

# Civil law regime of 3D models of museum collection items

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**Abstract.** The Fourth Industrial Revolution affected all spheres of life, as well as the museum sector. The prevalence of public relations on the creation of 3D models of museum items is combined with the fragmentation and inconsistency of their legal regulation. The study of the civil law regime of 3D models of museum items requires determining the place of the object in the system of civil rights; the list of persons empowered to create such an object and the scope of their rights; the means of protecting the rights to such an object. The analysis of current Russian legislation and law enforcement practice has revealed inconsistencies between the provisions of the institute of intellectual property and the norms regulating relations involving museums and cultural institutions. It is proved that the law enforcement position on the priority of "museum law" over copyright law has insufficient normative and theoretical basis. The author suggests ways to achieve a balance of interests of society, copyright holders and museums in this area.

## 1 Introduction

The Fourth Industrial Revolution affected all spheres of life, as well as the museum sector. The results of Charles Hull's work in the form of additive technologies have made it possible for cultural institutions not only to preserve the detailed appearance of relics, but also to reproduce lost items. It also allows one to make cultural property available in a virtual environment in a form that is closest to the face-to-face experience without the risk of damaging the items themselves [1].

Digital museum items are called the new transcultural memory cell [2]. According to Rosstat data for 2019, more than a quarter of the volume of the Russian museum fund is digitized and included in electronic catalogs, and 90 percent of the total number of museums in the Russian Federation has websites [3], which is approximately 4,873 museums [4]. The number of virtual museums in the Russian Federation, based, among other things, on the use of 3D modeling, is gradually growing and is close to 300 [5].

The prevalence of public relations on the creation of 3D models of museum items is combined with the fragmentation and inconsistency of their legal regulation. The clash of rights of the owner, author (other right holder), museum and citizens of the Russian Federation (in the meaning of Article 44 of the Constitution of the Russian Federation) in relation to an item of a museum collection generates a social conflict due to the differently directed interest.

The author intends to receive remuneration for providing the work to the museum; the museum wants to benefit from the use of the object by establishing fees for persons wishing to use an image of a museum object for the manufacture of products and consumer goods. Society wants to receive access to museum collections

and to use works that have passed into the public domain at their own discretion.

Adequate protection of the designated legal interests requires the establishment of their correlation, a detailed legislative regulation of the limits of the rights granted to the subjects of the designated relations. The choice of the regulatory model should take into account the economic and socio-cultural consequences that the digitization of the museum fund entails [6]. The study of the civil law regime of 3D models of museum items requires determining the place of the object in the system of civil rights; the list of persons empowered to create such an object and the scope of their rights; the means of protecting the rights to such an object.

## 2 The place of a 3D model of a museum collection item in the system of intellectual property rights objects

### 2.1. 3D model of a museum item as an object that is not protected by copyright

Scientific works and judicial practice have repeatedly expressed the position that it is fundamentally impossible to protect 3D models of existing items as objects of intellectual rights. The key argument of this approach is the lack of a creative component of creating a 3D model. In addition, there is a position according to which the creation of a 3D model of an existing item reflects only a change in the objective form of the existence of the work, and therefore cannot lead to the appearance of a new object.

The issue of the search for creativity in objects created by technical means is not new: the emergence of

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the photographic business has been perceived as a legal conundrum challenging the scientific community and the enforcer. For example, in the early days of camera use, there were disputes in the judicial practice of many states about the protectability of photographs.

An important one is the US Supreme Court ruling (1884) in the case of *Burrow-Giles Lithographic Co. v. Saroni*: there was a dispute between the parties about the origin of copyright in the photos of Oscar Wilde. The photographer claimed that his creative contribution was evident in the arrangement of light, exposure, determination of O. Wilde's pose. The opponent, on the other hand, argued that the photo only reproduced objective reality by technical means. The court recognized the photos as protectable and agreed with the position of N. Saroni [7].

