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Swiss dualistic model of the copyright system

Annotation. This article examines the prospects for protecting the personal non-property interests of authors of works in Switzerland, although the protection of personal non-property rights is enshrined in one law, it is of a different nature and can be sure of belonging to different institutions of law. The protection of the author's spiritual interests by the institution of personal rights in Switzerland was a complete alternative to French or German copyright, which recognized the institution of moral rights. In particular, Swiss copyright in legal science has been criticized for the fact that this mechanism does not allow protecting the non-property interests of the author after his death. From the understanding of the Swiss courts of individual rights as inalienable rights, it was logical that after the death of the author, these rights expire. In addition, the article notes that the Swiss legal system acquired, in a continental sense, the institution of moral rights of the author and comprehensively discussed the protection of personal non-property interests of authors.

Keywords: author, copyright, intellectual property, moral rights, common law countries, dualistic concept, property rights, personal non-property rights

There are only two global copyright approaches in the countries of the world. They are directly connected with the two largest legal families. In countries with Anglo-American legal traditions (the common law family), copyright is designated by the term «copyright» (literally, «the right to copy» or «the right to reproduce»). In the countries of the continental European legal tradition (referred to as Latin, or based on Roman law, or Romano-Germanic), the set of these norms is called «droitd'au-teur» (which literally means «author's right» in French). Along with the term «droitd'auteur», the expressions «proprietelitteraireetartistique» (literary and artistic property), «Urheberrecht» (copyright) are also used in this legal family [1, 42].

At the beginning of the XXcentury, such an effective doctrine as modern monism, which formed the basis of legislation and judicial practice, was proposed by German lawyers. The main representative of the monistic concept of copyright is the famous German legislator Eugen Ulmer. It should be noted that the approach to protection considered in modern monism as a reworking of the performances set out in the Berne Convention of 1908 is due to the influence of the scientific ideas of the outstanding Josef Kohler. After the revision of the Berne Convention in 1909, Joseph Collier expressed the opinion that the performance of a work can be considered as a reworking of the work and, accordingly, is protected by copyright.

The three-hundred-year history of copyright is a process of constant complication of the system of author's rights in terms of their number, diversity and content. As a result of this evolution, there was no single theoretical and a legislative approach to the composition and structure of the copyright system.

The reflection of property and non-property interests in the copyrights of various legal systems at different stages of their development was different. Speaking about such influence, it is important to understand that one or another interest the author can be protected both within the framework of the copyright institute and by norms external to copyright, which will be illustrated below by relevant examples. Thus, the possibility

of legal protection of the author's property and non-property interests does not yet indicate the automatic recognition of property and non-property copyrights.

The use of the terms «non-property rights of the author», «personal rights of the author», «personal non-property rights of the author», «moral rights of the author» requires even more reservations. Firstly, all the rights denoted by these expressions are non-property. O.A.Krasavchikov drew attention to the problem of defining the concept of «non-property right», who correctly noted: «The term «non-property» itself does not contain a positive content. His information is negative; it only indicates that non-property public relations do not belong to the property, and only» [1, 40].

One of the most difficult problems in the discussion on the directions of harmonization of national copyright laws, and above all, relating to the copyright system, on the one hand, and the continental droit moral system, on the other, was precisely the issue of the personal non-property rights of the author. Sensitivity to this topic is due to its direct relationship with the basic premises and patterns of these copyright mechanisms. We are talking about the basic justification of copyright as a system of protection of the author of the result of creative activity (continental law and order) or a system of protection of a work as a commodity in property turnover, as a result of investments (copyright system). Accordingly, the issue of personal non-property rights of the author is significantly related to the problem of the object of copyright, the scope of legal protection provided, the question of the possibility of granting copyright protection to fundamentally repeatable intellectual products, the possibility of reducing the requirements for the level of creative nature of protected works. The answer to the question about the nature of the author's personal non-property rights also determines the views on the problem of the content of exclusive property rights, the interaction between the personal and property rights of the author, and, finally, the solution to the problem of the scope of the possibilities for the disposal of exclusive rights, as well as the scope of the possibilities of their derivative acquirer.

Assessing the compromises reached (the rights listed in Article 6bis of the Berne Convention were legislated in the USA and the UK), and first of all, clarifying the question of whether the author's personal non-property rights in the copyright system currently perform the same functions as the institution of personal rights in droit moral systems, requires a clear understanding of the nature

of these rights and the mechanisms of their influence on the property turnover of copyright objects.

The issue of personal non-property rights of the author is no less acute when determining ways to harmonize European legislation that enshrine various models of interaction of personal and property rights of the author. Within the framework of monistic systems (Germany, Austria), copyright is considered as a single right, where personal and property rights form an inseparable unity. Dualistic systems (France, Belgium, the Netherlands) are based on the principle of independence of personal non-property and property rights of the author. Meanwhile, the choice between these basic models determines the entire architecture of copyright, including the resolution of the issue of the degree of participation of the work in circulation, as well as the scope of copyright and the possibilities of disposing of them [2, 38].

