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# Russia & Legal Harmonization: An Historical Inquiry Into IP Reform as Global Convergence and Resistance

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# RUSSIA & LEGAL HARMONIZATION: AN HISTORICAL INQUIRY INTO IP REFORM AS GLOBAL CONVERGENCE AND RESISTANCE

Boris N. Mamlyuk†

*This Article examines several waves of intellectual property (IP) regulation reform in Russia, starting with a specific examination into early Soviet attempts to regulate intellectual property. Historical analysis is useful to illustrate areas of theoretical convergence, divergence and tension between state ideology, positive law, and “law in action.” The relevance of these tensions for post-Soviet legal reform may appear tenuous. However, insofar as IP enforcement has been one of the largest hurdles for Russia’s prolonged accession to the WTO, these historical precedents may help to explain the apparent theoretical or political disconnect between the WTO and Russia. If Russian policymakers and many Western analysts agree that Russia has complied with all necessary structural adjustment reforms for WTO accession (including reforming its IP legislation), then we must search for deeper points of contention between Russia and the West. One point of departure, I posit, is Russia’s lingering inability to convey adherence to general international law, broadly conceived.*

*Thus, this Article re-conceptualizes this link between domestic and international legal orders by connecting the IP debate to broader debates over the nature of international law in the Soviet and post-Soviet space. Specifically, part one examines how Soviet theorists were able to reconcile (or not) IP regulation with Marxist ideology and socialist international law. Part two surveys the main IP law reform projects in post-Soviet Russia from 1992 to 2006, with particular emphasis on harmonization with global legal standards. The second part of this Article also provides a brief comparative analysis of Russia’s latest IP law (effective 2008) versus copyright protections in U.S. law and the 1971 Berne Convention. The Article concludes with an overview of doctrinal debates within Russia over harmonization, WTO accession and international law. These debates shed light on the development of local resistance to further legal harmonization efforts, an issue of immediate relevance not just for policymakers working with Russia, but for broader law and development debates.*

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## INTRODUCTION

Twenty years after the fall of the Berlin Wall, has Russia finally ended its transition and completed its restoration/re-integration into the international legal order? If so, has Russia developed a novel theory of international law or has it fully subscribed to the liberal international legal model? In his 2003 introduction to the second edition of G.I. Tunkin’s *Theory of International Law*, eminent Soviet/Russian law scholar William E. Butler notes that “there is no ‘substitute’ or ‘replacement’ theory, as yet, to supersede the insights into international behavior identified by Academician G.I. Tunkin.”<sup>1</sup> Taking as granted that Russia has not fully adopted a liberal theory of state and law along Western lines as most observers had hoped, it is worthwhile to reexamine the countless continuities and discontinuities between the Soviet and post-Soviet Russian experience with international law and institutions. Considering Russia’s increasingly aggressive foreign policy posture and growing uncertainty over the viability of domestic reforms,<sup>2</sup> it is vitally important to take stock of these difficult—and largely unquantifiable—aspects of Russian reforms, from the enduring legacy of great power/socialist/bureaucratic thinking still prevalent among Russia’s policy and academic elites, to more concrete issues like Russia’s attempt to project respect for property rights to potential investors.

The present paper explores these historical breaks and continuities in the

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<sup>1</sup> W.E. Butler, *Introduction*, in G.I. TUNKIN, *THEORY OF INTERNATIONAL LAW* xiii (W.E. Butler, *transl.*, 2nd ed., Wildy Simmonds & Hill Publishing, Ltd., 2003).

<sup>2</sup> Dmitri Trenin, *Russia Reborn: Reimagining Moscow’s Foreign Policy*, FOREIGN AFFAIRS (Nov./Dec. 2009); see also Boris N. Mamlyuk, *Book Review: International Law – a Russian Introduction* (V.I. Kuznetsov, B.R. Tuzmukhamedov, eds.), 35 REV. OF CENTRAL AND EAST EUROPEAN LAW (2010) (*forthcoming*).

context of Russia's intellectual property reforms.<sup>3</sup> The analysis follows two parts. The first section offers a brief legal history of Soviet regulation of intellectual property ("IP") rights, starting in the early 1920s when the Soviet state was first engineering its socialist legal system in an apparent attempt to break away from the global "bourgeois" legal order. The first section also provides an overview of the 'mature' or classic Soviet IP regime. Section two presents a synopsis of IP law reform projects in post-Soviet Russia and Russia's attempts to harmonize its IP legislation with international norms throughout the 1990s. Next, employing a traditional functionalist comparative law methodology,<sup>4</sup> section four compares Russia's subsequent IP law reforms to U.S. copyright law, particularly in reference to legal licenses or 'fair-use.' The paper concludes with a broader discussion on the effectiveness of Russia's attempts to harmonize its domestic IP system with international norms, including a study of resistance. This in turn allows us to evaluate alternative policy options or alternative normative approaches to law reform and law and development projects not just in Russia, but in other transitioning states.

