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## **THE STRUCTURE OF COPYRIGHT SYSTEMS OF FRANCE, GERMANY AND RUSSIA**

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**Introduction:** *as is known, there are two key copyright law traditions: Anglo-American and Romano-Germanic copyright laws. At the same time, copyright law of the main representatives of Romano-Germanic tradition is not homogeneous, as it may seem at first glance. French and German copyright law is in the vanguard of the continental copyright law, with the copyright law of Russia being among the others in this copyright law system. However, Russian copyright law has some specific characteristics. The **purpose** of the present article is to define the structure of copyright systems of France, Germany and Russia. **Methods:** comparative legal, historic, system structural and formal dogmatic methods are used in the analysis. **Results:** the article considers the influence of philosophical law theories on copyright systems in France, Germany and Russia. These systems are characterized in terms of correlation between the author's economic and moral rights. The role of exclusive rights is pointed out in copyright systems of France, Germany and Russia. **Conclusions:** we believe that Russian copyright system is a special form of the dualistic model. Here the legal status of the author's moral rights is controversial and uncompleted. In fact, this dualism is eclectic since it is influenced by conceptually different systems of French and Soviet copyrights. We come to the conclusion that the term "exclusive rights" has historical rather than theoretical grounds for statutory reference to copyrights.*

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Keywords: copyright system; exclusive copyright; author's moral rights; economic rights; monistic model; dualistic model; theoretical grounds for copyright; theories of intellectual property

**Introduction**

The role of copyright in the society is contradictory and comprehensive, with this institute affecting both private and public interests – interests in the sphere of science, education, culture, and arts. Copyrights are moral rights that provide authors and right holders with the possibilities to control use of copyright works and receive commission for it. These moral rights illustrate the close connection between the author and his / her work. They enable the author to forbid the third parties from distorting the work or using it without proper attribution.

The contradictive role of copyright is revealed in the ambiguous evaluation of economic contribution of copyright turnover in economy, in unjustified strict sanctions for the violation of this right and finally in the uncertainty about the future of copyright and in complexity of designing its fair and balanced model.

The international community puts serious efforts into the harmonization of copyright law in different countries. However, copyrights are characterized by their specific nature in regulation at the level of national legal systems, this having political, economic, cultural, dogmatic consequences for each country in particular and for the world community on the whole. This specific nature is

expressed in such a fundamental issue as the correlation between moral and economic rights of the author.

As is known, there are two key copyright law traditions: Anglo-American and Romano-Germanic copyright laws. A great number of scientific studies are devoted to the analysis of common and different features of these global systems. At the same time, copyright law of the main representatives of Romano-Germanic tradition is not homogeneous, as it may seem at first glance.

The purpose of the present research is to define the structure of copyright systems of France, Germany and Russia. French and German copyright law is in the vanguard of the continental copyright law, with the copyright law of Russia also belonging to Romano-Germanic law tradition. However, it is here, in the regulation of the relevant relations, that we have significant differences. Thus, the influence of the copyright law of France and Germany and Soviet copyright law on the copyright system in Russia is of particular interest.

### **Structure and Methodology of the Research**

Copyrights comprise a system, which is a whole set of connected elements. Any system has a highly important feature – a system as a whole has some features which are different from the sum of features of its elements.

The key role in understanding a system is assigned to understanding its composition and structure. An element of a system can be defined as the smallest indivisible component of this system considered under a particular method. In other words, an element inside a system is considered to be indivisible. The epistemological side of understanding an element is particularly focused on, since the system under consideration may be divided into the objects with the use of different methods. On the one hand, the author's right is a system's element of the copyright law system. On the other hand, considering copyright law system in a different way, a group of author's rights with some uniformity and functional homogeneity may be regarded as its element.

The notion "subsystem" is also often used in the analysis of complex systems. Its application is very convenient in case there are interim complexes, more complex than elements but less complex than a system, between the elements and the system. A subsystem unites the elements which being together do not have integrity and cannot fulfill the private function of the system.

The subsystem modeling is used in the analysis of copyright law as a complicated system. Here it is very important to identify the right criterion to divide systems into subsystems. The correct identifi-

cation of subsystems within the copyright law system is connected with the analysis of the structure of this system. A set of stable relations and correlations between the system's elements is a structure of a system. It is obvious that one cannot analyze all the relations between the elements of a particular system. The relations to be looked at depend on the purposes of the research and the tasks being solved. That is why the most significant, complex or interesting relations become the subject of the analysis, while insignificant and trivial ones do not.

