solve this problem, the legislator purposely highlights judicially neutral elements of the literary work, and lets them outside the presumption of authorship, which is valid according the other elements of the work, for which criteria of their protectability are stipulated in relation to the whole work. However due to absence of clearness in criteria of division of the work into separate elements of form and content, the possibility of acceptance of these elements as objects of copyright with obligatory protection cannot be excluded. Taking into account the condition of creative character of copyright's law, the elements of a literary work, along with independent and separated works, can be also accepted as independent result of creative work of the author, when their connection with the literary work is obvious, raises no doubts and if their application within another literary work could mislead the readers<sup>8</sup>. Of course, such approach is possible not in all cases and can be implemented not to all literary work's elements, but first of all to the topic, matter, materials, plot in art literary works and to principles, theories and concepts in scientific works.

Considering such issue as protectability of elements of a literary work, or, according to J. Fichte, constituent parts of a work's form, the Russian legislator defines these elements in part 7 Article 1259 CC RF. The law considers a character or a title of a literary work to be protected by copyright parts of a work, if they can be defined as independent result of the author's work and if they are expressed in objective form. However, this list of protected elements of the work isn't exhaustive. A lot of researcher in the field of copyright law are developing the idea of protection of such elements as the plot, artistic style of the author, so — the language, in which the work has been written, and also typical for the author methods and means of creating of artistic images, quotations. For example, E.P. Gavrilov notes, that the following have to be related to the elements of the form of a literary work: language, artistic images and characters, sequence of narration (style of author's narration), and to elements of content — topic, plot, ideological content and the concept of the work, as well as discoveries, actual circumstances, which were not have been made up and interpreted by the author<sup>9</sup>.

According to A.P. Sergeev, if the title is original and reflects the artistic uniqueness of the author, it is legally protected<sup>10</sup>. Noteworthy, that in the literary study the title of the work is accepted as element of content of a literary work, but not as

<sup>4</sup> The Resolution of the RF Supreme Courts Plenum No.10 from 23.04.2019 "On Application of part 4 CC RF" [Electronic resource] URL: <https://rg.ru/2019/05/06/postanovlenie-dok.html> (date of access: 16.08.2021).

<sup>5</sup> Convention of the World Intellectual Property Organization (WIPO), Copyright treaty, from December 20<sup>th</sup>, 1996 [Electronic resource] URL: <http://publication.pravo.gov.ru/Document/View/0001201609160016> (date of access 16.08.2021).

<sup>6</sup> Gorbunov A.A. The Problem of Identified Features of Non-Protected with Copyright Ideas in Context of Cultures' Development. *Ex jure*. 2020. No.3. P. 66.

<sup>7</sup> The Agreement on Trade-Related Aspects of Intellectual Property Rights [Electronic resource] URL: <http://new.fips.ru/documents/international-documents/soglasheniya/soglasheniye-po-torgovym-aspektam-prav-intellektualnoy-sobstvennosti.php> (date of access: 16.08.2021).

<sup>8</sup> See Rakhmilowitch A.V. The Title of a Literary Work as the Object of Copyright. *Magazine of Russian Law*. 2002. No. 11, P. 25.

<sup>9</sup> See Gavrilov E.P. Originality as a Criterion of Copyright Protection of Objects. *Patents and Licenses*. 2004. No.6. P.47.

<sup>10</sup> See Sergeev A.P. The Law of Intellectual Property in the Russian Federation. Textbook, the 2th edition. Moscow: TK Velbn P. 117–118.

consistent part of its form. Undoubtedly, considering the title of the work within the framework of law, its protection through copyright seems to be logical and fair decision of a legislator. But the discussion about the nature of a title (headline) of literary work and about its relation to elements of content or of a form is ongoing and the only solution of this issue is a deviation from J. Fichte's concept and considering the title of a work not within the doctrine of protected form and unprotected content, but according to the criterion of creative work of the author.

The reason why the protectability of a literary work's title is so acute, is caused by two important factors: the width of doctrinal discussions and a big amount of legal disputes devoted to the protection of titles of literary works (print medias and their sections and columns, literary text etc.) and their parts (poem's lines, verses and prosaic abstracts). In the other words, it's about legal protection as the title of a literary work, as their quotations as well. Considering related lawsuits of similar character, the courts conduct detailed analysis of a literary work and other elements of the work. Being divisible, the elements of the work are subjected to protection in such cases only, if they conform with creativity criteria<sup>11</sup>.

So, any part of the work by itself, if it conforms with criteria of protectability, is by default a certain copyright's object. However in this connection appears an other issue, related to the usage of the literary work's title as a trade mark. In this case the title of the work is being used separately from the work and is protected as a trade mark, but not a copyright object. As an example can serve the dispute about the protection of the title, having been considered by the Federal Antitrust Committee of Moscow district: the result of this consideration was a conclusion, that the title of the literary work as a protectable part of the work is considered to be an object of the copyright protection only, but not the object of the registered trade mark protection<sup>12</sup>.

There is another point of the nature of literary works protectability: the title is subjected to legal protection, if it is being associated by a reader with a certain work. Moreover, the author of this point A.V. Rackmilowitch supposes, that the application to the title of an creative criterion, including the criteria of originality and actuality, is a priori impossible while correct interpretation of the copyright law<sup>13</sup>, because this criterion is rather evaluative, and it raises risk of an unfair decision due to wide range of judicial discretion variety. However the criterion of gained distinguishing ability, provided by the author, surpasses in our point of view the criterion of creativity according to the dispute about evaluation and doesn't solve the problem of wide range of judicial discretion variety according such issues.