## I

### EARLY SOVIET IP PROTECTION: THEORY AND PRACTICE

#### A. Why Turn So Far to History?

Most historical studies looking at IP reform in post-Soviet Russia start with the classic or late Soviet period (1960-1989) as a point of departure.<sup>5</sup> This is a useful starting place. However, the early Soviet period—the Interwar years of 1919-1939—can offer a remarkably sophisticated complimentary analytical frame for considering the inner tensions and incongruities of Soviet legal theory and practice. How the USSR came to recognize IP rights despite openly professing to oppose 'private property' (and any laws that upheld the right of ownership to the means of production) may shed further light on the ambivalent intellectual structures of Soviet law, and by legacy, the post-Soviet

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<sup>3</sup> This paper is Chapter 6 of a larger dissertation on the development of international legal theory in Russia during two moments of crisis, the Interwar period (1919-1939) and the post-Soviet period (1989-2009).

<sup>4</sup> Michele Graziadei, *The Functionalist Heritage*, in *COMPARATIVE LEGAL STUDIES: TRADITIONS AND TRANSITIONS* 104-108 (Pierre Legrand, Roderick Munday, eds., Cambridge, 2003); Mary Ann Glendon, Michael W. Gordon and Christopher Osakwe, *COMPARATIVE LEGAL TRADITIONS* 11-12 (2nd ed., West, 1994). On functionalism more broadly, see the classic Robert K. Merton, *Manifest and Latent Functions*, in *SOCIAL THEORY AND SOCIAL STRUCTURE* (Free Press, 1957).

<sup>5</sup> See, e.g., WILLIAM E. BUTLER, *INTELLECTUAL PROPERTY LAW IN THE RUSSIAN FEDERATION* xvi (4th ed., London: Wildy, Simmonds & Hill, 2005). The notable exception in this regard is Michiel Elst's comprehensive historical study. See MICHEL ELST, *COPYRIGHT, FREEDOM OF SPEECH, AND CULTURAL POLICY IN THE RUSSIAN FEDERATION* (Martinus Nijhoff, 2005); see also SERGE L. LEVITSKY, *COPYRIGHT, DEFAMATION, AND PRIVACY IN SOVIET CIVIL LAW: DE LEGE LATA AC FERENDA* (Martinus Nijhoff, 1979). Elst and Levitsky, however, do not connect the history of IP regulation in the USSR and post-Soviet Russia with broader debates in Soviet/former Soviet international legal theory and practice, which is the goal of the present analysis.

legal system.

#### B. Lenin as IP Regulator-in-Chief?

As one of the tenets of Marxism and Leninism was the abolition of private property over the means of production and a critique of property forms generally,<sup>6</sup> it may come as a surprise that the early Soviet state was engaged in protecting IP rights. Yet the early Soviet state was an ardent defender of foreign and domestic, individual and commercial, right holders' claims, and not merely under the New Economic Policy which briefly liberalized the Soviet economy from 1922 to 1929. Lenin himself issued no less than half dozen decrees on copyright and authors' rights protections between 1917 and 1922. What explains this seeming paradox? Did not the very notion of owning an idea or a work of art contradict the socialist conception of mass production and commonality of title? The answer to this question goes to the very heart of the early Soviet theory of state and law and invokes fundamental theoretical debates that rocked the Soviet legal establishment throughout the interwar period. A quick survey of these debates is useful to contextualize the discussion that follows.

One reason for the eruption of fierce debates regarding the nature and function of law following the Bolshevik Revolution was that Marx himself did not expressly formulate the contours of post-revolutionary law and state.<sup>7</sup> Had Marx theorized law as he had intended, it is likely that the Bolsheviks' piety to his teachings would have reduced the ensuing Soviet legal drama to a well-managed bureaucratic transition.<sup>8</sup> Absent that, it was left to the Bolsheviks to negotiate the problems of managing a failed state through a series of foreign and domestic challenges while attempting to create consistent theoretical justification for their actions.

The most influential application of Marxist theory to the problem of political reorganization following the proletarian revolution was by Lenin

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<sup>6</sup> See generally RUDOLF SCHLESINGER, *SOVIET LEGAL THEORY* (Oxford, 1945); EVGENY PASHUKANIS, *GENERAL THEORY OF LAW AND MARXISM* (Barbara Einhorn, transl., Pluto, 1989); HANS Kelsen, *THE COMMUNIST THEORY OF LAW* (Praeger, 1955) (especially Chapter 5); HUGH W. BABB, *SOVIET LEGAL PHILOSOPHY* (Harvard, 1951); WILLIAM E. BUTLER, *RUSSIAN LEGAL THEORY* (NYU Press, 1996).

<sup>7</sup> Marx touches upon issues of law in his *Critique of the Gotha Program* and on economic relations as a basis for law throughout his work. See KARL MARX, *CRITIQUE OF THE GOTHA PROGRAM* (1875, Int'l Publ., 1938). But he does not offer a theory of law, or a programmatic analysis of the role of law in a communist society.