In the system of copyright law, relations between economic and moral rights of the author are systemically important because these rights protect different, sometimes even opposite, interests. In addition, exclusive rights occupy a special place in the system of copyright law. Therefore, here we should compare exclusive and non-exclusive author's rights, on the one hand, and economic and moral rights, on the other.

Thus, the present research analyzes philosophical legal doctrines influencing the most copyright law in France, Germany and Russia. Then these doctrines' influence on the structure of copyright systems in the abovementioned countries is revealed. Finally, the position of the exclusive copyright in the copyright system is specified.

### **Differences in Justification of Copyright in France, Germany and Russia**

Copyright law is not an autonomous system. The structure of copyright systems has certainly been affected by historical, philosophical, political, economic and other factors to a greater or lesser extent.

Copyright is based on the defined due regard principles, which are higher against positive law. Actually, these principles are philosophical law theories, studies, ideas which prove the necessity for copyrights to be provided. In science of law such theories and ideas are defined as theoretical grounds for copyrights [1, p. 32], theories of intellectual property [2], philosophy of intellectual property [4]. All these abovementioned definitions have the same idea meaning that the copyright is determined by means outside the law. The classification of theories underlying the copyright, when they are divided into scientific law and positivistic theories, is considered to be the most convincing and the most popular one.

Jus Naturalism played its great role in the development of the copyright law in France and Germany, while in Russia copyright law was not so greatly affected by philosophical law theories. At the same time, Russian copyright law was under the influence of French and German experience of the relevant relations regulation.

In England in the 17<sup>th</sup> century, copyright was first given legal science grounds. At that moment, for the first time one could observe transformation of the discourse on the permission to publish a book into the discourse on the property right to this work. The author was considered to be the first possessor of this right. The author's name was used by the book sellers to justify their lifelong right to the manuscripts bought from the author.

However, in England Jus naturalism fundamentals of copyrights have not further developed significantly. English ideas, especially John Locke's labor theory of property, were widely accepted in France in the 18<sup>th</sup> century. Here copyrights were grounded on the discourse about property as one of the most sacred natural rights of a person.

The same way as in England at the turn of the 17–18<sup>th</sup> centuries, in France the idea of the author's natural right was initially used as an instrument for holding discussions between the city and the country publishers and booksellers. Paris publishers held the rights to all bestsellers. They referred to the renewal of the privileges after their expiration. The country publishers, on the contrary, focused on the public interest and demanded the renewal of the privileges to be invalidated. Both parties appealed to justice in their debate, which was dealt with in the Royal Council. In 1725 Paris publishers tried to justify their opinion with the lifelong property right to a book they had been given by an author. For example, the publishers stated that they possessed the books due to the manuscript they had bought from the author, rather than due to the Royal mercy.

French copyright law development was, first of all, connected with the decrees of Assembly in 1791 and 1793, which were introduced during the period of the Great French Revolution. Generally, the idea of individual rights supremacy was one of the key revolutionary ideas. French decrees approving of the author's rights for the work performance and its publication played a significant role in continental copyright law development since the underlying individual rights were considered the true natural rights, not just the law product.

The genesis of copyright law in Germany has specific meaning since here we do not see the antagonism between the publishers and the authors, which took place in France and England. From the 16<sup>th</sup> century privileges were given to publishers who were more interested in the ancient privileges than in works of the contemporary writers. Then in some small territories general laws aimed at protecting from counterfeit were introduced. However, this protection did not cover all the country due to the lack of the country's integrity until 1870, when

the unitary Law on Copyright was introduced for all Germany.

I. Kant can be considered to be the ideologist of German copyright law. In 1785 he published an article devoted to the issue of illegal republication of books [5]. When speaking about this issue, Kant avoided appealing to the copyrights of a manuscript or an edition of a book. He put forward another discourse – a discourse of individual rather than property rights. The article repeatedly stated that a book is an author's speech addressed to the audience. In other words, a book is not a thing, but an act. Kant argued that the author had natural right, the right of his personality not to speak with the audience willingly [5, pp. 416–417].