In pre-revolutionary Russian legislation photographic works were included in the list of protected objects of copyright in Article 324 of the Censorship Charter of 1828 [8]. The need to protect them as intellectual property was debated critically in scientific works of that time. But scientists were inclined to argue for protection for photographic works (works of light painting). Copyrights can only apply to things that are not just a repetition of objects existing in nature, but are imprinted by the personal creativity of the author, can be seen as new creations, as a product of his individual mind and imagination... Even taking a good light-painting portrait on large or small sizes requires not only technical skills, but also artistic skills and a delicate taste" [9].

The Austrian court, in the case of *Painer v Standard Verlags GmbH*, stated that the photos were subject to copyright protection, "if the author was able to express his creative abilities in the production of the work by making free and creative choices" [10]. In scientific works, when analyzing this case, it is noted that originality should be understood as "personal touch" [11].

Russian judicial practice has dealt with a dispute over the protectability of a 3D model of the MAKS aerospace system [12]. The specialist report stated that "if the statement of work calls for the production of a 3D model strictly for engineering purposes and the object must be reproduced in exact accordance with the original drawings, there is no creative component in this process. There are standard computer programs for making 3D models of already created, existing objects, it is also possible to create a 3D model of the same object in parallel, i.e. by different persons having special knowledge in 3D modeling independently of each other". However, the court disagreed and stated the following: "The creation of this object, its elements, size, proportion, colour correction, reworking of brightness, contrast, sharpness, addition of new image elements including condensation trail, wingtip vortices, rocket engines flare, background (sky with clouds) based on imagination, creativity is an original work and an object of copyright. The author of the 3D model (plaintiff) has reworked this model and created his own model, its appearance, colour, contrast, background, etc., using common elements of known aircrafts, respectively, this

3D model is an artistic solution and the object of copyright".

Thus, the generally accepted approach is that the fact that the process of creating an object is technological does not exclude a creative contribution. The position on photos may well be extrapolated to the cases of creating 3D models of existing objects due to the similarity of the additive process and the photographic process [13].

The list of Article 1259 of the Civil Code of the Russian Federation does not mention 3D models; however, the list of objects that can be protected as objects of copyright is formulated as open-ended. Moreover, if the object meets such two criteria as "creativity" and "expression in an objective form", then the object will be protected by copyright means.

In order to determine whether there is creativity, the enforcer should ask the following questions:

- Does the result of digitization depend on individual actions?
- Will 3D models created by different people be distinguishable?

A particular difficulty for Russian law is the definition of the legal regime of the 3D model of a museum item that embodies a work that has passed into the public domain. While in the EU, the issue of the protection of objects derived from the reproduction of a work that has passed into the public domain was covered by Article 14 of Directive 2019/790 [14], in Russia this issue remains controversial and unresolved. The reason lies in the establishment of a special "museum law" in the Russian Federation, which does not fit into the construction of either property or intellectual rights.

Thus, the Resolution of the Intellectual Property Rights Court states that the right of museum directorates, provided by Part 3 of Article 36 of the Law on the Museum Fund, to permit/prohibit the use of images of museum items and museum collections for the purpose of producing pictorial, printed, souvenir and other replicated products applies both to images created on the initiative of the museum itself (the first publication), and to objects created by other persons [15]. Thus, even if a 3D model of a museum item, which embodies a work that has passed into the public domain, is not recognized as an object of copyright, it will be subject to "museum law" and participants of civil circulation will need to obtain the consent of the museum directorates for its use.

The above approach is criticized in scientific works of Russian civil scientists. For example, Professor E.P. Gavrilov notes that the norms of Article 36 of the Federal Law "On the Museum Fund of the Russian Federation and Museums in the Russian Federation" should be interpreted restrictively: if images of museum items are in open civil circulation, they can be used by third parties without the consent of the museum [16].

In order to resolve the above issues, it seems necessary to establish a presumption of the lack of a creativity of a 3D model of a museum item, which embodies works that have passed into the public domain. We must amend the provisions of Article 36 of the Federal Law "On the Museum Fund of the Russian Federation and Museums in the Russian Federation",

Article 53 of the Legislation on Culture. And we establish that these norms apply only to those objects that were created on the initiative of the museum itself or are the result from the first publication.

