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# Copyright Protection for Characters in Transmedia Environment

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## **Abstract**

The proposed article provides an analysis of the legal regime for characters as impacted by the current content creation and dissemination trends with a focus on characters placed in trans media environment and on the impact of trans media storytelling on creative work. The author argues current global changes in creative work and different media make it relevant to return to discussions of the main premises of copyright regime for characters. In particular, the author explores a possibility to recognize independent exclusive rights to characters appear in different works of art as well as to those not described in any one of them, and looks into legal importance of characters not described in traditional works of art and literature. The paper raises the issue of exclusive right to characters in complex objects such as audiovisuals or computer games, as well as of the authorship and exclusive ownership of team-created and transmedia characters. The cases of joint authorship of (script) writers and artists as well as implications of creating images of characters existing in literary form as commissioned or allowed by the copyright holder are discussed. The legally important components of characters are explored as well as copyright transferability in the context of media production needs. The paper argues for a need to avoid mixing characters with other copyright objects, first of all works of visual arts including cartoon character sketches.

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## **Keywords**

character; transmedia creative work; transmedia storytelling; copyright for characters; copyright to a part of work; exclusive right; intellectual property right; copyright infringement.

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## Introduction

A characteristic feature of the digital age (equally called information age) is not only the predominance of technologies described as “digital” but also overall changes to the composition and dissemination of information (content) as well as changes to the nature of creative work itself. These trends are exemplified by the problem of copyright protection for characters.

Under para 7 of Article 1259 of the Civil Code of Russia (hereinafter referred to as CCR), copyright applies to a part of work, its title and characters as long as they can be recognized by virtue of their nature a standalone creative product described in any objective form.

The copyright regime for characters is traditionally premised on the following statements:

character — a piece of work where it is described and protected as part thereof;

character is inextricably linked to the form (literary, animation etc.) it is described in;

character is authored by the author of the work describing it.

These premises should be subject to careful scrutiny in discussing characters in today’s media and creative work in transmedia environment.

In the United States, popular comics and cartoon characters were used in civil law transactions for production of goods and services separately from the artwork since the mid 20<sup>th</sup> century [Kopylov A. Yu., 2021: 3]. It was only in 1930 after the case of *Nichols v. Universal Pictures*<sup>1</sup> that characters were recognized independent from the story they were described in. This case was about copyright infringement for copying dramatic work in a film. The court noted that protection of literature cannot be limited to the exact text but did not establish a violation since the copied characters were recognized universal concepts and stock characters (prototypes). In Russia, the practice of using characters separately from original work has emerged only belatedly, with the growth of new entertainment industries (comics, computer games, animation films, etc.) giving rise to a phenomenon of character “migration” beyond the works where they were originally described.

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<sup>1</sup> *Nichols v. Universal Pictures Corporation*, 45 F.2d 119 (2d Cir. 1930).

## **1. The Concept of Character**

While originally not a legal term, the character has a content to be defined by relevant knowledge fields (literary and art studies), with the law to identify the properties and criteria relevant for its copyright protection.

E.V. Lozinskaya believes the character to be a complex category if regarded from the perspective of literary theory: on the one hand, characters are very closely integrated into the general structure of a work while, on the other hand, they are quasi autonomous and easily dissociable from the work and its media substrate [Lozinskaya E.V., 2013: 81]. In literature and arts, a character is human being or other hero of a story or narrative. The narrative may be associated with literature (novels, stories, plays) and arts (movies, TV series, audio theatricals, video games). These works come from different media. M. Freeman argues that characters are imaginary beings constructed from certain physical and psychological components and environmental features [Freeman M., 2017: 23]. In other studies, characters are defined as textual or media figures — either human or human-like — in a story world [Jannidis F., 2014: 30]. This interrelation of characters and story world is crucial as it ensures the association of characters with specific work (s). Under an extreme approach to the said relationship dating back to Aristotle's Poetics, characters are a kind of “functions” subordinated to and determined by narrative.

From the perspective of literary and art studies, defining a character requires both to describe it (not necessarily from exterior since description as a technique can also tell about personality and inner self) and to analyze its behavior including with all other characters of the work. Creating a character involves things such as appearance, dialogues, interactions with other characters, background, psychology (the set of techniques to be used may vary depending on the genre and style).

The legal doctrine abounds with character definitions. Thus, A.Yu. Kopylov overemphasizes the importance of character description (image) by proposing to define a “character in literature and arts” as a visualized description of imaginary person in the form of an objective image (series of images), 3D model or hologram representing an intellectual product usable in civil law transactions separately from the main work, of which the character is a detachable part [Kopylov A. Yu., 2021: 12–13]. I.A. Bliznets and V.S. Vitko argue in contrast that a protagonist can be recognized character as long as it represents an idea creatively expounded in a certain form of narrative behind the idea of the story's hero — a character. That is, they believe that characters are protagonists created by the author to express certain idea

(thought, feeling). For example, Don Quixote is the idea of knighthood in the service of Beauty; Raskolnikov is that of the right of strong person to rise above the world and “break what needs to be broken once and for all” [Bliznets I.A., Vitko V.C., 2022].