Following Kant, eight years later I.G. Fichte published an article about the issue of illegal republication of books [3]. This philosopher looked at the problem of counterfeit via the discourse on property, not individual rights.

In his book, Fichte distinguished physical and ideal aspects. The ideal aspect is divided into the material aspect, that is the content of the book, its ideas, and the formal aspect, that is combination, edition, where one can find these ideas [3, p. 447]. Due to its ideal nature, the content of a book belongs to everyone. However, the form of the ideas cannot be assigned to anyone because each person has their own personal thinking process. Fichte believes that the author has the exclusive property right to the form of his book. In addition, the author has the right to authorship recognition [3, p. 451]. This division of rights makes Fichte a predecessor of dualistic copyright in comparison with Kant, who is undoubtedly a spiritual ancestor of the monistic model of copyright.

Thus, both Fichte and Kant justify the copyright via author's personality rather than via labor. However, Fichte does not support Kant in the idea of the author's individual right to his speech addressed to the audience. Fichte goes further and points out the right to authorship recognition.

In Russia in the 19<sup>th</sup> century, copyrights were legally grounded on the arguments of the justified author's reward. Such a way to legitimate copyright is closer to positivistic studies rather than to the philosophy of natural rights. We may say that the reward theory is a primitive combination of Jus Naturalism and utilitarianism arguments. This simplified justification of Russian copyright was caused by the fact that in the Russian Empire of the 19<sup>th</sup> century this institute appeared as the Emperor's will, not as a result of the parliament activities, like in Great Britain, USA, France. Thus, Russian society of the 19<sup>th</sup> century did not need any expressive philosophical law arguments to support copyrights.

G. F. Shershenevich (1863–1912), a distinguished scientist, is one of the most widely known representatives of the reward theory in Russian science. According to him, in the economic system based on the first principles of private entrepreneurship, the only possible way to support authors is to put them in one line with economic activists and to provide them with the opportunity to take care of their interests on a non-preferential economic basis. That is why law gives authors exclusive right to distribute their works and to prohibit republication and sale of republished books to others. [7, pp. 10–11]. With copyright as a reward for the labor, G. F. Shershenevich was against the introduction of moral rights into this right [7, p. 69].

### **Economic and Moral Rights in the Copyright System**

Unity and contradiction of a system are the basis for its development. In copyright law this principle can be seen in the correlation between moral and economic author's rights.

In France, the same way as in other countries, copyright appeared as an economic right. However, at the beginning of the 19<sup>th</sup> century French lawyers and artists drew public attention to the fact that use of works was both profitable and connected with the author's name and reputation. And in the 19<sup>th</sup> century courts gradually started to provide protection for individual interests of particular authors.

In the second half of the 19<sup>th</sup> and the beginning of the 20<sup>th</sup> centuries, a category of moral and author's powers within it was developed in French theory. However, at that stage one could not talk about a developed dualistic copyright model in France. At those times, only exclusive economic copyright was considered to be the true copyright. Moral right was deduced from the general principles of personality protection.

It was only in 1957, when the Law on protection of literary and artistic property<sup>1</sup> was adopted, that the author's moral rights were legally recognized in France and French dualistic copyright was completely developed. Moral rights were recognized to be one of two components of copyright.

Formally, one may talk about dualism in copyright when there is an institute of moral rights in the Law on copyright. It is obvious that the clear distinction between moral and economic rights should remain. Conceptually dualism appears when the regime of the author's moral rights becomes separated from the regime of personality's rights. Indeed, the former rights can be clearly separated from the latter ones by such parameters as an ob-

ject, basis for being developed, validity period, protection method.

Long before their legal regulation, copyrights in Germany were seen as rights connected with the author's personality. Moral and economic copyrights are closely connected, just like two sides of a coin. These rights, interpreted in Germany as different manifestations of one unitary right, generally guarantee the observation of the intellectual and economic author's interests. The German model of the copyright system is called monistic because of the conformity of the copyright of a work. In this personality-based system copyright is believed to be nontransferable during the author's life (§ 29 Act on copyright and related rights<sup>2</sup>).