<sup>8</sup> B.B. ЛАПАЕВА, ВОПРОСЫ ПРАВА В КАПИТАЛЕ МАРКСА 5-6 (Юр. Лит., 1982) [V.V. LAPAEVA, QUESTIONS OF LAW IN MARX'S CAPITAL 5-6 (Jur. Lit., 1982)]. Lapaeva's succinct explanation of the doctrinal disagreements between eminent theorists P.I. Stuchka and E.B. Pashukanis, on the one hand, and I. Razumovsky, on the other, provides an excellent summary of the debates and is a good starting point for scholars interested in understanding the official post-Stalin position on Pashukanis. According to Lapaeva, Razumovsky was able to demonstrate, contra Pashukanis, that abstract and concrete conceptions of the legal form did not necessarily require the abolition of law, since law did not encompass all relations between property owners, but rather represented one aspect of economic relations. *Id.* at 7-9.

himself in his *State and Revolution*.<sup>9</sup> Here Lenin restated the main theses of Marx and Engels on the state, including the theory of class rule, formulated the theory of a Marxist state as one ruled by the proletarian class and defended this conception against whom he saw as ‘opportunists’ (the German Social-Democrats and English Fabians) from the Second International. Lenin outlined the class nature of governments, the origins and role of the state, and bourgeois’ use of class antagonism in maintaining the state.<sup>10</sup> Lenin further critiqued what he described as a petit-bourgeois illusion of gradual transformation of capitalism into socialism without revolution.

According to Lenin, following a socialist revolution, the dictatorship of the proletariat would develop into a strong, centralized democratic base of Soviets (or worker’s councils). The central communist party would play a guiding role in the construction of this socialist state by ensuring discipline, organization, and redistributing material resources. Most importantly, Lenin developed and theorized Marx/Engel’s writings on the dual phases of communism, the immediate socialist state following a socialist revolution, and a higher phase of communism which would finally see the withering away of the state. Contrary to Bukharin,<sup>11</sup> Lenin claimed that the transition to communism could only come after strengthening the state administrative organs and consolidating power in the hands of the Soviets and the party. Furthermore, this consolidation of power would coincide with the development of other proletarian movements across the world. Thus, Lenin theorized the importance, and indeed, inevitability of the *transition period* as a political and strategic necessity, but also as forceful rhetorical and argumentative tool. As we shall see, this formulation would serve as the basis for Korovin’s transition theory of international law and all subsequent Soviet theories of international law until the development of the doctrine of permanent peaceful coexistence in 1963. This transition theory would also have a direct impact on the development of private law in the early Soviet state.

Per Lenin, until the ‘highest form of communism’ arose, the party would need to exert strict control over society and the state to regulate labor, production and consumption.<sup>12</sup> This higher form of communism would

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<sup>9</sup> ЛЕНИН, ГОСУДАРСТВО И РЕВОЛЮЦИЯ: УЧЕНИЕ МАРКСИЗМА О ГОСУДАРСТВЕ И ЗАДАЧИ ПРОЛЕТАРИАТА В РЕВОЛЮЦИИ (1917) (Полное собрание соч., 5 изд. т 33 с. 1-120) [LENIN, STATE AND REVOLUTION (Robert Service, *transl.*, Penguin 1992)].

<sup>10</sup> Lenin theorized that despite differences in form between modern bourgeois states (parliamentary, traditional monarchic, etc.), the dictatorship of the capital owning class (the bourgeois class) over the proletariat united these diverse forms.

<sup>11</sup> Н. Бухарин, *К теории империалистического государства*, РЕВОЛЮЦИЯ ПРАВА 5 (Изд. Ком. Акад., 1925) [N. Bukharin, *Towards a Theory of the Imperialist State*, in REVOLUTSIA PRAVA 5 (Communist Academy, 1925)]. To Bukharin, the post-revolutionary state existed only in a transitory moment and could not be strengthened after the revolution. The state apparatus had to be reduced in direct correlation with the elimination of classes. *Id.* at 13. This directly contradicted Lenin’s position on the need to strengthen the communist apparatus.

<sup>12</sup> STATE AND REVOLUTION, at 97 (Collected Works edition).

occur when society would overcome the differences between physical and mental labor, divisions of standards of living between urban and rural workers, and as a result of the mixing of nations (ethnicities).<sup>13</sup> In *State and Revolution*, Lenin does not specify the role of law in the transition from bourgeois order to socialism, indeed law is mentioned but once (and even then, in a discussion of the Anti-Socialist law in Germany).<sup>14</sup> However, in *The Proletarian Revolution in Russia*, a collection of articles and speeches by Lenin and Trotsky, it is clear that law as control is meant to be exercised directly by the soviets through direct democracy.<sup>15</sup> But immediately a theoretical crisis presented itself.