A.E. Sukhareva and R.E. Turkin argue that a character can be understood in a wide and narrow way. In the first case, a character is defined through the name, image and appearance of the story’s heroes, with copyright protection focused on the image inextricably related to the name and appearance. This practice is typical of the United States and other countries governed by the Anglo-American legal tradition. In the second case, the legal focus is exclusively on the description and graphic image, only to ignore how the character is represented by readers/viewers [Sukhareva A.E., Turkin R.E., 2017].

The Russian legal practice tends to overemphasize the character’s image with a vast majority of disputes dealing with illegal copying of audiovisual (animation) characters. The Supreme Court of Russia’s opinion is that a character should be understood as a set of descriptions and/or images of a protagonist in the form(s) proper of the given work of art: written, oral, visual, audio or video recording, 3D, etc.<sup>2</sup> In stressing the character’s description (image), the Supreme Court of Russia has advanced a refutable presumption that protagonists are subject to protection if proved to have distinctive features.

Today it is apparently urgent to shift the emphasis in the legal discussion of characters given that it is not only (and not so much) their image that should be protected but the entire set of features including personal traits, relations with other characters, speech patterns, names, nicknames, etc. Thus A.A. Nikiforov argues that in Germany a character’s appearance as such is not recognized as an adequate basis for copyright protection which is available only if there is a set of accurately described individual actions and traits embodied in a single character [Nikiforov A.A., 2020: 187]. A case brought in the U.K. makes a good example of accounting for personal and other distinctive traits not related to the character’s appearance in deciding whether it is protectable.<sup>3</sup> The case was about infringement of the right to Del Boy from the BBC’s *Only Fools and Horses* comic series broadcasted over ten years from 1981 to 1991. The defendants used the character in the *Only Fools The Dining Experience* interactive show. To assess the fact of

<sup>2</sup> Supreme Court of the Russian Federation Plenum Resolution No. 10 On Applying Part Four of the Civil Code of Russia 23.04.2019, para 82 // SPS Consultant Plus.

<sup>3</sup> Shazam Productions v. Only Fools The Dining Experience. 2022. EWHC 1379 IPEC.

copying, the court used the BBC's TV series scripts and established, in particular, the following Del Boy distinctive traits the defendants had copied: a) use of unique phrases the Oxford Dictionary attributed to this character; b) use of French in an attempt to create an exquisite atmosphere; c) perennial optimism; d) involvement in sham deals; e) self-sacrifice for the sake of another character, Rodney. In hearing the case, the court had to decide to what extent the appearance and representation of the actor playing Del Boy in the TV series (that is, the character's representation) could be separated from the one created by the script's author. To be able to decide, the judge watched three episodes script in hand, only to conclude that Del Boy's traits referred to by the claimant as making up his traits were accurately and objectively visible in the script. This case is remarkable as the issue of illegal copying is dealt with, firstly, on the sole basis of the character's traits, image and relations with other characters without reference to its appearance, and, secondly, the fact of infringement through indirect copying is recognized (the dining show authors apparently did not read the scripts describing the original character when they copied the character reproduced by the actor in the TV series).

## **2. Transmedia Nature of Content**

Today's creative work is characteristically transmedia focused. The so-called transmedia storytelling is about stories that unfold in a number of platforms, each contributing to our understanding of the world. While a book is prequel to film, TV series is its sequel and computer game a spinoff. Each new work will expand the original storyline, with the character allowing to place books, films and other works together in a single context. A look at the multitude of imaginary worlds — Marvel, Star Wars, Pirates of the Caribbean, etc. — makes it obvious that characters appearing in a comic strip can march on into a full-length movie and then across TV series, books etc. Media companies such as Marvel, Disney, etc. have been making their products based on a single timeline with the same characters for quite a while. Transmedia storytelling should not be confused with cross-media — posting the same content to different media — where, unlike transmedia, it is used in a different media environment but not expanded in terms of its plot or storyline. From the legal perspective, while the original work needs to be adapted both for cross-media content and transmedia storytelling, the former does not assume a considerable expansion of the storyline.

The expansion of transmedia storytelling calls for a special analysis of the so-called transmedia characters. Since the said characters exist as part of transmedia narrative, each media where the story unfolds will further

develop them. The role of characters in transmedia creative work is to be underlined since a host of stories can be interrelated and grow specifically at the expense of characters, in particular, through multiple sequels and prequels [Freeman M., 2017: 21, 23]. The main feature of transmedia characters is that they extend well beyond the particular work (and even beyond a particular form of expression), their existence challenging the idea of inextricable link between the character and the form expressing it.

In justifying the existence of transmedia characters, the discussion should be firstly focused on the competing approach to recognize the same protagonists of different works expressed in different objective forms as different characters. Thus, E.P. Gavrilov believes that a character is always inextricably linked to an objective form of its expression. In other words, a literary character makes up a work of art different from that of a visual character even if the latter has the same name and embodies the same ideas, concepts and facts [Gavrilov E.P., 2011]. To demonstrate his view, E.P. Gavrilov refers to *Cheburashka* as literary character created by E.N. Uspensky, its visual counterpart created by L.A. Schwartzman, and *Cheburashka* as animation character owned by Soyuzmultfilm (Federal Animation Films) Studios. This opinion is shared by A.E. Sukhareva and R.E. Turkin, who underline the character as a single concept does not exist — it will be always inextricably linked to an objective form of its expression [Sukhareva A.E., Turkin R.E., 2017].