Professor E. Ulmer made a significant contribution into the development of the monistic copyright model. According to him, copyright law, if considered as one institute, cannot be put in a law system which recognizes economic and moral rights only. It is evident that along with the rights which by their nature belong to one of groups there are other rights which comprise features of both groups [8, pp. 116–117]. The German law expert saw the disadvantage of the dualistic theory in the provision that after the author's death the fate of moral and economic rights may be different. The former are transferred to the author's relatives, while the latter may be transferred to any third parties.

At first glance, Russia is characterized by the dualistic copyright model. Article 1226 of the Civil Code<sup>3</sup> states that intellectual rights shall be recognized for the results of intellectual activity and means of individualization, which include an exclusive right, being a proprietary right, and, in cases provided for by the present Code, also personal non-proprietary rights and other rights (*droit de suite*, right of access, and others). The independence of the law regime of economic and moral author's rights is justified by the fact that the exclusive copyright may be completely transferred to the third parties by the author. At the same time, a model of license contract on the right to use a work is legally recognized. However, in this case a license contract does not show a monistic character of the copyright system structure.

The dualistic character of the copyright system is weakened by a group of other rights with no con-

<sup>1</sup> Law on Protection of Literary and Artistic Property of March 11, 1957 (France). URL: <http://www.wipo.int/wipolex/en/details.jsp?id=14231> (accessed 30.12.2015).

<sup>2</sup> Act on Copyright and Related Rights of September 9, 1965 (Germany). Available at: [http://www.wipo.int/wipolex/en/text.jsp?file\\_id=239044](http://www.wipo.int/wipolex/en/text.jsp?file_id=239044) (accessed 30.12.2015).

<sup>3</sup> Civil Code of the Russian Federation. Part One № 51-FZ of November 30, 1994, Part Two № 14-FZ of January 26, 1996, Part Three № 146-FZ of November 26, 2001 and Part Four № 230-FZ of December 18, 2006. Available at: <http://www.wipo.int/edocs/lexdocs/laws/en/ru/ru083en.pdf> (accessed 30.12.2015).

ceptual grounds for categorizing. At the same time, grouping different rights into a category of other rights is a very convenient law technique.

In Russian legislation a term “personal non-proprietary rights” defines moral copyrights. These rights have a dualistic status in Russian legislation. On the one hand, they belong to the group of intellectual rights, but on the other hand, they are a type of personality rights. In a completed form of dualistic copyright the law regime of moral copyrights is separated from the regime of personality rights. In Russia, on the contrary, moral copyrights as such are invalid after the author’s death. Protection of the rights to the work integrity was mistakenly connected with the protection of honor, dignity, business reputation of the author in accordance with the general rules of the personality rights institute [6, pp. 365–367].

Thus, Russian copyright system is characterized as a specific form of dualism. In fact, this dualism is eclectic since it is influenced by conceptually different systems of French and Soviet copyright.

### **Exclusive Rights in the Copyright System**

Exclusive right is one of many fundamental notions of intellectual property law and copyright law in particular. The exceptional nature of copyright law is a symbol illustrating its special unique character.

In law systems the term “exclusive” right appeared long before the development of the exclusive rights theory. The application of this term was not limited to the sphere of intellectual property. Moreover, the term “exclusive right” was borrowed by copyright and patent law from a wide range of privileges, which were one of the key juridical means of economic activities in the Middle Ages and at the dawn of the Modern Times. Privileges are understood to be the rights based on individual and particular acts of legislative and administrative powers. In this sense, privileges are opposed to rights, introduced by laws as general and abstract norms.

In copyright law, the word combination “exclusive right” appeared in the 18<sup>th</sup> century. Practically all further evolution of copyright law was connected with the usage of the term “exclusive right” in legislative and other legal acts. At the same time, there has been no uniform approach to differentiate exclusive rights from other ones, both in foreign and Russian laws. However, we may present the mainstream view on this issue.

Throughout the history, only economic copyrights have been considered to be exclusive in the countries of Anglo-American copyright law. Until the end of the 20<sup>th</sup> century, Great Britain, USA and Australia had not recognized moral author’s

rights, that is why their recent regulatory actions could not violate the age-old traditions of the copyright system.