According to Marx, the state and law are elements of a social superstructure determined by the economic relations and activities (the base) of the ruling classes of a particular society. If the purpose of the Soviet state was to destroy this superstructure and replace it with a domestic communist order, then law should have had no function in the new Soviet state. In other words, because law was the manifestation of class struggle and reinforced class difference, the abolition of class would require the simultaneous abolition of law. This thesis was famously theorized by the early Soviet legal philosopher Evgeny Pashukanis (1891-1937) in his 1924 *General Theory of Law and Marxism*.<sup>16</sup> Pashukanis went even further than merely exposing the logical inconsistency of maintaining law in a classless society. He argued that since law arose as a consequence of property exchange, it was necessary to do away with law in effort to disrupt the cycle of property rights, commodity fetishism, and material relations between individuals in the new Soviet state.<sup>17</sup> In short, law went hand in hand with property and vice versa. Only by abolishing both law *and* property could individuals rise to a higher form of social consciousness and political awareness.<sup>18</sup>

Analogously, on the international plane, it was theoretically impossible for the Soviet Union to exist in a world system of law which was built by the bourgeois and imperialist ruling class (the powerful imperial nations of the nineteenth century).<sup>19</sup> These differences between socialism and capitalism were deemed *a priori* to be irreconcilable by some jurists (like Stuchka and Pashukanis).<sup>20</sup> Others (i.e., Goikhbarg<sup>21</sup>) saw the potential of reinventing law

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<sup>13</sup> *Id.* at 93-97.

<sup>14</sup> *Ibid.*

<sup>15</sup> LENIN & TROTSKY, THE PROLETARIAN REVOLUTION IN RUSSIA 83 (1918).

<sup>16</sup> ЕВГЕНИЙ Б. ПАШУКАНИС, ОБЩАЯ ТЕОРИЯ ПРАВА И МАРКСИЗМ: ОПЫТ КРИТИКИ ОСНОВНЫХ ЮРИДИЧЕСКИХ ПОНЯТИЙ (1924) [EVGENY B. PASHUKANIS, GENERAL THEORY OF LAW AND MARXISM: AN ATTEMPTED CRITIQUE OF BASIC LEGAL FORMS (Moscow: Communist Academy Publishing, 1924)].

<sup>17</sup> *Id.* at 12-37.

<sup>18</sup> *Id.* at 3, 4.

<sup>19</sup> *Id.* at 6 (arguing that a subject under international law is identical to a subject under municipal law).

<sup>20</sup> *Id.* at 52 (“Современное международное право включает в себя весьма солидную дозу самоуправства (реторсии, репрессалии, войны и т. д.)” – “Contemporary international law

to serve the interest of the proletarian class (*i.e.*, the creation of Bolshevik law) that would administer the dictatorship of the proletariat. In international law, this meant the creation of a Bolshevik legal order or a socialist international law governing relations between Socialist-dominant states and capitalist states.<sup>22</sup>

Though Lenin was a lawyer and himself often spoke and wrote often on such central topics as self-determination, sovereignty, non-intervention, and international economic law,<sup>23</sup> he did not participate in these core theoretical debates. This was due to at least three reasons. First, as the chief executive of the Soviet state, Lenin was too preoccupied with more urgent matters of war and peace. In the first two months of Soviet Russia's experience, for instance, Lenin issued more than 40 decrees concerning foreign relations.<sup>24</sup> In the first five years (1917-1922), more than 270 legal acts were adopted concerning foreign relations.<sup>25</sup> Second, it is well-known that Lenin preferred to write in populist form to emphasize the relevance of his theories to the working masses.<sup>26</sup> Therefore, it is not surprising that he avoided engaging in the

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includes a solid dose of contradictory 'self-regulation' (retribution, repression, war, etc.)." *Id.* at 67 n. 148 ("[...] в международных отношениях государство выступает вовсе не как воплощение объективной нормы, но как носитель субъективных прав, т. е. со всеми атрибутами субстанциональности и эгоистической заинтересованности." – "[...] in international relations, the state does not act as embodying objective norms, but acts as a holder of subjective rights, that is with all of the attributes of substantive and egoistic self-interestedness.").

<sup>21</sup> A.G. Goikhbar was the first director of the Institute of Soviet Law from 1922 to 1925. After Pashukanis gained control over the Soviet legal academy in 1932, he expelled Goikhbar from his teaching post for maintaining 'bourgeois' attachment to the notion of Soviet law. Goikhbar was ultimately jailed, but rehabilitated after WWII.

<sup>22</sup> ЕВГЕНИЙ А. КОРОВИН, МЕЖДУНАРОДНОЕ ПРАВО ПЕРЕХОДНОГО ВРЕМЕНИ (М., 1924) [EVGENY A. KOROVIN, INTERNATIONAL LAW OF THE TRANSITION PERIOD (Moscow, 1924)] [*hereafter*, KOROVIN, INTERNATIONAL LAW OF THE TRANSITION PERIOD].

