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PECULARITIES OF PROTECTION AND LEGAL REGIME OF OFFICIAL WORKS IN THE FIELD OF LIGHTING DESIGN

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ABSTRACT

The legal regime of official works has a complex dichotomous construction. The issues connected with the creation of an official work are subject to the labour law, while the issues of official work usage are governed by copyright. The protection issues of lighting design works have their own characteristics due to technical, artistic creativity and use of special technologies. These objects are subject to copying, and because of this fact a lot of legal issues in the field of not only copyright, but contract law arise.

The authors of the article aim to determine the signs of creativity for the recognition of a lighting design work as an object of copyright; to develop the criteria for assessing the identity of a design work, created under a contract, and the result of creative activity, the rights to which are transferred to the customer; to identify subjects of copyright for lighting design works. The article uses special legal methods (comparative legal method, formal-legal method and system analysis of legal phenomena method).

On the assumption of Article 1295 provisions of the Civil Code of the Russian Federation, it can be concluded that it is possible to conclude an agreement on granting the employer the exclusive right to official lighting works, which were not yet created at the time of concluding such an agreement. The absence of a direct prohibition on the transfer or alienation of the exclusive right in respect of a future work may lead to the probability of recognizing such a contract as not concluded due to the inconsistency of its subject matter. In foreign jurisdictions, there is a ban on inclusion in the agreement of the condition on the result of intellectual activity not yet created (future works). At the same time, in advance to accurately identify the official work, which is to be created by the employee during his labour activity, should not deprive of legal force the contract on the use of official works by the employer. The article proves that the lack of definiteness of the subject, provided that such a subject can be classified as definable, does not entail recognition of this contract as not concluded, and its subject matter is not harmonized.

Keywords: official work, employer, employee, work of lighting design, result of intellectual activity, lighting, light environment

Lighting design is a separate branch, which is connected with art, science, technology and architecture. This industry is based on technical devices. Any lighting is designed to emphasize the style, to influence the feelings and emotions, to give the surrounding space attractiveness and comfort. So, for example, with the help of facade lighting it is possible to change the external appearance of the building at different times of the day. The design of lighting is simultaneously influenced by science and art. And the faster the science develops in this direction, the more interesting the design of lighting becomes.

As J.B. Aizenberg pointed out in his article, artificial lighting constitutes a significant percentage (more than 15 %) of the global energy consumption of modern society [1]. It is artificial lighting

that plays a major role in creating lighting design works.

In accordance with the founder of Russian design Yu.B. Soloviev, the theoretical basis of design is technical aesthetics, a scientific discipline that studies the socio-cultural, technical and aesthetic problems of the formation of harmonious subject environment created for the life and activities of man by means of industrial production [2]. Aesthetics is called the science of the essence of beauty in nature, creativity, and in art. Correctly selected lighting using different designs, forms of buildings, decor elements, technical equipment, etc. creates light design.

The objectives of the investigation are analysis of Russian and foreign experience in determining the criteria for the protection of lighting design works; analysis of distinctive features of the attribution of the lighting design result to a certain type of intellectual activity result; development of recommendations on confirmation of compliance of the intellectual activity result received under the contract with the criteria described in technical specification; analysis of the legality of concluding an agreement on granting the employer the exclusive right to the so-called "future" official works of lighting design.

In accordance with Council Regulation (EU) No. 6/2002, design means "the appearance of the product as a whole or part there of, developing in particular from such distinctive features as lines, contours, colours, shape, texture and (or) the material itself of the product and (or) its decorative ornament" [3].

As Jeremy Phillips pointed out, design is most frequently protected as an industrial design, and in Europe, like in many other countries; it is difficult to find a law on industrial designs that would not operate with the term "dishonesty". At the same time, the author notes that the current legislation as a whole is mostly focused on the technical nuances of legal protection, which greatly complicates the identification of the moral "spirit" of the law [4].

According to point 1 of Article 1349 of the Civil Code of the Russian Federation (hereinafter referred to as Russian Civil Code), an industrial design is the result of intellectual activity in the field of design. Moreover, this result of intellectual activity can also be recognized as a work of art. A design object, having a dual nature, must be original and creative.

"Originality" from Latin means "initial", "authentic". It turns out that "an industrial design must be both popular and original at the same time. This is the dichotomy of the legal approach to this object of industrial property" [5].