E.P. Gavrilov's interpretation of *Cheburashka* as an example is arguable. Its visual representation contained in Uspensky's books differs from the character's "canonic" cartoon image. Uspensky never mentioned large ears as the character's key feature. Meanwhile, the sketch created by Leonid Schwartzman became the character's image thanks to the story imagined by Eduard Uspensky and cartoons produced by Roman Kachanov. By the way, the cartoon scripts were co-authored by Uspensky and Kachanov. The sketch created by Leonid Schwartzman would not visualize *Cheburashka* if it were rejected by cartoon authors: a different image would have been chosen. In this case, this sketch would just become another work of graphic art. The story of *Cheburashka* in Uspensky's books and cartoons is the same. Its personal traits, relations with other characters do not change. Thus, it will be fair to say that *Cheburashka* is a classic example of transmedia character. As regards the famous disputes about the rights to this character, they were normally related to the use of cartoon image on souvenirs and other items (toothpaste tubes, USB storage) and can be reduced to disputes about the right to copy the character's cartoon image or — which is the same — about the copyright to artwork, sketch created by Leonid Schwartzman. It can also be argued that *Cheburashka* appearing in the full-length movie of 2022

embodies the same character. This is proved by the character's visual similarity and relations with other characters played by actors (Sergey Garmash as *Ghena the Crocodile*, Elena Yakovleva as *Chapeau claque*, and Dmitry Lysenkov as *Lariska the Rat*).

As such, transmedia characters need to be regarded in light of what makes them different from the so-called characters *per se*. This term is used to designate complex cultural constructs that extend considerably beyond the represented entities with intentional inner life in narrated worlds. Such characters would include, for instance, serial characters resulting from repetitions, reviews, reboots of their storylines. The terms proposed to distinguish characters *per se* from those of artwork are “transmedia figure” or “cultural icon”. It is also proposed to introduce another term — “an established character template”. Such transmedia character template would cover the physical, mental and social qualities of a recognized transmedia figure that are proper of any character with a name but not necessarily manifested in a specific character named after the relevant transmedia figure [Thon J.-N., 2019: 179, 181,184].

The terms “transmedia figure” and “cultural icon” are required to adequately respond to the situation where certain character names (such as Sherlock Holmes, Batman, etc.) come to designate different characters as a result of a long record in a variety of works. The Norwegian researcher Jan-Noël Thon finds an example of such transmedia figure in Sherlock Holmes, arguing with good reason that Sherlock Holmes, Victorian classic master detective appearing in Arthur Conan Doyle's stories and novels released from 1892 to 1927, the 19<sup>th</sup> century Sherlock Holmes in the BBC's *Sherlock* TV series (2010-2017), Sherlock Holmes the immigrant and former drug addict paired with Joan Ginny Watson in the CBS's *Elementary* TV series (2012-2019), the 21<sup>st</sup> century Afro-American Holmes in comics series by Boller, Leonardi and Stroman, the dog handler and detective of the Italian-Japanese anime series *Sherlock Hound* (1984–1985) or the master detective fighting rodents in the Walt Disney animated film the *Great Mouse Detective* (1986) do not (and are unlikely to be designed to) fit into one and the same transmedia character [Thon J.-N., 2019: 188]. In fact, these examples do not share a story unfolding in different works and even different media: they offer different stories with the characters constructed on the basis of archetypal private detective (and thus devoid of character features).

### 3. Specialization of Creative Work

Like other types of human activities, creative work becomes more complex with time. Ideally, the author will create a work of art himself from



start to finish. However, already Alexander Dumas Père would often employ “ghost writers”. The specialization of writers and other authors allows creative work to be scaled up: the main author will develop the storyline, characters and the world they exist in while his “day workers” will do dialogues or important parts of the work. Such genres as TV series scripts would not survive without specialization, with different people almost invariably responsible for the storyline and dialogues. The current problem of specialization of creative work goes hand in hand with that of its collectivity as modern authors get inspiration from an enormous reservoir of the funded cultural knowledge [Nikiforov A.A., 2020: 175–176]. Both specialization and collectivity of creative work diminish the inextricable link between authors and their products, only to impose a different view on the copyright mechanisms.

Due to complication of creative work (because of its stream-like nature) some authors have to design characters separately from the story (for example, to make a creative “universe”) while lawyers have to invent ways to correctly register the copyright to characters and other intermediate creative inputs before they become part of the finished work (prosaic or dramatic one). For instance, one author describes the main traits of the principal and secondary characters, events, relations between them while others, based on these descriptions, produce literary or other works of different genres (prosaic, screenplays, etc.). By the way, such a specific genre as character sketch has existed in literature for relatively long time. A character sketch is a written piece normally shorter than a short story with a limited storyline (if any) since it purports only to portray the character as it is. This genre associated with journalism has currently gained much importance. In particular, the above practice raises the issue of relationship between the character and the form it is expressed in.

#### **4. Alienation of Characters from Works of Art**

The emergence of transmedia characters and specialization of creative work tend to “alienate” characters from works of art, only to impose on the law the task of protecting such “alienated” characters.