<sup>23</sup> In fact, his writings on international law were ultimately collected and published as a standalone volume by the Soviet Institute of International Relations. ЛЕНИН О МЕЖДУНАРОДНОЙ ПОЛИТИКЕ И МЕЖДУНАРОДНОМ ПРАВЕ (Иза-во Ин-та международных отношений, 1958) [LENIN ON INTERNATIONAL POLITICS & INTERNATIONAL LAW (MGIMO, 1958)]; *see also* V.I. LENIN, QUESTIONS OF NATIONAL POLICY (Foreign Languages Publ. House, Moscow, 1959) (devoted mainly to self-determination and related questions). In 1970, the Soviet Union issued a volume of Lenin's contributions to international law, edited by Tunkin and V.F. Fedorov. *See* Г.И. Тункин, В.Ф. Федоров, *ред.*, В.И. ЛЕНИН И СОВРЕМЕННОЕ МЕЖДУНАРОДНОЕ ПРАВО (Москва, Знание 1970) [G.I. Tunkin, V.F. Fedorov, *eds.*, V.I. LENIN AND CONTEMPORARY INTERNATIONAL LAW (Moscow, Znanie, 1970)]. For a short overview of Lenin's contributions to international law, *see* Г.В.Игнатенко, В. И. Ленин и международное право, 2 ПРАВОВЕДЕНИЕ 98-108 (1970), *available at* <http://www.law.edu.ru> (Russian).

<sup>24</sup> Н.В. МИРОНОВ, ПРАВОВОЕ РЕГУЛИРОВАНИЕ ВНЕШНИХ СНОШЕНИЙ СССР (1917-1970) 7 (ИМО, 1971) [N.V. MIRONOV, LEGAL REGULATION OF FOREIGN RELATIONS OF THE USSR (1917-1970) 7 (IMO, 1971)] (providing an excellent anthology of legal reforms pertaining to foreign relations bodies in the Soviet Union from 1917-1970).

<sup>25</sup> *Id.* Despite his physical condition, Lenin was actively involved in executive decisions on matters of war and the status of the USSR in foreign relations: Lenin's responses to on-going peace negotiations with the Central Powers, for instance, and exchanges between him, Stalin and Trotsky regarding the Georgia Affair and legal status of Transcaucasian SSR showed that he was exceptionally sensitive to how the USSR was being perceived abroad. *Ibid.*

<sup>26</sup> П.И. Стучка, Ленин и Революционный декрет, РЕВОЛЮЦИЯ ПРАВА 32 (Иза. Ком. Акад., 1925) [P.I. Stuchka, Lenin and the Revolutionary Decree, in REVOLUTSIA PRAVA 32 (1925)] (telling the



theoretical fights on the pages of Soviet law journals. Third, by 1922 (when these debates began in earnest) Lenin was effectively debilitated from a stroke, itself caused by an assassin's bullet. Lenin died in January 1924 just as Pashukanis' and Korovin's main treatises were being published.

For these reasons, modern historians and especially legal scholars do not treat Lenin's writings on international law seriously. However, in the context of a Soviet conception of international law and property, Lenin's writings are key to understanding the overarching spirit of pragmatism/realism while staying true to core Marxist tenets.<sup>27</sup> Lenin's influence on Soviet international law remained profound in two respects.

First, Lenin explicitly sanctioned the idea of *legal instrumentalism*, or the notion that law needed to serve a particular policy end. Though law was theoretically indeterminate, unnecessary and ultimately a bourgeois fiction,<sup>28</sup> it was necessary to further the cause of communism in the immediate transition period. This methodology directly influenced an entire generation of pre-WWII and post-War Soviet jurists. Indeed, legal instrumentalism (and perhaps, exceptionalism) in international law would go on to be the Soviets' most dangerous and most enduring contribution to mainstream international law.<sup>29</sup> Second, how early Soviet jurists rationalized and justified radical departures from Marxist doctrine to carry out diametrically opposed policy reforms sheds light on the Soviet's particular sensibility, or *mentalité*, concerning law. Understanding this intellectual dynamic can explain not just how Soviets wanted to have their cake and eat it too; how Soviet law on the books differed from "law in action." More importantly, by unpacking *why and how* Soviet Russia betrayed its avowed ideals in exchange for tangible benefits (recognition, material aid, so on), we can better understand how the very notions of law, legality, and so on, were co-opted, decoupled from any

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anecdote that even Stuchka, despite being intimately familiar with Lenin's work, did not know that Lenin was a lawyer until the two of them were buying a printing press in Spring 1917 and Lenin presented his bar card to the seller).

<sup>27</sup> After WWII scholars attempted to systematize Marx's and Lenin's writings on international law. Notable among these was Tunkin's 1970 work. Г.И. Тункин, В.Ф. Федоров, В.И. Ленин и современное международное право, 2 ГОСУДАРСТВО И ПРАВО (1970) [G.I. Tunkin, V.F. Fedorov, V.I. Lenin and contemporary international law, 2 STATE AND LAW (1970)]; В.Ф. Губин, Карл Маркс и международное право, 2 ГОСУДАРСТВО И ПРАВО (1969) [F.G. Gubin, Karl Marx and international law, 2 STATE AND LAW (1969)]. These journals are not to be confused with the separate periodical of the Institute of State and Law, *Sovetskoe Gosudarstvo i Pravo*.