The creative result, accompanying the creation of lighting design objects, represents technical and artistic creativity. The sphere of artistic creativity relates these design objects to copyright objects. But, nevertheless, the protection of design works (point 1, Article 1259, Russian Civil Code) has its own characteristics due to technical, artistic creativity and the use of special technologies.

The sign of originality and novelty (paragraph 2, point 1, Article 1352, Russian Civil Code) of industrial design brings it closer to copyright objects, in respect of which courts often apply these characteristics (Decree of the Court on Intellectual Rights of June 29, 2017, No. C01–465/2017 in case No. A56–23644/2016; Decree of the Court on Intellectual Rights of October 30, 2017, No. C01–1/2017 in the case No. A40–92472/2016), although the sign of originality and novelty is not a mandatory feature of copyright objects in accordance with the rules of the fourth part of the Civil Code of the Russian Federation.

Light and lighting in our modern life is difficult to overestimate. Today, lighting design is a popular branch. High level of competition in the market requires faster product updates, which lead to the application of increasingly new technologies. Beauty, style, energy efficiency, functionality, and aesthetic perception have an impact on lighting design. State bodies often act as customers for the development of street lighting projects, illumination of historical and cultural monuments. This fact raises the question: who will own the rights to the elaborated lighting design? To answer this question, firstly you need to decide whether the lighting design is an art and what is to be recognized as a work in this case.

In the field of lighting design, there are different approaches: for some people, light is a purely functional element that allows you to see in the dark, for others – light is a view item that makes you feel.

V.I. Serebrovsky defined a work as "a combination of ideas, thoughts and images that, as a result of the author's creative activity, has been expressed in a form that is accessible to human senses and which can be reproduced" [6]. The signs of the work, as a result of which it acquires protection, are an objective form of expression and its creative character.

The form of a lighting design work makes a spiritual impact on the people, but still, the form is

material embodiment of a work. The form of a work is important not only when the result is considered creative, but also when works are compared on the subject of borrowing, and it is the form that is the manifestation of certain aesthetic properties of the work.

The essence of a work is its content, that is what the author wanted to express with his work; and the form is how the author expressed the content. The objective form of expression of lighting design works is the projects of creating lighting, layouts, drawings, sketches, illustrations, etc.

Proceeding from this, A.P. Sergeev noted rather exactly that it is important to distinguish between the work itself, having intangible nature, and the form of its embodiment, i.e. that material form, which is the material carrier of the work (for example, a manuscript, a drawing, a musical notation, etc.). It turns out that the form and content are important components of the work, "where the content is an ideal component and the form is material components existing in inseparable unity" [7]. The content and filling of lighting design objects are also of significant importance due to the peculiarities of the object itself in contrast to traditional copyright objects.

Festivals of light, light shows and various types of video projections can be called popular modern commercial projects with the use of lighting design.

One of such popular projects using lighting technology is video mapping; mapping means reflection or projection. This is the audio-visual information content, which is a three-dimensional modelling (3D projections) of the object, to which the video is distributed. Although this object is considered modern and new, it originated in 1969, when a new attraction called "Haunted Mansion" was opened in Disneyland with the use of video mapping. Because of the high cost of this technology only for the third time, already in the late nineties, 3D mapping began to develop thanks to new capabilities of technology and the Internet. There are different types of video mapping: architectural mapping, video-mapping of interiors, individual objects mapping, for example, mapping of a car, a costume, a picture or entire collection of paintings, etc. The use of these objects is broad: in the advertising sphere, in the cultural sphere, in education, entertainment, services and other spheres. Thus, as a new kind of creative activity with a combination of architectural objects and graphics, objects of fine arts, graffiti, etc., this type of audio-visual art is recognized as an object of copyright protection.

As it is pointed out by I.G. Lander and A. Kh. Kubach, "such installations actively supplant the traditional forms of show, such as salute or laser show, and the play of light and shadow creates the impression of transformation and movement of space, external change in the geometry of objects, transformation or even destruction (fracture, incision) of the usual architectural form of the object to which the projection is directed" [8].

Video mapping can be created purposely for specific goals, for a particular object, as well as a template in one area or another in an interactive form.