The dualistic theory has been consolidated in most European legal systems, including France, Italy, Portugal, Denmark, Spain, Belgium, Switzerland. In Switzerland, as in Germany, the position of the Supreme Federal Court (Bundesgericht)had a decisive influence on the approval of the copy-right model. In Switzerland, unlike Germany, after the entry into force in 1912 of the Swiss Civil Code (art. 27 and sl.) it was possible to talk about the existence of a general institution for the protection of personal non-property rights, which allowed not to fear for the prospects of protecting the personal non-property interests of the authors of works. Accordingly, the Federal Court could afford to proceed quite consistently from the fact that the personal and property rights of the authors, although secured by a single law, nevertheless have a different nature and belong to different institutions of law. The authors' personal non-property rights are part of the general institution of personal non-property rights.

The property rights of the authors are interpreted in the sense of Immaterialgüterrecht I.Color and are considered as unconditionally transferable civil rights (in a translational manner). The latest Swiss law on copyright and Related Rights of October 9, 1992, in accordance with the requirements of the Berne Convention, included norms on personal non-property rights of authors, however, as noted in the literature, the significance of this step is limited only to optimizing the location of legislative material. Legislative novelties have not fundamentally changed the ratio of personal and property rights of the author, and, above all, the provisions on the unconditional transferability of property rights [3, 85].

The main features of the models of continental copyright that exist today were laid down in the 18th and 19th centuries during the search for justification (legitimation) of the ban on reprinting works. Accordingly, the main factors that influenced the formation of these models should include, firstly, the strengthening of a philosophical (moral) justification (legitimation) of copyright monopoly in national legal systems, and secondly, a set of problems specific to individual legal systems, the solution of which has become a necessary condition for the integration of copyright into the civil law system.

So, for France, the most significant thing turned out to be that the consolidation of the copy-right monopoly contrasted strongly with the movement to abolish feudal privileges during the French Revolution. In this regard, the adoption of the laws of 1791 and 1793 required a special justification, the functions of which were performed by the theory of intellectual property.

In the German lands, a thorough doctrinal study of the issue of the grounds of copyright was determined by the need to ensure a ban on «pirated»reprints of works in conditions of territorial fragmentation and the absence of a single power center. The adoption of a single legislative act establishing such a ban and operating on the territory of all German lands remained impossible. At the same time, the prohibition of reprinting, which is valid only on the territory of individual lands, was easily circumvented by the method of transferring the printing house to neighboring land. In this regard, it was necessary to provide the courts with sufficient grounds for recognizing such actions as violating the rights of others, which should not have been associated with the presence or absence of a legislative act. This explains both the more «dense»dogmatic study of the issue, and the use of natural law techniques, as well as the style of argumentation characteristic of pandectics.

Interestingly, with common initial assumptions (the need to justify the prohibition of reprinting works), France and Germany came to largely different results from the point of view of the model of protecting the personal non-property interests of the author. If in France the property and non-property components of copyright exist largely independentlyof each other, which makes it possible to characterize the model fixed there as dualistic, then in Germany a monistic model has been implemented, which considers copyright to be a single right, where personal and property rights remain inextricably linked. In fact, the difference in approaches has seriously affected the general models of copyright implemented in these legal systems.

Let's try to reconstruct the logic of the development of views on copyright and its foundations in Europe of the 18th and 19th centuries in order to identify the causes of these variations, and to assess the nature of their argumentation and, accordingly, its compulsion for these copyright systems.

In contrast, the dualistic concept divides the totality of copyright rights into two groups of rights, one has signs of intangible rights, and the other —property rights, which, respectively, are combined under the name of personal non-property (moral) rights and property rights; they cannot be confused, despite their interdependence.At the same time, the dualistic interpretation is not limited to this distinction, which is also resorted to by supporters of the monistic theory when considering the dual purpose of the AP (protection of intangible and economic interests) [4, 101].

According to A.Debois, a supporter of the dualistic theory, the protection of intellectual needs and the satisfaction of property interests are two independent goals that make it possible to distinguish between common sense and observation of practice. In addition, the interests of the moral and property order have different spheres of application; personal non-property rights and property rights have

different histories, they do not arise and do not disappear at the same time. While property rights represent simple opportunities after the completion of the work and until the author has decided to use them when starting publication, personal non-property rights themselves exist from the first brush stroke or stroke of the pen, from the first sketch of the preliminary plan. It is by exercising his personal non-property right to publish the work that the author introduces it into the field of economic categories, specifying in what form and to what extent it can be used. Let's leave aside the period of validity of the exclusive right for now: after its completion, the personal non-property right, the validity of which is far from over, remains useful and effective until the work is finally forgotten; anyone who, after many decades, tries to return it from oblivion, will certainly be obliged to reproduce it in the form in which it was once created and published by the author [5, 90].