While the copyright for characters has been long confined to protection from illegal copying in merchandizing, the “migration” of characters beyond the works of their origin, explosive growth of such phenomena as fan creation (including the writing of “fanfics” — amateur works themed on popular books), and expansion of popular imaginary worlds by third-party authors (for example, that of *Metro 2033* has been described in more than 110 books) make it important to control the use of characters elsewhere.



Creative work in imaginary worlds under a strict copyright control where the author of the next Spiderman comic strip is unlikely to depart from the established canon also allows to assert the fact of employing characters as a single creative product in a variety of works.

Faced with the situation of the same character appearing in a number of works of different forms (books, comics, films, cartoons, computer games), the question should be whether these are the same or different copyright objects (especially in the context of identifying the so-called transmedia characters)? A.A. Nikiforov brings this question even further in arguing that one can imagine characters that are not part of any work. He refers to the example of the Dungeons and Dragons role game where players act for imaginary characters in an imaginary world and where the created characters are not part of any work but can be objectively expressed in special “character sheets” [Nikiforov A.A., 2020: 193]. This example is similar to the above case of characters developed by the author for a work yet to be created. In this case, the character also exists exclusively in the form of description.

The question of whether a character has been alienated from the work it was originally part of requires to analyze it conceptually as “part of the work”.

The issue of protecting a part of the work is raised by the contents of para 7 of Article 1259 of the CCR whereby copyright will apply to a part of the work, its name and characters as long as they can be recognized by virtue of their nature a standalone creative product described in any objective form. A character is thus traditionally understood as part of the work. At the same time, a protectable character should be itself recognized a work of art. Recognizing a character a standalone work is thus crucial as it paves the way to transferability of copyright to the character, allows to dispose of the copyright to the character separately from the work. Transactions of this kind are currently widespread.

The concept of “part of the work” is a contradiction in itself. Is a “part of the work” a work in its own right? If yes, how does it differ from the larger work; if not, it is to be admitted that copyright applies not only to the work but also its part. A.A. Nikiforov believes that the problem of the character’s independence from the work is solvable in either of the three ways: an independent character becomes a separate work of art fully covered by copyright, a character is recognized part of the work exempt from specific provisions applicable to the work of art as a whole; a character is self-sustained intellectual property independent from the original work but essentially different from traditional copyrighted objects and thus in need of specific provisions to be developed [Nikiforov A.A., 2020: 190]. The author of the quoted study supports the last option.

I.A. Bliznets and V.S. Vitko argue that the concept of “part of the work” is devoid of specific criteria and characterized by the same legal qualifications as that of “work”. Therefore, the protection of the whole work and its constitutive parts, in order to be meaningful, should follow one and the same rule [Bliznets I.A., Vitko V.S., 2022]. E.P. Gavrilov previously suggested that part of the work makes up a work [Gavrilov E.P., 2020]. On the contrary, V.O. Kalyatin argues that a character cannot amount to stand-alone work as copyright to independent work is premised on objective form. A character, like imagery, is devoid of objective form which is supplied by the work where it appears. No character can be protected on its own since copyright is attached to the work.<sup>4</sup> The CIPR has adopted a conservative stance and argues that recognizing a character a creative product does not make it an independent object of copyright, so that no independent exclusive copyright will arise in respect of a character.<sup>5</sup> In view of the provisions of para 7 of Article 1259 of the CCR identifying two grounds for copyright to apply to characters (objective form and recognition as an independent creative product), the CIPR has a good reason to stick to the above position that a character cannot have an independent objective form.

Meanwhile, it appears that characters (just like other meaningful parts such as storyline) do have an objective form. It is easiest to reproduce characters from an animated film (hence the number of infringement cases concerning this category of fictional characters). Anyone, having read a novel or having watched a movie, can reproduce a character by creating its description. The reproducibility appears to be an indication of objective form. Such reconstruction of a character could be done in multiple ways, for example, by creating its description. Describing a character is often part of creative process to produce a work of art. A description could be quite detailed and contain dozens of pages. Media giants use descriptions to develop the so-called “canonic” characters widely used for franchising.<sup>6</sup> A.A. Nikiforov refers to the party game Dungeons and Dragons where characters, while not part of any work at the time of their creation, are objectively expressed in specific “character sheets”. This author suggests to regard this kind of

<sup>4</sup> Collected minutes of the Board of Academic Advisors under the Court for Intellectual Property Rights / Journal of the Court for Intellectual Property Rights. Annex to anniversary issue. No. 2, June 2023.

<sup>5</sup> Brief on the issues arising from application of para 7 of Article 1259 of the Civil Code of Russia (part of the work of art) approved by CIPR Presidium Resolution No. SP-21/33 of 28.12.2022. Journal of the Court for Intellectual Property Rights, 2023, no. 1, pp. 12–13.

<sup>6</sup> See, for example, the description of Peter Parker, a character of the Spiderman franchise. Available at: [https://marvels-spider-man.fandom.com/wiki/Peter\\_Parker](https://marvels-spider-man.fandom.com/wiki/Peter_Parker) (accessed: 12.04.2022)

description both as a literary work fully made of single character description and as objective expression of a character [Nikiforov A.A., 2020: 190]. Another approach is to create a new work (novel, film, game, etc.) with the same character that thus acquires objective form.