In light shows, projectors and their technical characteristics are of great importance. Lamp projectors are replaced with laser projectors; it helps create interesting creative show projects. Light installations in combination with sound systems allow them to be used at concerts, Olympiads and other major events. For example, lighting on the Eiffel Tower is protected as a work of art. The decision of the Cassation Court of France of 1992 states that legal protection is granted to "a composition of actions and light intended to disclose and emphasize the forms of the Eiffel Tower, which constitutes the original visual work" and, consequently, the creative work. The court stressed the legitimacy of photographing the lighting of the Eiffel Tower, if it is done for personal purposes, but this action is not allowed, if afterwards these photographs will be reproduced in the publication, distributed as postcards, will be used in the play without the permission of the authors of the lighting.

Due to the peculiarity of the lighting design, the creation of such art objects is possible within the framework of an official work. The works created in the course of performance of the service assignment are not only the result of the activity of the legal entity, but also of its employee-author whose creative activity is related to the labour relationship with this organization. It should be noted that an official work is the result of the creative activity of an author, an employer in such legal relationships acts as an investor who carries out various material costs. Therefore, it is necessary to balance the interests of both parties, both in legislation and in practice.

In practice, there is frequently a dispute over the identity of a work, created by an employee or a contractor under an author's contract, and the result of the creative activity used by the organization. Solving this problem affects the possibility of us-

ing a work of lighting design by an employee irrespective of the employer, the need for payment, and the legitimacy of transferring the right to it to third parties.

So, the court pointed out that when proving the ownership of copyright on the object of exclusive rights, it is necessary to establish the fact of transferring the result of intellectual activity to the customer. In the case under consideration, the performer transferred the works on a tangible carrier in the form of a flash card, which was confirmed by the act of reception-transmission. However, in the court session, the plaintiff provided the CD-R disc as evidence, the examination of which showed that the files submitted for the study had been changed, while previous changes could not be tracked, because files did not have cryptographic protection of information. Thus, the court concluded that it was not possible to determine whether the files provided were original, and also to establish the possibility of using other files for their production. In this connection, the court rejected the plaintiff's argument of transferring the exclusive rights to him on disputed images under an order contract [9].

According to Article 432 of the Civil Code of the Russian Federation, the inconsistency of the essential terms of the contract entails its non-inclusion, but the essential condition for any type of contract is its subject. Contracts in the field of intellectual rights are not an exception. However, the non-material nature of the result of intellectual activity in combination with in most cases the lack of the possibility to determine in advance the result that will be achieved on the basis of the performance of works in the field of lighting engineering can lead to difficulties in identifying the subject matter of the contract and proving the identity of the result obtained by the subject specified in the contract.

In this issue, problems do not arise unless only with already patented decisions, when the subject of the contract is determined by indicating the date and number of the patent. However, how to prove that the solution obtained, capable of patenting is the one that was subsequently granted a patent?

If we talk about contracts for the transfer of rights in relation to the already achieved results of intellectual activity, then the individualization of their subject is possible by describing their signs and characteristics. It is about contracts on the alienation of the exclusive right and on licensing agreements. It is not enough to specify only the name of the work; moreover, improvements and corrections on the part of its authors are not excluded, which can lead to the loss of identification of the subject.

That is why, in practice, individualization of the contract subject is frequently resorted to by pointing to a material carrier containing the result of intellectual activity and being subjected to transfer under the contract. In addition, here we should carefully consider the type of such a material carrier. Of course, in this case the most protected one will be a paper copy containing the results of intellectual activity (for example, drawings, plans, lighting design projects). You may specify such a carrier in the contract as an annex to it and make it an integral part. Because of practical impossibility to make changes in the content of a work recorded on paper, the risk of a dispute over the ownership of intellectual rights to a work is practically reduced to zero. However, the large volumes of such carriers, as well as the difficulties of their storage, which require the allocation of significant areas and the staff providing accounting and classification, make this method of identifying the subject of the agreement not always convenient.

More often in civil circulation, the work is transmitted on an electronic material carrier. In this case, as mentioned above, the use of USB storage devices without special means of protection against overwriting is not recommended. A. Shvedchikov suggests using an optical CD-disk with the finalization of the recording process by specifying its serial number in the contract [10].

Works created by employees are often transferred to the customer through information and telecommunication networks to the e-mail address of the responsible person. However, in such a situation it is necessary to specify in the contract for the coordination of its terms through electronic document circulation. According to point 3 of Article 75 of the Code of Arbitration Procedure of the Russian Federation, documents received by facsimile, electronic or other communication, including the information and telecommunication network "Internet" usage, as well as documents signed by an electronic signature in the order established by the legislation of the Russian Federation, are allowed as written evidence in cases and in the order provided by this Code, other federal laws, regulatory legal acts or by the contract.