Speaking about the works main character as a protected element of a literary work — the verbal description of the character<sup>14</sup>, so the artistic image like the title of the work are subjected to protection in such case only, if it is a result of the authors creative activity and can be used independent, so separately from the work, which element this character is. Developing this concept, can be clear that not all characters of literary works can be protected, there are a group of "classic" characters which are essential elements of every literary work in certain genre. For example, it's impossible to imagine a classic Italian comedy (*commedia dell'arte*)<sup>15</sup> without such characters as Pierrot and Harlequin, like the Russian folklore is impossible without Leshy and other fictional characters, which appear in every Russian fairytale. Their acceptance as objects of copyright would be unfair towards other characters of a genre, in which such characters are defining. The key criterion is, that the character have to act not only as an ideological image, but also to be an unique expression of the authors idea. It also have to be mentioned that according to this principle, the legal protection is provided not only to main characters of a literary work, but also the characters of the second plan, on the condition that their character, describing of their appearance and actions as well the relationship with other characters are so detailed, that they are unique, original and provide possibility for independent usage, for example for adaptation if the work while creating an audiovisual work (screen version) or while using a character for commercial purposes.

There is an opinion, that in practice only the characters name is protected, but it is not true, because a lot of courts support the opinion that the character and its name are not equal. So, in 2005 the Arbitration Court of Moscow district took a decision, that in the dispute about registration of the trademark "Winnie" and violation of copyright for the character "Winnie the Pooh" not only the name "Winnie" would be protected, but also the other features of this character (appearance, character, actions) as features, making the character recognizable, well-known for consumers<sup>16</sup>. So, the concept "character" is not equal to the concept "Characters name" and can include a lot of constituent elements: appearance, features of character, actions<sup>17</sup>.

<sup>11</sup> See Gavrilov E.P. Originality as a Criterion of Copyright Protection of Objects. Patents and Licenses. 2004. No.6. P.48.

<sup>12</sup> The Resolution of the Arbitration Court of Moscow District from 29.01.2003 on the case No.ГК-А40/9147-02 according denominations "Sarkrov" and "Sarflex" [Electronic resource] URL: <http://www.consultant.ru/cons/cgi/online.cgi?req=doc&cacheid=B3660281C1B2329B2D05DC0B47D72E46&SORTTYPE=0&BASEONDE=24&ts=4654037208409279845324087&base=AMS&n=25385&rnd=F0F1976B98DE2EF5090B18380C0F6DDD#1se0qmbdtz1> (date of access 15.06.2021).

<sup>13</sup> See Rakhmilowitch A.V. The Title of a Literary Work as the Object of Copyright. Magazine of Russian Law. 2002. No. 11, P. 26-27.

<sup>14</sup> See: The Comment to the Part 4 Civil Code of Russian Federation. Ed. A.L. Makovsky. Moscow: Statut, 2008. P. 54.

<sup>15</sup> It's about mask comedy as a kind of Italian theatre of 16-17 centuries, which performances was created as improvisations. The characters of *commedia dell'arte* were typical masks (Pierrot, Harlequin, Pulcinella, Columbine), turning from one performance to another.

<sup>16</sup> The Resolution of the Arbitration Court of Moscow District from 19.06.2003 on the case No.KA-A40/3146-03 [Electronic resource] URL: <http://www.consultant.ru/cons/cgi/online.cgi?req=doc&cacheid=F4C8238A6EE4E280F42C1DE7F739E0A6&SORTTYPE=0&BASEONDE=24&ts=4654037207547163128966781&base=AMS&n=29285&rnd=F0f1976B98DE2EF5090B18380C0F6DDD#apdsuok874> (date of access: 30.05.2021).

<sup>17</sup> See: Sprigman Christopher Jon. Copyright and the Rule of Reason (May 5, 2009) [Electronic resource] Journal on Telecommunication & High Technology Law. Vol. 7, 2009. Virginia Law and Economics Research Paper No. 2009-03. URL: <http://ssrn.com/abstract=1399522> (date of access: 15.05.2021).

One more considering protectable element is the language of a literary work, all typical for the author means and methods of creating of artistic images and means of expression. The language of a literary work unlike the other parts of a work is an internal form of a work, and its legal protection is based on the criterion of creativity. The language of the narration cannot be used by another author, if only it is not a quotation with indication of source of borrowing<sup>18</sup>.

In such a way, the Russian legislation determines separately unprotected elements of the content and protected elements of the form of a literary work, because it is irrational to protect the whole work. CC RF determines that protected elements of a literary work are characters and the title of the work, at a sufficient level of creative component and at the possibility of their independent usage and recognition. The doctrine also determines a lot of other elements, which are worth being legally protected like separate parts of a work — for example, the language of the work, it is impossible to consider it as an element of content. The existence of wide court praxis reflects the low grade of legal regulation and absence of detailed regulation of this issue, what causes a lot of disputes and increases the risk of judicial discretion at their considering. It have to be mentioned that this research has theoretical character, but its results and conclusions imply the further modernization of the current legal system, namely elaboration of criteria of protection of literary works.

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<sup>18</sup> See Sergeev A.P. The Law of Intellectual Property in the Russian Federation. Textbook, the 2th edition. Moscow: "TK Velbn". P. 117–118.