## **2.2. The 3-D model as an object of intellectual property rights**

As a result of the amendments made to Part IV of the Civil Code of the Russian Federation by Law No. 217-FZ of 20.07.2020, the term "three-dimensional model" was enshrined in legislation. The term has not been legally defined. In accordance with articles 1354, 1375, 1376, 1377 of the Civil Code of the Russian Federation, 3D models in electronic form may be used for interpretation of the claims and utility models that may be attached to a patent applications.

A three-dimensional model may also be attached to the application for state registration of a trademark (Article 1492 of the Civil Code of the Russian Federation). Clause 61.1 of the Order of the Ministry of Economic Development of the Russian Federation sets out requirements for such three-dimensional models: "A three-dimensional model of the invention in electronic form shall be submitted in STEP, U3D, PRC, OBJ or STL format. A three-dimensional visual representation of the chemical formulae included in the application materials should be provided in CDX or MOL format. The maximum file size is 50 MB" [17].

At the same time, the 3D model itself is qualified by the courts as an object of copyright [18] with reference to clause 3 of Article 1259 of the Civil Code of the Russian Federation. According to it, «copyright extend both to promulgated and non-promulgated works expressed in any objective form, including written or oral forms (in the form of a public pronouncement, public performance and in another similar form), in the form of an image, in the form of a sound or video recording or in a three-dimension spatial form». This approach reflects the classification of 3-D models as "other works".

Also in scientific works, the 3-D model is considered as a part of a multimedia product (a kind of complex object according to Article 1240 of the Civil Code of the Russian Federation) [19] and as a derivative work (according to Article 1260 of the Civil Code of the Russian Federation) [20]. At the same time, the list of applicable norms and conditions for the legality of creating and using such an object depends on the determination of the place of the 3D model in the system of objects of rights. For example, the organizer of the creation of a multimedia product does not have personal non-property rights, he/she only acquires the right to use this object by virtue of Article 1240 of the Civil Code of the Russian Federation.

The creator of a derivative work under Article 1260 of the Civil Code of the Russian Federation has moral, property and "other" rights, but they arise only if the rights of the author of the original work underlying the derivative are respected. It seems that a 3D model of a museum item (with the criterion of creativity) will be an

independent original object of copyright, if the work is not embodied in the item. If a 3D model is created in relation to the tangible medium of the work, it should be recognized as a derivative work and the requirements of Article 1260 of the Civil Code of the Russian Federation should be applied.

## **3 A person authorized to create a 3D model of a museum collection item**

### **3.1. A person authorized to create a 3D model of a museum collection item that embodies a work that has passed into the public domain**

The museum's right to digitisation, creation of images and 3D models derives from the content of Article 3 of the Federal Law "On the Museum Fund of the Russian Federation and Museums in the Russian Federation". This Article defines the publication of an item of a museum collection as "a form of museum activity involving all types of presentation of museum items and museum collections to society through public display. This includes reproduction in printed editions, on electronic and other types of media, posting of information about museum items and museum collections in the information and telecommunications network "Internet"".

Also clause 9.1. of the Order of the Ministry of Culture of the Russian Federation [21] dated 15.01.2019 No. 17 "On Approval of the Regulations on the Museum Fund of the Russian Federation" establishes that access of citizens to museum items included in the Museum Fund and located in state or non-state museums is provided by posting images of museum items and information about them on the Internet, including on the official website of the Federal State Information System "State Catalogue of the Museum Fund of the Russian Federation".

It remains a controversial question whether other persons, with the exception of museums, have the right to create a 3D model of a relic that embodies an object that has passed into the public domain. Thus, by virtue of Article 1282 of the Civil Code of the Russian Federation, a work that has passed into the public domain may be freely used by any person without anybody's consent or permission. However, the provisions of Article 36 of the Federal Law "On the Museum Fund of the Russian Federation and Museums in the Russian Federation", Article 53 of the Fundamentals of Legislation of the Russian Federation on Culture stipulate that the right of the first publication (including posting on the Internet) belongs to the museum. And it proclaims the obligation to obtain the permission of the museum directorate or other title owner of the museum collection item to use the image of the museum item.