Accordingly, since the dualistic interpretation refers to two categories of rights whose legal fate is different, the latter act as independent, and their legal regulation may be different: the principles of transferability are applied to property rights and they are limited in time, and personal non-property rights, on the contrary, are subject to the principles of inalienable, non-applicability of the statute of limitations and eternity.4In legislative terms, the dualistic concept prevailed.

The dualistic model of the copyright system is the most multifaceted and widespread in nation-al legal systems. The term «dualism»in the name of thismodel, on the one hand, focuses on the recognition of two groups of copyrights, on the other —emphasizes the difference and certain isolation of these rights from each other. There is no dualistic model in the world that is uniform in its characteristics. It is advisable to start her research with an analysis of classical Swiss copyright, which is a curious example of a continental legal order, where the non-property interests of the author were protected by means external to copyright. We are talking about the period from January 1, 1912, when the Swiss Civil Code of December 10, 1907 came into force,391 to July 1, 1993, when the Swiss Copyright Law of October 9, 1992 came into force [6].

At the specified time, the moral rights of the author, without finding official recognition, were protected by the Swiss courts as an element of the general right of the individual, which was recognized in Articles 27 and 28 of the Civil Code. So, in Article 28 it is established that the one whose personal relations will be unlawfully violated can file a claim for the elimination of the violation. The Swiss Copyright Law of 1922, which became invalid in 1993, did not recognize the moral rights of the author. This approach looks very interesting if we take into account the enormous influence of German and French civil law on the law of Switzerland, as well as the fact that this country was a permanent party to the Berne Convention for the Protection of Literary and Artistic Works. Institutionally, the Swiss model of the copyright system is in some respects close to the Anglo-American model, since in these systems the protection of the non-property interests of the author is carried out by means external to copyright. At the same time, dogmatically and historically, it is close to the classical dualistic copyright represented by the French legal order. As will be shown below, the modern model

of the French copyright system in its development has passed a stage that is very close to the classical Swiss copyright. One of the reasons for Switzerland's long–term non-recognition of the author's independent moral rights is that at the turn of the XIX–XXcenturies, this country became the only European legal order that legally recognized the construction of a single personal right of acitizen. Accordingly, countries that did not recognize the construction of a single personal right, to a greater extent than Switzerland, were interested in developing a category of moral rights of the author.

The protection of the author's spiritual interests by the general institute of personal rights in Switzerland, according to K.Rigamonti, represented a full-fledged alternative to French or German copyright, recognizing the institution of moral rights It is difficult to fully share such an optimisticpoint of view. In particular, Swiss copyright was criticized in legal science for the fact that this mechanism did not allow protecting the non-property interests of the author after his death. The fact is that from the understanding of the Swiss courts of individual rights as inalienable rights, it logically followed that after the death of the author, these rights expire. The noted drawback was eliminated by the Copyright Law of October 9, 1992. Together with this act, the Swiss legal system received a full-fledged institution of moral rights of the authorin the continental sense [7, 392].

When transferring the right to a brand name for use by other persons, its owner does not share his legal capacity, he transfers the brand name for use for other purposes (for example, the user of the right to improve his trade, create advertising, etc.). As a result of the transfer of the right for temporary use, its owner is not liquidated, and a new entity is also not formed. Most importantly, this transfer of rights should not lead to violations of consumer rights [8, 74].

Analyzing the Copyright Law of 1992, S.A.Baryshev comes to the conclusion that one of the essential features of Swiss copyright is the possibility of transferring moral rights to the author. In-deed, Article 16 of the Copyright Law refers to the possibility of transferring copyrights. There is no separate prohibition of the transfer or alienation of the moral rights of the author in this act. However, as noted by J. de Verra (J. de Werra), considering the question of the legality of the transfer of moral rights, it is necessary to take into account the provisions of the Civil Code and the decisions of the Supreme Court of Switzerland in relevant cases. In general, the moral rights of the author in Switzerland are inalienable. This principle is derived from Article 27 of the Swiss Civil Code, which prohibits excessive restriction of freedom and personal rights of a citizen. At the same time, with respect to each of the moral rights, judicial practice allows transactions aimed at limiting them. One of the conditions for the legality of such transactions is their concreteness [9].

Thus, in Switzerland, the parties to the copyright agreement have the same discretion regarding the form of conclusion of the contract, which can be both written and oral in relation to any type of copyright agreements. The regulation by the Swiss legislator of the rights and obligations of the par-ties to the copyright agreement is also not very detailed. Individual rights and obligations are specified

only in relation to the publishing contract, which is confirmed by the Swiss science of copy-right. A characteristic feature of the regulation of copyright contracts in Swiss civil law is the extremely important role of judicial practice.

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