One has to agree with E.P. Gavrilov that a character is protected not for being part of a work but on its own account as making itself a work of art [Gavrilov E.P., 2011]. In attempting to remove the contradiction of opposing the work and its part, E.P. Gavrilov concludes that para 7 of Article 1259 of the CCR is only applicable where a part(s) of work is used separately from other parts. Thus, any part of the work can make up a work in its own right once it exhibits all features of artistic work and is used separately. On the contrary, if a part is used jointly with the work as a whole, it is never protected by copyright [Gavrilov E.P., 2021]. With all support for this approach in general, it has to be said that it fails to address specific practical issues, in particular, that of ownership of the exclusive rights to characters of individual works.

## 5. Ownership of the Exclusive Right to a Character

The question of ownership of the exclusive right to a character does not arise where character and work are authored by the same person. But what about characters of complex objects such as audiovisuals or computer games? Or about characters created through teamwork? Or else transmedia characters which require creative inputs to be realized in different media?

The most frequent example of creative teamwork is where one person creates the traits, story and (optionally) literary description of a character while another the character's visual image or appearance. These are cases of co-authorship of writers and artists, and of creating an image of the character already existing in the literary form as commissioned or permitted by the copyright holder. Strictly speaking, the image may come first: for example, *Misha the Bear*, mascot of the XXII Summer Olympics in Moscow (1980) created by Victor Chizhikov, was subsequently used in a number of cartoons (*Baba-Yaga the Dissenter*, *Olympic Spirit* and even the anime series *Koguma no Misha*). A.A. Nikiforov argues that, apart from co-authorship of several individuals giving rise to joint exclusive rights, there are also other forms of authors' cooperation, only to result in different legal implications in terms of the ownership of exclusive right to character [Nikiforov A.A., 2020: 217–218].

In its ruling on the use of *Cheburashka* and *Matroskin the Cat* for producing USB storage in the form of these characters, the Civil Chamber of the Moscow City Court noted that while the claimant was the author of literary works (and thus of fictional characters) and of cartoon scripts representing

the said characters for the first time, the defendant used them as expressed in the form of images rather than literary form. The latter was an independent copyrighted item exclusively held by the Federal Wholly State-Owned Enterprise “United National Film Registry”.<sup>7</sup> This case was specific in that the United National Film Registry claimed its rights under the Civil Code of 1964 whereby an enterprise that produced a film was the holder of the original copyright to it (and thus to the characters as part of the film).

Let’s assume that we need to identify the author and copyright holder of an animated film. This can be done in either of the two ways: identifying the range of persons who provided inputs to create the character and studying their relations with the audiovisual production organizer, or assuming that the copyright to the character as part of the audiovisual is held by the persons recognized by law as the authors of the audiovisual since the character is part thereof.

The authors of an audiovisual are the director, script writer, composer and art director of animated film (cartoon) (para 2 of Article 1263 of the CCR). It follows from the concept of “character as part of work” that the producer’s rights to the audiovisual character including the image will arise from the rights to the audiovisual itself. An image of the cartoon character may be thus authored by someone not recognized by the film author while the producer’s rights to the character will arise from those to the film. This contradiction can be removed only under an agreement between the producer and the author of the character. Such personalized approach fits into the construct of rights to complex objects: organizer/producer of film as a complex object will be entitled to use intellectual items embedded into the complex object under agreements with holders of exclusive rights to the relevant items (para 1 of Article 1240 of the CCR). It thus follows from the personalized approach that in order to have exclusive rights to the character, the producer should envisage the appropriate terms under agreements with the character’s authors (let’s assume that the relevant provisions regarding the graphical image will be part of the art director’s or artist’s agreement, and, regarding the traits, of the script writer’s agreement).

In computer games, definitely complex object/multimedia products,<sup>8</sup> the issue of copyright for the work (game) and its part (character) is addressed differently.

The question of whether complex objects such as theatrical performances and multimedia products (Article 1240 of the CCR) are covered by an in-

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<sup>7</sup> Moscow City Court Ruling on case No. 33-195354. 24.06.2011.

<sup>8</sup> Another fairly widespread approach is to recognize a computer game a software, only to paradoxically make programmers the character’s authors and completely ignore individual creative inputs of the real authors.

dependent exclusive right has no straightforward answer. One point of view is that both can be deemed works of art, with an independent exclusive right arising as long as they constitute creative products expressed in an objective form. Under another point of view, no exclusive right to these objects as a whole will ever arise. That they are listed as complex objects in Article 1240 only means a special regime of coexistence and usage of several interrelated intellectual products.

Since the law neither defines the authors of multimedia product nor qualifies it, unlike audiovisuals, as comprehensive copyright object, we are confronted with a curious dilemma of either designating intellectual inputs (of which the character is a part) that make a computer game or recognizing the computer game character a standalone work of art (that is, in this case a character of computer game cannot be that of artistic work).

Leaving aside the technicalities of software operation, a computer game is an interactive audiovisual world where different storylines unfold in a certain setting (gaming environment). Game characters make part of this environment. However, under this approach the characters will be authored by all those who develop the gaming world which is obviously contrary to the principle of individual creative input. Under the principle of individual creative input, it is the artist and the script writer — those who created the character's appearance, story and imagery — that are the authors.