These contradictions were revealed by the court in the following dispute [22]: The painting "Lady in Blue" by T. Gainsborough is under the right of operational management in the State Hermitage Museum, i.e. the painting is included in the museum fund of the Russian Federation, and the museum is its owner. The designer

decided to use the image of the painting "Lady in Blue" as a commercial designation and background for a fashion show. The Hermitage appealed to the court with a demand to oblige the designer to stop using the painting with reference to Article 36 of the Federal Law "On the Museum Fund of the Russian Federation and Museums in the Russian Federation" and Article 53 of the Fundamentals of Legislation of the Russian Federation on Culture. The court granted the museum's claim.

The court came to a similar conclusion in the following case [23]: the entrepreneur used the image of a Signal bell on a box of manufactured sweets. At the same time, the Signal bell is assigned to the State Historical and Archaeological Museum-Reserve "Tauric Chersonesos" on the right of operational management. The museum appealed to the court with a claim for losses due to the fact that the entrepreneur used the image of the item without the consent of the museum directorate. The court granted the museum's claim.

The unclear nature of the museum's rights causes difficulties in determining the jurisdiction of the dispute, i.e. the court competent to resolve the dispute. In particular, the dispute over the image of the signal bell was referred to the Intellectual Property Court. But the Court found that the case on protection of the rights to the object of cultural heritage "Signal Bell" does not belong to the category of disputes to be considered by the Intellectual Rights Court as a court of cassation by virtue of Article 43.4 (sp.2 of p.3) of the Law on Arbitration Courts. The Court referred the dispute to a non-specialized arbitration court. Although the case concerning the use of T. Gainsborough's painting "Lady in Blue" was resolved by the Intellectual Property Court. The foregoing illustrates the lack of clarity even in the procedural aspects of the consideration of these types of cases.

Thus, judicial practice once again demonstrates a bias of legal protection in favor of museums. At the same time, this bias seems unjustified and hinders the development of creativity and the popularization of heritage. It seems that a similar approach will be applied to the creation of 3D models.

### **3.2 A person authorized to create a 3D model of a museum collection item in which the work is embodied, and the exclusive right has not expired**

The legislation of the Russian Federation on museums and culture contains no indication that museums need to obtain the consent of the author (other right holder) to perform actions to use a work listed in Article 1270 of the Civil Code of the Russian Federation. Although the obligation to obtain consent to the use of works is proclaimed in Article 1229 of the Civil Code of the Russian Federation, Article 1260 of the Civil Code of the Russian Federation.

In judicial practice, due to inconsistencies of the provisions of the Civil Code of the Russian Federation and the Federal Law "On the Museum Fund of the

Russian Federation and Museums in the Russian Federation", the following dispute arose [24]. Citizens created the posters through joint creative work and donated them to the museum under a donation agreement. Exclusive copyright was not transferred to the museum. The museum created an exhibition and published these posters. The court responded negatively to the question of whether the museum was required to obtain consent for reproduction and publication from the authors. The Court concluded that these actions could be carried out by the museum without the consent of the authors by virtue of Article 36 of the Federal Law "On the Museum Fund of the Russian Federation and Museums in the Russian Federation". The foregoing means that "museum law" has priority over "copyright" and prevails over it, which indicates a bias in the regulatory framework in favor of museums rather than authors.

### **3.3 A person authorized to create a 3D model of a museum collection item that does not contain an object of intellectual rights**

The provisions of Articles 3 and 36 of the Federal Law "On the Museum Fund of the Russian Federation and Museums in the Russian Federation" and Article 53 of the Fundamentals of Legislation of the Russian Federation on Culture also fully apply to those items that do not embody any object of intellectual property. For example, the use of 3D models of the remains of extinct organisms, fossils, fragments of rare rocks and plant species for the production of replicated products; consumer goods will also require the consent of the museum. Of course, the right of first publication is also reserved for the museum and cannot be exercised by another person without its consent.