Most countries of Romano-Germanic copyright law legally recognize only economic copyrights as exclusive rights as well. However, this rule has a significant exception, exemplified by the approach of France and other countries following French tradition of copyright law. In France exclusive copyrights include both economic and moral copyrights. Article L. 111-1 of the Intellectual Property Code<sup>1</sup> states that an author of a creative work holds exclusive rights with the features of both intellectual and moral and economic nature. This provision was transferred practically word-for-word to Article 20 of Chad Law on Protection of Copyright, Neighboring Rights and Expressions of Folklore<sup>2</sup>, to Article 1 of Madagascar Law on Literary and Artistic Property<sup>3</sup>.

We may find an intriguing paradox in comparing traditions of assigning the name “exclusive” to different copyrights in France and Germany. In the French dualistic model of copyright with clear distinction between moral and economic rights, with their different history and juridical faith, still both groups of these rights are called “exclusive”. The German monistic model with copyright understood as a uniform inalienable right with the powers of personal and economic nature recognizes economic rights as exclusive rights only. Thus, we may conclude that the exclusiveness of particular copyrights has, first of all, historic grounds, legislative traditions and does not have any significant theoretical and practical value.

Modern Russian copyright law follows the world trend and specifies economic author’s rights as exclusive ones. The same approach was typical of the copyright law in the Russian Empire, where all key legal acts manifested the exclusive nature of copyrights, and moral copyrights were not developed yet. However, in Soviet copyright law in the mid-1920s – 1960s, moral and economic author’s rights were thought to be exclusive ones, although there was no official division of copyrights into these two groups. While reconsidering civil legislation of the USSR and RSFSR in the 1960s, the legislator refused to assign exclusiveness to copyrights. Here we can see the influence of Soviet legal

<sup>1</sup> Intellectual Property Code of July 1, 1992 (France). Available at: <http://www.wipo.int/wipolex/en/details.jsp?id=14082> (accessed 30.12.2015).

<sup>2</sup> Law on Protection of Copyright, Neighboring Rights and Expressions of Folklore of May 2, 2003 (Chad). Available at: <http://www.wipo.int/wipolex/en/details.jsp?id=8047> (accessed 30.12.2015).

<sup>3</sup> Law on Literary and Artistic Property of September 18, 1995 (Madagascar). Available at: <http://www.wipo.int/wipolex/en/details.jsp?id=5320> (accessed 30.12.2015).

science which offered not to use the vague term “exclusive right” in legislation.

Thus, defining copyrights as exclusive ones has historical rather than theoretical grounds. The majority of states only recognize economic author’s rights as exclusive ones. However, the examples of France and other countries following French traditions of copyright law show that moral copyrights may also be considered exclusive ones. The term “exclusive right” itself is not strictly connected with copyrights and with the intellectual property right, it is used in many laws regulating other social relationships. Some scientists connecting the nature of the exclusive rights with the semantics of the corresponding term do not take this circumstance into account.

The copyright system must not be based on division of rights into exclusive and other rights, which are not exclusive. This system must be grounded on the principle which would show the key features of copyright. This principle is to divide copyrights into economic and moral rights.

### Conclusions

In the system of copyrights, the connection between economic and moral rights is systemically important because these rights protect different interests.

Jus Naturalism studies played its great role in the development of the copyright system in France and Germany, while in Russia the copyright system was not so greatly affected by philosophical law theories.

In France copyrights were grounded on the discourse on property as one of the most sacred natural rights of a person. In the 19<sup>th</sup> – the first half of the 20<sup>th</sup> century, French copyright law was expanded by a subsystem of moral copyrights, which were determined not by the discourse on property but by romanticism ideas. As a result, there appeared dualistic copyright law, where economic and moral copyrights had different background, different grounds and different law regimes.

The German copyright system has philosophical roots in studies of German idealism of the turn of the 18<sup>th</sup>–19<sup>th</sup> centuries. Kant’s understanding of copyright as an author’s speech addressed to the audience is a philosophical basis for the monistic copyright model.

The Russian copyright system is a specific form of the dualistic model. In fact, this dualism is eclectic since it is influenced by conceptually different systems of French and Soviet copyright.

Legislative characterization of copyrights as exclusive ones has historic rather than theoretical grounds. In the French dualistic copyright model both economic and moral rights are called “exclusive”. The German monistic model, where copyright is understood as a unitary inalienable right, recognizes economic rights on use of a work as exclusive ones.

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