Player characters — heroes of party or computer games with actions (and often appearance) controlled by gamers rather than game rules — are the most specific of all game characters.

As an example of such characters, let's take the already mentioned Dungeons and Dragons game (D&D) where they belong to a race (humans, dwarfs, goblins, gnomes etc.) and class (priests, warriors, brigands, magicians etc.) with parameters prescribed by the rules. The available skills and abilities depend on specific class and race. At the same time, each character has a background describing its origin, activity and location in the D&D world. Characters have names chosen by players as well as descriptions. Importantly, characters have goals and motivation derived from the background imagined by players. They also have an outlook depending on combination of two factors: morals and attitude to society and law and order. Players may also take notes on their personality by describing unique personal traits or details of appearance. Interestingly, characters in D&D are authored both by developers and players. There is yet another party, Wizard, involved in the game as narrator rather than player. The Wizard is responsible for narration, script and setting for the game to unfold, and describes to other players what they perceive in the game's imaginary world and what are the consequences of their actions.

Computer game characters are similar to those of role games. V.V. Arkhipov notes that they are primarily user avatars, that is, virtual representations of users as persons within the limits of a particular game. He doubts that avatars amount to computer game characters since an avatar should make part of the storyline, that is, become a protagonist to be counted as a character [Arkhipov V.V., 2022]. But in computer games (just like in role games) introducing a character into a story is not straightforward: not all games have a storyline or else the storyline is variable and shaped by the gaming process.

## 6. Transferability of Exclusive Rights to a Character

Recognizing the existence of characters beyond the original work (including multimedia characters) as well as those that are not part of any work (expressed in “character descriptions” and similar documents) requires a look into the issue (fraught with controversy) of transferability of the rights to a character.

It is widely admitted that a character can be used under a licensing agreement setting the relevant limits of use. Moreover, it is generally believed that a character cannot be subject to an exclusive right transfer agreement since it is covered by the exclusive right to the work as a whole.

E.A. Pavlova believes that a licensing agreement may provide for the right to use part of the work such as a certain figure. In this case, it is irrelevant whether it is part or independent work since the holder retains the right to the original work. On the contrary, a right transfer agreement to part of the work is not possible as it will prevent further disposal of the right to the work.<sup>9</sup> This view is shared by E.M. Tilling.<sup>10</sup> The CIPR supported this position by arguing that the possibility to use a character separately from the work as a whole does not amount to recognizing it a work in its own right. Such usage is available to the author or other person under a licensing agreement setting the relevant limits. No character can be subject to an exclusive right transfer agreement since it is covered by the exclusive right to the work as a whole.<sup>11</sup> However, the CIPR allows for independent rights to character’s artwork later embedded into an audiovisual, something that assumes transferability of the rights to such artwork including possible disposal.

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<sup>9</sup> Ibid. P. 417.

<sup>10</sup> Ibid. P. 419.

<sup>11</sup> Brief on the issues arising from application of para 7, Article 1259 of the Civil Code of Russia (part of the work of art) approved by CIPR Presidium Resolution No. SP-21/33 of 28.12.2022. Journal of the Court for Intellectual Property Rights, 2023, no. 1, pp.12–13.



A transaction for disposal of the exclusive right to a character seems possible in principle, provided that the parties remove a restriction on using the character in the work it makes part of, for example, by signing a counter licensing agreement or (paradoxically but possible in theory) by excluding the character from the work. Suppose an author working in a universe created by another author (such as *Metro 2033* or *Patrols*) writes a novel containing a new secondary character of interest. Can another author purchase the exclusive right of disposal to this character with a view to using it in another work as the main hero? It should be equally possible to dispose of the exclusive right to a character (not just its artwork as allowed by the CIPR) created for a complex object (cartoon or computer game) and embodied in objective form such as description of personal traits, appearance, interactions etc. (for example, a new character for the *Masha and Bear* animated series not included into new episodes yet).

The point that “a character cannot be subject to an exclusive right agreement as it is covered by the exclusive right to the work as a whole” needs to be further checked for cases of characters appearing in multiple works. For instance, the *Iron Man* of Marvel’s cinematic universe appears, apart from the solo film of 2008, in the *Iron Man 2*, *Iron Man 3*, *Incredible Hulk*, *Avengers*, *Avengers: Age of Ultron*, *Captain America: Civil War*, *Spider Man: Homecoming*, *Avengers: Infinity War* and *Avengers: Endgame*. If understood as part of a work of art, the character of Iron Man should be covered by exclusive rights to all of the said films, something that would be strange. This conflict cannot be removed unless the exclusive right to character as an artwork usable separately from the primary work is recognized.

## **7. Defining the Character’s Legally Important Components and External Borders**

There is a need to define legally important elements and external borders of a character as standalone work of art before making it a major copyright object and addressing infringement disputes related to its illegal copying or adaptation.

This task is especially important in respect of transmedia characters and also those outside “traditional” literary or artistic works. In migrating from one work to another, transmedia characters inevitably change (modify) their appearance. It is an impending consequence of cross media existence where each medium (literature, cinema, animation, computer graphics) has pictorial means of its own, only to vary the character’s appearance this way or another.