<sup>28</sup> Cf. ROSCOE POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW (Yale, 1922). The parallel between Pound's policy-oriented sociological jurisprudence and early socialist legal theory (early Soviet legal realism vs. American legal realism) are underresearched and deserve greater scrutiny. For one move in this direction, see generally MICHAEL HEAD, PASHUKANIS: A CRITICAL REAPPRAISAL (2004); Lon L. Fuller, *Pashukanis and Vyshinsky: a Study in the Development of Marxist Legal Theory*, 47 MICH. L. REV. 1157 (1949).

<sup>29</sup> Contemporary scholars trace the theoretical roots of exceptionalism to Carl Schmitt, but Evgeny Korovin's 1924 International Law of the Transition Period arguably influenced Schmitt to a greater extent than has been previously understood.

objective referent, and ultimately served as nothing but rhetorical gestures.<sup>30</sup> Two historical moments illustrate how the early Soviet Union came to recognize and protect intellectual property rights while being ostensibly opposed to law, property, and like ‘bourgeois notions.’ First, this was the need to attract foreign trade and project respect for foreign property rights pursuant to international obligations. Second, this need for property protection was internalized into the domestic legal order.

1. *The Dilemma of Attracting Foreign Trade (Pragmatism & IL)*

Modern histories of early Soviet law neglect the economic constraints that molded Soviet international legal practice, focusing on major events such as Russia’s negotiations of the many peace treaties with WWI adversaries, later accession into the League of Nations and subsequent expulsion therefrom. Most scholars list historical and political reasons as lying at the root of Soviet preference for a classic conception of international law (strict sovereignty, anti-monism, *etc.*).<sup>31</sup> In international relations, the early years of the Bolshevik state (1918-1920) are commonly seen as when the Soviets developed a foreign policy based on expediency and an *ad hoc* application of Marxist principles in relations with imperialist states to gain recognition, and political legitimacy.

But economic realities had a more direct influence on the shaping of Soviet notions of international law and the place of the USSR vis-à-vis the capitalist states. As Pashukanis wrote in his brief entry on ‘peaceful blockades,’ the Allies, having realized that the Bolsheviks had defeated the counter-revolutionaries, lifted their blockade of Soviet Russia on January 16, 1920 because it was an economic necessity *for them* to trade with Russia.<sup>32</sup> However, prior to any official recognition of the USSR under international law, it was the Soviet Union rather than bourgeois states that was seeking foreign trade. According to Korovin, “[b]y 1921, after the final act of the foreign intervention in the Russian civil war, and the final defeat of Wrangel in 1919-1920, the Soviet Union shifted to negotiations and began seeking compromises and business relationships.”<sup>33</sup> This is not splitting hairs. As both Korovin and Pashukanis claimed that material conditions determined the substance of international law, it is important to understand correctly the material conditions of the RSFSR and how this affected doctrinal developments.

In fact, despite the high-flying rhetoric of worker’s councils, global

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<sup>30</sup> Following Prof. Butler, this *mentalité*, in turn, may bear directly on how contemporary Russian jurists approach law. See Butler, *supra* note 2, at xiii.

<sup>31</sup> See, e.g., GEORGE GINSBURGS, FROM SOVIET TO RUSSIAN INTERNATIONAL LAW: STUDIES IN CONTINUITY AND CHANGE (Leiden, Nijhoff, 1998); TARJA LANGSTROM, TRANSFORMATION IN RUSSIA AND INTERNATIONAL LAW (M. Nijhoff, 2003); Emanuel Margolis, *Certain Aspects of the Impact of Communism on International Law*, Unpublished Ph.D. Dissertation (Harvard University, Department of Government), March 1951, at 5-13.

<sup>32</sup> Е. Пашуканис, *Мирная Блокада*, ЭНЦИКЛОПЕДИЯ ГОСУДАРСТВА И ПРАВА, т. 2, 1002, 1003 (1925-26) [Pashukanis, *Peaceful Blockade*, in ENCYCLOPEDIA OF STATE AND LAW, v. 2, 1002, 1003 (1925-26)].

<sup>33</sup> KOROVIN, INTERNATIONAL LAW OF THE TRANSITION PERIOD, at 60.

revolution, and withering away of law, property, and state, by the early 1920s, the territory of the former Russian empire lay in economic ruin.<sup>34</sup> From 1919, as a consequence of the Great War, the Revolution, the ensuing Civil War, a blockade, the armed allied intervention, and Bolshevik agricultural policies, the Russian economy was essentially flatlined.<sup>35</sup> In addition, as a result of drought and crop failure in 1920, by spring 1921 Russia also encountered a major famine.<sup>36</sup>

With the failure of communist revolutions in Europe, by 1922 it became clear that the building of socialism communism required industrialization or a surrender to the ‘hostile capitalists’ encircling Russia.<sup>37</sup> On the domestic front, Lenin masterminded the famous (and domestically controversial<sup>38</sup>) New Economic Policy (NEP) program to revive the economy, which was issued by decree on March 21, 1921.<sup>39</sup> Yet a lesser known aspect of NEP was its focus

