

## Artículo de investigación

## The copyright for work scenario in Russia: practical issues

El derecho de autor para el escenario de trabajo en Rusia: cuestiones prácticas

Copyright para o cenário de trabalho na Rússia: questões práticas

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Written by:

**Guzel B. Hazieva****Andrey V. Mihaylov****Anastasia A. Valeeva**

Kazan Federal University

Yumadilova212@gmail.com

### Abstract

This article is devoted to litigation in the field of intellectual rights on scenario works in Russia, as well as to the legislative basis of intellectual property objects. The most important features of the work scenario as an object of copyright are considered. The concept of this is defined, examples of judicial practice in Russia related to the protection of work scenarios are given. The spectrum of civil-law ways of protecting these rights is analyzed in case of their violation or contestation by third parties. The issue of the presence or absence of discretionary powers of courts in determining the amount of compensation for protecting the violated exclusive right to a work scenario is under consideration.

**Keywords:** Scenario work, scenario, civil-law protection of copyright, title of scenario work.

### Resumen

Este artículo está dedicado al litigio en el campo de los derechos intelectuales en escenarios de trabajo en Rusia, así como a la base legislativa de los objetos de propiedad intelectual. Se consideran las características más importantes del escenario de trabajo como objeto de derecho de autor. Se define el concepto del trabajo de escenarios, se dan ejemplos de prácticas judiciales en Rusia relacionadas con la protección de las obras de escenarios. El espectro de las formas de protección civil de estos derechos se analiza en caso de violación o impugnación por parte de terceros. Se está considerando la cuestión de la presencia o ausencia de facultades discrecionales de los tribunales para determinar el monto de la indemnización por la protección del derecho exclusivo violado a un trabajo de escenario.

**Palabras clave:** Escenario de trabajo, escenario, protección de derecho civil de derecho de autor, título de trabajo de escenario.

### Resumo

Este artigo é dedicado ao litígio no campo dos direitos intelectuais em cenários de trabalho na Rússia, bem como à base legislativa de objetos de propriedade intelectual. As características mais importantes do cenário de trabalho são consideradas objeto de direitos autorais. O conceito de trabalho de cenário é definido, exemplos de práticas judiciais na Rússia relacionadas à proteção de obras de cenário são dadas. O espectro de formas de proteção civil desses direitos é analisado em caso de violação ou objeção de terceiros. A questão da presença ou ausência de poderes discricionários dos tribunais está sendo considerada para determinar o montante da compensação pela proteção do direito exclusivo violado a um trabalho de cenário.

**Palavras-chave:** Cenário de trabalho, definição, proteção de direitos autorais do direito civil, título do trabalho de estágio.

## Introduction

Currently, the Russian Federation is actively working on the formation and improvement of legislation in the field of copyright protection, including scenario works. Scenario work is used in many areas of art, like the creation of movies, television formats, quests, concert and other mass entertainment events. Practical discussions arise with regard to the scenario work as an object of copyright, such as the establishment of authorship rights, recovery of compensation, and so on.

Legislation of the Russian Federation has a wide range of ways to protect the authors' rights to a scenario work. In order to prove the existence of a copyright infringement on a scenario work, two circumstances are necessary: the use of the work in any way, including the commission of one of the types of violations provided by law, as well as the absence of the person who implements such use of the work, the agreement with the right holder (or the previous licensee).

## Methods

The research methodology is based on such general scientific methods of research as comparison and analysis, synthesis. With their help, an analysis of judicial practice in Russia in the sphere of violation of rights to a scenario work was made, as well as a critical analysis of various scientific points of view with respect to approaches to the mechanisms and ways to protect the scenario work in Russia.

## Results and discussion

To show that a scenario work is used and exists, as a rule, as part of a complex object, for example, a movie, a movie format, a quest, etc., as well as the idea and the semantic load of the scenario plot is not protected by law.

According to Art. 1259 of the Civil Code of the Russian Federation<sup>82</sup>, the scenario work is an object of copyright, which implies the protection of this work and the protection of the rights of

authors and rightsholders to scenario works. Legislator in Art. 12 of the Civil Code of the Russian Federation<sup>83</sup> established civil means of protecting rights and legitimate interests for authors of scenario works in the event of their violation. Special ways of protecting copyright for scenario works are established in the provisions of art. 1251, 1252, 1253 and 1301 of the Civil Code of the Russian Federation.

The method used by the authorized subject to protect violated or disputed copyrights on scenario works should lead to restoration of the violated or disputed rights. In this regard, it is true that the range of ways to protect personal non-property and exclusive (proprietary) copyrights does not match<sup>84</sup>.

Ways to protect personal non-property rights of the author are established by the legislator in art. 1251 of the Civil Code of the Russian Federation, the methods of protection of exclusive (proprietary) copyrights are established in art. 1252 of the named law.

It is necessary to pay attention to the fact that the domestic judicial practice of applying normative rules in terms of protecting copyright for scenario works does not have an established and unambiguous character, and there is no detailed regulation in the legislation of relations related specifically to the origin, implementation and protection of copyright for scenario works.