The Supreme Court of Russia has noted the importance of a character’s specific traits to recognize the fact of its use. In particular, the Supreme



Court has explained that copying involves production of not only duplicates using, for example, a text with the character's description or specific image (such as animation frame) but also of any material using the character's traits (representative recognizable details of its image, character and/or appearance). In the latter case, a character is deemed to be copied even where specific traits do not fully coincide or insignificant details vary as long as such character is recognizable as part of the specific work (such as where it is still recognizable despite a difference in clothes).<sup>12</sup>

A character's main components normally include its name and image (if any) as well as personal traits.

A character's name functions as its identity normally bringing the memories of everything known about it. For example, when we hear the name of Spider Man we understand that it means Peter Parker, New York resident, orphan and "friendly neighbor" endowed with superforce after a bite of radioactive spider, whom we can associate with a hero of hundreds of comic books, dozens of films, cartoons and computer games.

Can a character's name (designation) be acknowledged part of an artwork that is independent intellectual product and thus subject to protection in its own right (just like the name of the work itself)?

This issue should be apparently addressed on a case-by-case basis. Fictional designations proper of comic strips (*Spider Man*, *Iron Man*, *Captain America*, etc.), just like imaginary names such as *Aelita*, *Ariel*, *Ichtiandr* (Amphibious Man), *Captain Nemo*, *Athos*, *Porthos*, *Aramis* and *D'Artagnan* are extremely original and indicative of specific characters. The FAC for the Moscow Circuit explicitly noted that the name *Winnie* from a book by Boris Zakhoder (*Winnie the Pooh and What Not*) well-known throughout Russia belongs to a character different from Milne's. The name *Winnie* with a double "n" was introduced to the Russian vocabulary by Zakhoder as original translation. The FAC for the Moscow Circuit thus concluded that Zakhoder has exclusive copyright to the work and designation *Winnie*.<sup>13</sup>

Characters with ordinary names is a more complex story. Can everyone recall which of the two — Alexander Ivanovich Luzhin or Pyotr Petrovich Luzhin — is the character of Nabokov's novel "Luzhin's Defense" and protagonist of Dostoevsky's novel "Crime and Punishment"? The matters are still worse for characters named after historical personalities. Thus, Napoleon as portrayed in Tolstoy's novel "War and Peace" is not a great man

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<sup>12</sup> Para 82, Supreme Court of the Russian Federation Plenum Resolution No. 10 "On Applying Part Four of the Civil Code of Russia". 23.04.2019.

<sup>13</sup> FAC for the Moscow Circuit Ruling No. KA-A40/9754-05-P of 12.10.2005.

but a base defective “butcher of nations” in contrast to a romantic image described in many other works. Unexpectedly, the name of Abraham Lincoln may belong to a vampire hunter of the American Civil War era (film by T. Bekmambetov) while Grigori Rasputin and Felix Yusupov may turn into vampires (*Karamora*, a TV series by D. Kozlovsky in the genre of alternative history).

The above examples demonstrate that while in some cases a character’s name may constitute a copyright object and individualizing trait, in other cases, on the contrary, it may denote several characters rather than one, thus failing to provide a link to specific work.

A character’s image is its another important (but not mandatory) component. The situation here is not straightforward either. In case of characters from animated films or computer games, the hero’s created image will undoubtedly constitute a standalone artwork (object). The costumes of superheroes in feature films might be considered a work of design. On the other hand, a literary (verbal) description of appearance is unlikely to be separated from the character and does not amount to protectable image.

As for the difference between a character’s verbal description and image from the perspective of protection options, it is worth noting that possible infringements of copyright will vary since the description and image are used differently outside the original work. A.A. Nikiforov even argues for a distinction to be made between a character’s static use as only one element/part and its static use as protagonist in another work) [Nikiforov A.A., 2020: 200]. With this distinction in mind, it is only natural to conclude that while static use of an image (mostly of cartoon artwork) separately from the original work is widespread, separate static use of description (appearance) is nothing but conceivable assumption. This is why a vast majority of illegal copying claims concern the infringement of copyright to the character’s image.

In discussing the character’s image, one should distinguish between the image as such and the appearance, the latter often providing recognizable traits (such as the spectacles, the scar and the stick for *Harry Potter*; the red hair, the freckled face and the streaky stockings for *Pippi Long stocking*, etc.). Large segments of popular culture such as cosplay (costume play) and carnivals rely on the use of meaningful elements of appearance, unique costumes and attributes. Thus, copyright for image should not apply to the character’s appearance since it will unreasonably expand its scope. A.A. Nikiforov refers to an example from German legal practice where the High Court of Cologne recognized that the use of a literary character’s appearance (designing and marketing *Pippi Long stocking* costumes) did not violate exclusive rights and should not be restricted [Nikiforov A.A., 2020: 187].