<sup>34</sup> It is generally agreed that the material situation worsened precipitously from 1917 to 1922. In *Socialist and Imperialist Diplomacy*, Chicherin’s report to the Fifth Congress in July 1918, he remarks the goal of Soviet foreign policy was both staying on the “revolutionary offensive” while coping with the “unbelievable deterioration” from the effects of the Great War and Tsarism. LENIN & TROTSKY, *THE PROLETARIAN REVOLUTION IN RUSSIA* 409-410 (1918). Furthermore, this was a period of intense violence and uncertainty in Russia, not only among the general population but also in the diplomatic corps. The assassination of the German ambassador, Count Wilhelm von Mirbach, on April 23, 1918 shortly after his arrival in Moscow presented a very real legitimacy challenge for the Soviet state. *Id.* at 410. Economic historians, politicians and literary figures also paint a grim tale regarding Russia’s economy during this period. See АЛЕКСЕЙ ТОЛСТОЙ, *ХОЖДЕНИЕ ПО МУКАМ* (РОМАН ТРИЛОГИЯ), КНИГА 3: ХМУРОЕ УТРО (1922-1941) [ALEKSEY TOLSTOY, *THE ORDEAL* (NOVEL TRILOGY), BOOK 3: SULLEN MORNING (1922-1941)] (describing that, in the year after the Revolution, it was possible to walk through the center of Moscow at noon-time without encountering a single person). This image is strikingly similar to Josef Koudelka’s famous photo of Prague’s Wenceslas Square, nearly empty at noon on August 21, 1968, during the Warsaw Pact invasion of Czechoslovakia.

<sup>35</sup> Nikolay Bukharin, *Economics of the Transition Period* (1920), in *THE POLITICS AND ECONOMICS OF THE TRANSITION PERIOD* (K.J. Tarbuck, ed., London 1979); Bukharin, *Imperialism and World Economy* (1918); Charles Noble Gregory, *The International Labor Organization of the League of Nations*, 15 AM. J. INT’L L. 42, 49 (1921) (“The Soviet press shows that excluding railroad employees workers in industry decreased 2,402,000 men up to January 1919 and a report of the Supreme Council of Popular Economy of March 1919 states that production in the greater number of Russian industries has decreased 400 to 500 per cent.”)

<sup>36</sup> LINCOLN HUTCHINSON, *ON THE TRAIL OF THE RUSSIAN FAMINE* (Stanford, 1927); see also Terence Emmons, Bertrand M. Patenaude, eds., *WAR, REVOLUTION, AND PEACE IN RUSSIA: THE PASSAGES OF FRANK GOLDER, 1914-1927* at 89 (Hoover Press, 1992) (describing drought in 1920-1921 and the major famine in Russia stretching from the Volga valley and into southern Ukraine).

<sup>37</sup> ALEC NOVE, *WAS STALIN REALLY NECESSARY?* at 21.

<sup>38</sup> The NEP enveloped and called into question the core premises of the Bolshevik revolution, including the protection of private property, land reform, and accommodation of the bourgeois merchant class.

<sup>39</sup> Some Russian sources place this event on March 23, 1921. The decree “On the Replacement of *Prodrazryorstka* [Foodstuffs Requisition] by *Prodnalog* [Foodstuffs Tax]” was issued on March 21, 1921. See Декрет ВЦИК, принятый на основе решения X съезда РКП(б) “О замене развёрстки натуральным налогом” (21 марта 1921 г.), available at [http://www.hrono.info/dokum/prod\\_nal.html](http://www.hrono.info/dokum/prod_nal.html) (last accessed June 2, 2008); see also Речь Владимира Ильича Ленина «О продовольственном налоге или о продналоге и о свободном обмене хлебных излишков» [Speech of V.I. Lenin “On Foodstuff Tax and/or Free Exchange of Excess Wheat Production”], audio file of the speech, available at,

on reviving international trade, particularly with respect to exports of grain and raw materials. Just as international trade presented a strategic dilemma—restarting international trade meant cooperating with the same ‘hostile capitalists’ the Bolsheviks had so fiercely opposed—the contradictions between NEP and Marxist theory could not have been wider.

As a further strain on the tensions between Marxism and the actual Soviet policies, in 1921 the Soviet Union began praying for material sustenance from the ‘capitalist’ West to relieve the effects of the famine.<sup>40</sup> Then, as now, the United States was one of the first states to respond. By Summer 1921, the American Relief Administration (ARA), headed by Herbert Hoover,<sup>41</sup> began delivering medical supplies and foodstuffs, along with private aid from worker’s unions and individuals. On August 20, 1921, in response to Gorky’s call for aid, the ARA and the Soviet government signed the Riga Agreement stipulating that the ARA had the right to control its operations inside Russia provided it did not mix with Soviet politics.<sup>42</sup> Similar agreements were signed with the German Red Cross organizations and other states’ relief organizations.<sup>43</sup> But it was U.S. aid that attracted particular interest and ire from the Soviets.