Within the framework of the judicial investigation, the issue of originality, novelty of the scenario work, part of the scenario work is subject to resolution through expert examination, hearing the testimony of specialists.

At the same time, the courts draw conclusions about the application of the norms of substantive law and appeal to civil-law ways of protecting copyright for scenario works.

<sup>82</sup> The Civil Code of the Russian Federation (Part 4) of 18.12.2006, No. 230-FL (edited on 01.07.2017) (amended and supplemented, effective from 01.01.2018) // Collected Acts of the Russian Federation. 2006. № 52 (Part 1), Art. 5496.

<sup>83</sup> The Civil Code of the Russian Federation (Part 1) of 30.11.1994, No. 51-FL (edited on 29.12.2017)

(amended and supplemented, effective from 01.01.2018) // Collected Acts of the Russian Federation. 1994. № 32, Art. 3301.

<sup>84</sup> See: Bogdanova O. Forms and ways of protection of intellectual copyrights // IC. Copyright and related rights. 2016. No. 7. 24 p.

As it turned out in practice, the main physical form of expressing a scenario work is a written form.

Scenario work can be expressed in the following forms: in writing (notation); in the form of direct performance by artists; video recordings.

Given the specific nature of such an object of copyright as a scenario work, such an optimal way of fixation should prevail that properly reflects the production of the performed work, will describe in detail each scene, action and dialogues of the characters. In this regard, the range of ways to materially fix a scenario work is so limited.

By resolving the dispute in cases concerning the protection of rights to scenic works, courts, as a rule, are primarily based on expert opinion and testimonies of the specialists involved.

Generally, conclusions concern the following: the name of the scenario work is an integral part of the work itself, therefore, the copyright on the scenario as a whole and on its separate parts is covered by civil-law protection in case of their violation; the use of the name of the scenario within another work by a third party, provided that the title is not original and does not have novelty, uniqueness (if it is considered in isolation from the whole work), can not be qualified as a violation of the exclusive rights of the authors of the scenario work (the plaintiffs in the dispute).

It should be noted that a systematic analysis of the copyright objects themselves with the isolation of parts of the scenario work with the aim of establishing the fact of borrowing as a violation of the exclusive rights of the authors of the scenario was used by the courts even during the Soviet era of law enforcement activities. The most striking example is a dispute about authorship of the screenplay of the film "Lenin in October." At the same time, the court thoroughly investigated the questions of the plot construction of the scenario, the interpretation of the characters by the scenario writers, the analysis of the art form of the scenarios, and

came to the conclusion that there were no copyright infringements on the scenario<sup>85</sup>.

Courts, of course, when resolving disputes on copyright, are based on their own, subjective understanding of creativity and creative activity. When establishing the presence of signs of creativity in the activity of authors, the courts do not identify the notion of creativity and do not disclose its content, but only solve the question of the presence of a creative nature with respect to certain types of works (parts of the work): the TV program, the artwork of the packaging design, the name of the literary work<sup>86</sup>.

Today scenario work is subject to legal protection regardless of the way it is expressed. This copyright object is protected from the moment of its creation and any form of fixation is not required. A sign of a physical form means that a work must exist in the universe separately and independently of the author's personality. Thus, a scenario work can be reproduced by its performing.

According to the current version of art. 1259 of the Civil Code of the Russian Federation, copyrights extend to part of the work, to its title, to the characters mentioned in this work, if by their nature they can be recognized as an independent result of the author's creative work and expressed in some objective form. Accordingly, any borrowing of parts of the work, not based on law, agreement with the rightholder, is subject to qualification as a violation of exclusive rights to the work.

Participation in the creation of an audiovisual work of the author of his scenario may be mediated by a contractual form. Such an agreement may be an agreement on the alienation of the exclusive right to a work whereby the author or other rightholder transfers or undertakes to transfer his exclusive right to work in full to the acquirer of such a right, according to art. 1258 of the Civil Code of the Russian Federation. This agreement, provided that the parties to the author's relations approach it, is the basis (title) for the emergence of the right to civil-law protection of the

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<sup>85</sup> See: Jonas V.Ya. Criterion of creativity in copyright and judicial practice. Moscow: Juridical Literature, 1963. 117-118 p.; See also: Soviet Justice. 1938. № 14.

<sup>86</sup> See: 1 and 2 Information Letters of the Presidium of the Supreme Arbitration Court of the Russian

Federation No. 47 of 28.09.1999, "Review of the Practice of Dispute Resolution Related to the Application of the Law of the Russian Federation "On Copyright and Related Rights"

transferred exclusive right, with both in the material and procedural sense. The court specifically examines the question of the ownership of the right to sue the applicant on the basis of the relevant treaty on the transfer of exclusive rights concluded between the author of the scenario work and the producer of the audiovisual work in the manner of art. 1263 of the Civil Code of the Russian Federation<sup>87</sup>.

With regard to the appeal to civil law ways to protect the exclusive rights of authors of scenario works, it is necessary to note the mandatory nature of the rule that it is impossible to protect the exclusive right by recovering compensation for moral harm. This rule is fully extended to cases of protection of violated exclusive rights of scenario writers.