Finally, one has to analyze whether a character's traits can be recognized as its part. Let's compare those of *Pinocchio* and *Burattino*. The principal difference between the two characters lies in their arcs (paths). Created as a wooden puppet, *Pinocchio* passes through trying times to change his inner self. In reward, a fairy transforms him into a real boy. Meanwhile, *Burattino* does not change: in the end he is still a puppet though with a spark of value for friendship. Different arcs underpinning the two characters exhibit a seemingly minor external difference: *Pinocchio*'s long nose becomes even longer when he lies (as a manifestation of moralizing approach by Carlo Collodi, *Pinocchio*'s author) while *Burattino*'s long nose is his permanent feature: any attempts to shorten it were to no avail. Inspired by Collodi's character, A.N. Tolstoy ended up with a creature of his own albeit derivative from *Pinocchio*.

Case law adopted by U.S. courts allows to extend copyright to components of character's identity, one of the most interesting cases being the extension of legal regime for characters to inanimate objects. A textbook example is believed to be the Court of Appeal for the Ninth Circuit's ruling to provide legal protection to the Batmobile.<sup>14</sup> The court applied a three-part test for detailed assessment, with the results leading the court to conclude that this kind of character can be protected by copyright. The court determined that the Batmobile had certain physical as well as conceptual qualities, a distinctive graphical image in comics, motion pictures and television series, and, since the Batmobile maintained its "physical and conceptual qualities" after it had appeared for the first time, it could be concluded that it was "sufficiently delineated" to be recognizable as the same character whenever it appeared. The court also established that the Batmobile contained unique elements of expression. In another case the plaintiffs, New Line Cinema and New Line Productions, claimed that toy gloves with plastic knife-like razors marketed by the defendant Russ Berrie & Company violated and undermined New Line intellectual property rights related to a series of films "Nightmare on Elm Street", in particular the glove belonging to the film's main hero Freddy Krueger. The plaintiffs also made trademark infringement claims.<sup>15</sup> The court concluded that Freddy's glove was entitled to copyright protection by referring to a prior case whereby "copyright protection is extended to the component part of the character which significantly aids in identifying the character".

In assessing the legal practice recognizing inanimate objects as characters, it has to be said that the argument of providing protection to the character rather than a work of design is not sufficiently founded. Thus, in DC Comics

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<sup>14</sup> DC Comics v. Mark Towle. 802 F.3d 1012 (9th Circ. 2015)

<sup>15</sup> New Line Cinema v. Russ Berrie, 161 F. Supp. 2d 293, 302 (S.D.N.Y. 2001).

v. Mark Towle the defendant produced exact copies of the Batmobile marketed at USD 90,000. In *New Line v. Russ Berrie* the defendant produced goods very similar to Freddy's glove. Both, the Batmobile and Freddy's glove, are standalone intellectual products and works of design which, in order to be copyright protected, do not need to be qualified as part of the character as a more complex intellectual product. It would have been necessary to refer to the character if the alleged infringement involved the reproduction of its agreed identifying traits, not producing a copy (exact or modified). The fact of such traits allowed U.S. courts to assert, in particular, that *James Bond* played by eight actors in 25 full-length films from 1962 to 2021 was the same character since it maintained permanent attributes. An attempt to qualify these objects as characters may be due to the fact that copyright protection does not extend to design of functional components in the United States but can be extended in exceptional cases to artistic components that do not affect the functional aspects of products usable on their own.

## Conclusion

In summary, it should be said that challenges of today's media are receiving (or should receive) responses from copyright. The example of character can lead to certain conclusions that the current creative practices and business environments in creative industries require to review the principle of inextricable link between the character and the work, as well as between exclusive rights to the character and the work.

The concept of "character" as used in copyright should be interpreted on the basis of how it is understood in other sciences. It is important to avoid mixing characters with other copyright objects, primarily, works of graphic arts including cartoon character sketches.

Viewed from the perspective of law, the character is above all an agreed set of individualizing traits. This copyright object is valuable because it allows to provide protection not only from exact reproduction of image but also from illegal copying or other borrowing of individualizing traits that allow to place the character in this or another context (literary work or "universe").

In widespread division of creative labor it is quite realistic that a character of literary, audiovisual or other work may be created by someone who did not author the work as a whole. The more complex the object (intellectual product), the more likely is this course of events. Artists behind computer game characters are rarely the authors of the game itself while those creating cartoon characters and cartoon itself may be different individuals, etc.

Transmedia content production brings to existence transmedia characters that appear in different works. The characters swarming the "worlds"

of the Star Wars, Marvel, DC, *Harry Potter* refute the traditional idea of inextricable link between the character and the form of its expression. Along with existence of transmedia characters we are forced to admit those that could be barely qualified as part of any specific work. For example, there are characters of computer games which, being multimedia products and complex objects, do not possess the qualities of a single work. To identify the copyright holder in complicated cases, one has to apply the principle of personal creative input and identify individuals whose creative efforts resulted in a particular character.

The demands of current business environment call for a search of methods to make copyright for characters transactable. While licensing of such copyright does not raise issues, the construct for disposal of exclusive rights to characters under the Russian law separately from those to the original work need to be refined. Moreover, in view of media business needs one has to admit the unquestionable possibility to dispose of the rights to a work containing exhaustive description of the character (appearance, personal traits, interactions with other characters, role in the storyline and/or in the development of creative “universe”) before the character in question appears in the work it belongs to. Such (descriptive) work will endow characters with an objective form, create an opportunity to reproduce and introduce them into other works, and finally allow to assert an exclusive right to characters.



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