It should be considered that the result of intellectual activity transmitted via e-mail will serve as evidence of the performance of the contract of the

author's order or performance of the service assignment if the contract contains a provision stating that the transfer of a lighting design work in the form of a layout, project or drawing in electronic form is appropriate fulfillment of obligations. In this case, you should list the e-mail addresses to which you should send such a design work. In addition, it should be noted that electronic exchange of letters, claims and any other documents necessary for the performance of the concluded contract is permissible.

At the same time, in some cases, in the absence of such a condition, courts proceed from the length of the legal relationships of the dispute parties, who have repeatedly used e-mails to exchange documents [11]. In another case, the court indicated that receiving or sending a message, using an e-mail address known as the person's mail or the official mail of his competent employee, indicates that the person has committed these actions until proven otherwise (when establishing compliance with the procedure for conducting an audit and seizing evidence) [12].

The issue of the possibility of concluding agreements on the transfer of rights with respect to the so-called "future works", which at the time of the conclusion of the contract have not yet been created, is the subject matter of legal regulation in foreign countries. So, the Austrian Copyright Law allows the transfer of rights only to those "future works", which will be created within five years from the date of the conclusion of the contract. At the same time, the above mentioned Law specifies the right to unilaterally renounce the contract at any time, if the conditions of the agreement on the transfer of rights to the future work do not allow individualizing its subject [13].

The German Copyright Law contains similar rules, specifically stipulating the insignificance of any provision of the contract on the transfer of rights in respect of future results of intellectual activity excluding the right to unilaterally terminate it [14].

Article X.131–1 of the French Intellectual Property Code allows the conclusion of contracts with respect to future works only on the condition of their detailed individualization, which makes it possible to identify the subject matter of the contract [15].

Proceeding from the provisions of Article 1295 of the Civil Code of the Russian Federation, it can be concluded that it is possible to enter into an agreement on granting the employer the exclusive right to official works that have not yet been created at the time of concluding such an agreement.

Another issue connected with the acquisition of rights in respect of lighting design works is related to the identification of the range of subjects that can be recognized by the authors of this work.

There are four types of specialists. First, the lighting engineer who performs calculations on which the lighting and its compliance with the established standards depend. Second, the lighting technician who is responsible for the functioning and compliance of the illumination degree for achieving the tasks that the project implements under the given conditions. Third, the lighting designer who creates a form and performs an aesthetic search through the prism of functionality and technical requirements. In addition, finally, the lighting artist, who provides the light component of the presentation and emphasizes the general idea of representation through a light-colour solution.

These four types of specialists cannot be revealed in one single person, since the difference between an engineer and a designer is enormous, and not only because of their skills (artistic / technical), the conditions for their implementation (degree of freedom: creative activity / restriction by technical requirements), their abilities (different competencies), but mainly because of the difference in their practical skills (the rigidity of the requirements for the engineer work performance against the freedom of self-expression of the designer; the objectivity associated with the need for the requirements compliance of the engineer against the subjectivity of the designer opinion).

Louis Clair, one of the first presidents of Association of Light Designers and Lighting Technicians, draws an analogy between the lighting designer activities and the world of music. A composer is one who gives directions and creates common features of a work, just like the scheme of a city's light-illuminating device. The conductor carries out the realization of the created work outward by his personal actions, using the work. The soloist chooses the appropriate instrument with all the necessary settings. Apparently, the composer has more freedom of creativity. He corresponds in this analogy to a light artist and a lighting designer [16].

In conclusion, it seems possible to come to the following logical deductions. Objects of lighting design represent the result of technical and artistic creativity, which predetermines their dual legal protection as objects of copyright and patent law. Unlike the traditional idea of copyright protection of the

form of the work, the content and filling of objects of lighting design are of significant importance due to the peculiarity of the object itself. Persons of copyrights to the lighting design works should be recognized as a light artist and a lighting designer.

The problem of identifying the subject matter of the contract and determining the compliance of the achieved result with the requirements stated in the contract can be solved by using the method of determining the subject matter of the contract in a material carrier, in which the obtained result of intellectual activity will be fixed.

As regarding the identification of the subject matter of the contract in the form of lighting design future works, we should state the legality of the transactions on the transfer of exclusive rights to copyright objects that do not exist at the time of the conclusion of these transactions.

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