The reason for the relevant prohibition of recourse to the above-mentioned civil-legal method of protection with respect to compensation for moral harm is the mandatory provisions of Art. 1229, 1270 of the Civil Code of the Russian Federation, where it is determined that the exclusive right, namely the right to dispose of the result of intellectual activity, including a scenario product, is a property right.

The Supreme Court of the Russian Federation specifically explained that, according to Art. 1251 of the Civil Code of the Russian Federation, protection by collecting compensation for moral harm is subject only to personal non-property rights of the author; the exclusive right to protection by compensation for moral damage is not subject to, since it does not apply to non-property rights<sup>88</sup>.

In accordance with Resolution No. 5 of the Plenum of the Supreme Court of the Russian Federation, the Plenum of the Supreme Arbitration Court of the Russian Federation No. 29 of March 26, 2009 "On certain issues that arose in connection with the introduction of the fourth part of the Civil Code of the Russian

Federation" the demand for recovery of compensation is of a property nature. The amount of compensation to be recovered is determined at the discretion of the court, while the claim statement must indicate the price of the claim in a fixed amount. The court determines the amount of compensation at its own discretion, but not higher than the claim stated by the claimant.

The claimant for collecting compensation is not obliged to prove the amount of the losses incurred, the burden of proof is only proof of the violation of exclusive rights.

In determining the amount of compensation, the court, taking into account in particular the nature of the violation committed, the term of illegal use of the result of intellectual activity, the degree of guilt of the infringer, the presence of violations of the exclusive right of the rightholder previously committed by the person, the probable losses of the rightholder, makes a decision based on the principles of reasonableness and fairness, and proportionality of compensation for the consequences of the violation<sup>89</sup>.

Thus, the recovery of compensation in case of violation of exclusive rights is attributed to special civil-law means of protection, the amount of compensation is within the discretionary powers of the court considering a specific case. By means of compulsory judicial interpretation, only the boundaries of such judicial discretion are established in the form of a low and high limit for determining the amount of compensation on the basis of evaluation categories (principles) of reasonableness and justice.

Judicial practice abounds with examples of compensation in case of illegal use of characters in audiovisual works by third parties. In this case, the court examines the issue of the plaintiff's right to claim in a material sense with respect to the continuity of his rights on the basis of contracts with the author (authors) of scenario works<sup>90</sup>.

<sup>87</sup> Decision of the Arbitration Court of the Nizhny Novgorod Region of 26.10.2017 No. A43-19887 / 2017 [Electronic resource]. Access from the legal system "ConsultantPlus".

<sup>88</sup> The definition of the Chamber of Civil Cases of the Supreme Court of the Russian Federation of 23.12.2014 No. 5-KG14-126, dated 27.12.2015 No. 5-KG14-129 [Electronic resource]. Access from the legal system "ConsultantPlus".

<sup>89</sup> Decision of the Plenum of the Supreme Court of the Russian Federation No. 5 of the Plenum of the

Supreme Arbitration Court of the Russian Federation No. 29 of 26.03.2009 "On certain issues that arose in connection with the introduction of the fourth part of the Civil Code of the Russian Federation" // the Bulletin of the Supreme Arbitration Court of the Russian Federation. 2009. № 6.

<sup>90</sup> Decision of the Arbitration Court of the Nizhny Novgorod Region of 26.10.2017 No. A43-19887 / 2017; Decision of the Arbitration Court of the City of Moscow of 22.09.2017 No. A40-24274 / 2017; Decision of the Arbitration Court of the City of

Summarizing the scientific study of law enforcement practice in the part of civil law protection of the rights of participants in copyright relationships arising and existing regarding such a specific object of copyright as a scenario work, it should be noted that the unity of position in the field of justice on these issues is at the stage of making and progressive development, there are still aspects that require careful attention and the development of the integrity of the views of the law enforcer. A special role in the consideration of this category of disputes is played by the system analysis of the copyright object itself - the scenario work, taking into account the specific nature of the legal nature and its properties, as well as the connection with complex copyright objects.

### Summary

In order to recognize the scenario as a protected work of art, first of all this work should meet the following criteria, the first criterion is creative character, and the second is the objective form of the work (Article 1257, p. 3, article 1259 of the Civil Code of the Russian Federation). In addition, some scholars also put forward the following features of the work: novelty, ability to reproduce; public utility; legitimacy of the use of other protected objects.

For a protectable copyright object, the Civil Code of Russia establishes special ways of protecting the rights intended for use only in case of violations in certain cases, in particular, the rules on the possibility of collecting special compensation for violating the exclusive right. Appropriate means of protection of rights can be applied at the request of rightholders and rights management organizations on a collective basis, as well as other persons. The absence of the offender's guilt does not absolve him from the obligation to stop the violation of rights, nor does exclude the use of measures aimed at protecting the rights against the offender.

### Conclusions

Thus, based on the results of the study, it seems reasonable to establish a legitimate definition of a "scenario work" that would include one of the features of the plan for organizing the creative

process of a complex object, for example, an audiovisual work, an animated work, and others.

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