The analysis of Russian legislation and law enforcement practice allows concluding that the interest of the museum prevails over the interest of the authors, the public. Despite the fact that the establishment of such a broad content of the "museum right" allows museums to receive income for permitting the use of relic images, there are also negative effects of the implemented regulation model. In particular, this is the use of works that have passed into the public domain, and thus creative activity is artificially restrained; the popularization of items from museum collections is slowed.

## **4 The ways to protect the museum's rights to a 3D model of a museum collection item**

The choice of an appropriate method of protecting the right, of course, involves determining the type of violated right.

As noted above, the nature of a museum's law is controversial and judicial practice has repeatedly disputed what exactly a museum is entitled to claim for unauthorized use of an image of a museum collection

item. Thus, the appropriate means of protecting the right were recognized:

— a requirement to prohibit the sale of a publication containing images of museum items [25];

— a requirement to withdraw from the circulation of all copies of the publication containing images of museum items [26];

— on the recovery of losses for unauthorized commercial use of reproductions of museum items in a book [27].

At the same time, museums are guided by the provisions of Article 12 of the Civil Code of the Russian Federation when formulating a claim. In particular, museums are guided by such a method as "suppression of actions that violate the right", because the legislation on museums does not contain special methods of protection.

In case of violation of the museum's right to a 3D model of the museum collection item, several options are considered possible:

— if it is proved that the museum's exclusive copyright to a 3D model of a museum item has arisen, the provisions of Article 1301, Article 1302, Article 1250, Article 1252 and Article 1253 of the Civil Code of the Russian Federation will apply, including the possibility of claiming compensation, publishing the court decision on the committed infringement, etc.

— due to the fact that the 3D model of the relic contains its image, Article 36 of the Federal Law "On the Museum Fund of the Russian Federation and Museums in the Russian Federation", Article 53 of the Fundamentals of the Legislation of the Russian Federation on Culture and Article 12 of the Civil Code of the Russian Federation can be applied. Only confirmation of the inclusion of the item in the museum fund and proof of the use of the 3D model by the defendant without the permission of the museum directorate will be required to make claims based on these provisions.

## 5 Conclusion

The analysis of current Russian legislation and law enforcement practice has revealed inconsistencies between the provisions of the institute of intellectual property and the norms regulating relations involving museums and cultural institutions. The law enforcement position on the priority of "museum law" over copyright law has insufficient normative and theoretical basis. It seems necessary to proceed from the need to ensure a balance of interests of society, copyright holders and museums, which can be achieved through:

— establishing a presumption of non-creative nature of the 3D model of a museum item that embodies a work that has passed into the public domain;

— differentiation between museum law, intellectual law and substantive law by harmonizing the categories of "publication", "promulgation", "use", "temporary use", etc., as used in different senses in the Federal Law "On the Museum Fund of the Russian Federation and

Museums in the Russian Federation", Parts I and IV of the Civil Code of the Russian Federation;

— proclamation of the inadmissibility of restricting access to works that have passed into the public domain, including for commercial purposes, and derogation of the provisions of Article 44 of the Constitution of the Russian Federation;

— taking into account the hierarchy of acts of civil legislation, according to which federal laws should not contradict the provisions of the Civil Code of the Russian Federation (Article 3 of the Civil Code of the Russian Federation).

## References

1. M. Rimmer, 3D Printing Jurassic Park: Copyright Law, Cultural Institutions, and Makerspaces, Pandora's Box (2016). Retrieved from: <https://ssrn.com/abstract=2887167>
2. N. Meehan, Digital Museum Objects and Memory: Postdigital Materiality, Aura and Value, The Museum Journal (2020), retrieved from: <https://onlinelibrary.wiley.com/doi/full/10.1111/cura.12361>
3. Information Society in the Russian Federation. 2020: statistical collection (Federal State Statistics Service; National Research University Higher School of Economics) Retrieved from: <https://rosstat.gov.ru/storage/mediabank/lqv3T0Rk/info-ob2020.pdf>
4. Museums around the world in the face of COVID-19, retrieved from: <https://unesdoc.unesco.org/ark:/48223/pf0000373530>
5. Catalog of virtual museums, retrieved from: <https://www.culture.ru/museums/institutes/hasVirtualTours-true/location-russia> (accessed: 12.06.2021)
6. P. Esposito, P. Ricci, Cultural organizations, digital Corporate Social Responsibility and stakeholder engagement in virtual museums: a multiple case study. How digitization is influencing the attitude toward CSR, Corp. Soc. Responsib. Environ. Manag., **28** (2021) Retrieved from: <https://onlinelibrary.wiley.com/doi/abs/10.1002/csr.2074>
7. T.S. Kogan, The Enigma of Photography, Depiction, and Copyright Originality, Fordham Intellectual Property, Media & Entertainment Law Journal, **25(4)** (2015), Retrieved from: <https://dc.law.utah.edu/cgi/viewcontent.cgi?article=1045&context=scholarship>
8. The Censorship Charter of 1828 with additions to 1857 and 4 appendices, Retrieved from: <https://lenizdat.ru/articles/1124285/>
9. V. Spasovich, *Copyright and Counterfeiting*, pp. 100-102 (M. O. Wolf, St. Petersburg, 1865)
10. Case C-145/10, Retrieved from: <https://curia.europa.eu/juris/document/document.jsf?jsessionid=A603F3F21B2503271D68EF17E459965>

- [1?text=&docid=115785&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=1536832](#)
11. I. Stamatoudi, 'More' Originality for Cypriot Copyright Law According to the CJEU's Case Law, *The Cyprus review*, **30**, 1 (2018)
  12. The ruling of the Moscow City Court of 12.07.2011 on the case No. 33-18753
  13. H. Dasari, Assessing Copyright Protection and Infringement Issues involved with 3D Printing and Scanning, *Alpha Quarterly Journal*, **41(2)** (2013)
  14. DIRECTIVE (EU) 2019/790 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, Retrieved from: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019L0790&rom=EN>
  15. Resolution of the Intellectual Property Court dated 09.06.2018 No. C01-324 / 2018 in the case No. A40-256706/2016
  16. E.P. Gavrilov, About «Museum law», *Economy and law*, **3**, 71-81 (2015)
  17. Order of the Ministry of Economic Development of the Russian Federation of 05/25/2016 No. 316 (as amended on 03/31/2021); Information message of Rospatent "On the issuance of patents and certificates in the form of an electronic document and the provision of three-dimensional models as part of applications", Retrieved from: <https://rospatent.gov.ru/ru/documents/informacionnoe-soobshchenie-28012021>
  18. Resolution of the Ninth Arbitration Court of Appeal dated 03.24.2021 No. 09AP-9195/2021-GK on the case No. A40-201964/2019
  19. A. Gurko, The ratio of 3D models and computer programs, *IS. Copyright and related rights*, **6**, 33-42 (2016)
  20. A.E. Sukhareva, Some issues of protection of intellectual rights when creating objects by 3D printing, *Bulletin of Civil Law*, **1** (2018)
  21. Order of the Ministry of Culture of the Russian Federation of January 15, 2019 No. 17 "On approval of the Regulations on the Museum Fund of the Russian Federation" (Registered in the Ministry of Justice of the Russian Federation on April 17, 2019 N 54410)
  22. Resolution of the Intellectual Property Rights Court of 05.03.2015 No. C01-65/2013
  23. Resolution of the arbitration court of the central district of April 29, 2021 in case No. A83-13886/2019
  24. Ruling of the St. Petersburg City Court of 24.04.2012 No. 33-4219/2012
  25. Resolution of the Intellectual Property Court dated 09.06.2018 No. C01-324 / 2018 in case No. A40-256706 / 2016; The decision of the Moscow Arbitration Court of June 24, 2016 in the case A40-44111/15-129-284
  26. Resolution of the Intellectual Property Court dated 09.06.2018 No. C01-324 / 2018 in case No. A40-256706 / 2016; The decision of the Moscow Arbitration Court of June 24, 2016 in the case A40-44111/15-129-284
  27. Resolution of the arbitration court of the north-western district of August 22, 2019 Case No. A56-72721/2018