On the one hand, the ARA aid humiliated the Bolsheviks, who resented not only the notion of imperialists ‘bailing out’ socialists but were also uneasy about a foreign organization with a sizeable local staff operating throughout much of the country.<sup>44</sup> The suspicion was shared, though it was ultimately

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[http://upload.wikimedia.org/wikipedia/commons/e/eb/Lenin\\_-\\_About\\_Natural\\_Tax.ogg](http://upload.wikimedia.org/wikipedia/commons/e/eb/Lenin_-_About_Natural_Tax.ogg) (last accessed September 27, 2009).

<sup>40</sup> In July 1921, writer Maxim Gorky (at the behest of Lenin) issued an appeal to “all honest citizens” to send food and medical supplies to Soviet Russia.

<sup>41</sup> WAR, REVOLUTION, AND PEACE IN RUSSIA, *supra*. Golder, an archivist and Director of the Hoover Library at Stanford University travelled extensively throughout revolutionary Russia. He also served on the American Relief Administration, formerly a government aid agency, but at the time a private relief organization headed by then-Secretary of Commerce Herbert Hoover.

<sup>42</sup> *Id.* at 90 (*citing* HAROLD H. FISHER, THE FAMINE IN SOVIET RUSSIA, 1919-1923: THE OPERATIONS OF THE AMERICAN RELIEF ADMINISTRATION (New York, 1927).) Archival records reveal the vast scope of the ARA operation:

The initial plan was for the ARA to feed two to three million children, but the mission rapidly expanded to include adults and medical relief as well. The major leap forward came on December 22, 1921, when President Warren Harding signed into law a congressional appropriation of \$20 million for the purchase of corn and seed grain from U.S. farmers for Russian relief. To this total other government and private U.S. contributions were added (as well as a Soviet government expenditure of nearly \$12 million from its gold reserve); in the end the two-year ARA program amounted to more than \$60 million.

<sup>43</sup> TIMOTHY A. TARACOUZIO, THE SOVIET UNION AND INTERNATIONAL LAW 263 (Macmillan, 1935) [*hereafter* Taracouzio].

<sup>44</sup> WAR, REVOLUTION, AND PEACE IN RUSSIA, at 90; *see also* KOROVIN, INTERNATIONAL LAW OF THE TRANSITION PERIOD 63 (1926) (recalling negotiations with “representatives of the International Red Cross, and with personal friends of the American president, vacationing billionaires, and commercial groupds.”). This resentment echoes Russia’s post-2000 turn against the foreign aid establishment.

resolved to mutual benefit.<sup>45</sup> As a matter of international law, Korovin was also alarmed by relief organizations' claims to extraterritorial jurisdiction and wrote at length about the need to limit the legal status of foreign charitable organizations operating in the Soviet Union. Writing in the first volume of the journal *Sovetskoe Pravo*, for instance, Korovin stressed the importance of limiting the rights of foreign organizations operating on Soviet soil, but also recognizing the need to set reasonable permissions to aid famine relief efforts.<sup>46</sup>

On the other hand, NEP and foreign aid programs in the early 1920s certainly worked, as evidenced by the increase in international trade and betterment of material conditions in Russia during that period. Between the years 1921 and 1925, trade with the U.S., for instance, quadrupled.<sup>47</sup> During this time, the USSR also entered into a large number of bilateral treaties with European states to normalize trade relations.<sup>48</sup> Each of these agreements stipulated that the USSR would honor foreign investor's property rights on its territory, in sharp break from the nationalization decrees issued in the immediate aftermath of the Revolution.<sup>49</sup> To facilitate this process, between 1922 and 1924, the Soviet diplomatic apparatus was restructured to avoid conflicts between the consular representatives abroad and the foreign trade representatives working under the People's Commissariat of Foreign Trade (NarKomVneshTorg).<sup>50</sup> Ten years after the Bolshevik Revolution, the Soviet

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<sup>45</sup> *Id.* at 90 (“The ARA mission was headed by a career army officer, Colonel William N. Haskell, most of whose U.S. staff had served in the American Expeditionary Force. Many men had attended some of the finest U.S. colleges and universities and had had experience with the ARA in Europe. They were eager to tackle the Russian job with trademark ARA drive and efficiency and had little tolerance for Soviet inefficiency and suspicion; they especially resented the network of Red Army commissars and agents of the secret police set up to monitor their activities. There were many ARA-Soviet confrontations over issues big and small, but each was somehow resolved through diplomacy. In the end the Soviet government officially acknowledged the ARA's contribution in checking the famine and saving millions of lives.”) (emphasis added).

<sup>46</sup> E.A. Коровин, *Иностранная филантропическая деятельность в РСФСР и ее правовые формы*, 1(1) СОВЕТСКОЕ ПРАВО 108 (1922) [E.A. Korovin, *Foreign Philanthropic Activity in the RSFSR and its Legal Forms*, 1(1) SOVIET LAW 108 (1922)]. In his *International Law of the Transition Period*, he was more direct: “A charitable organization—[such as the Red Cross]—claiming universality over territorial sovereignty of nations is the same legal nonsense as the attempt of a corporation to claim rights under family law.” KOROVIN, *INTERNATIONAL LAW OF THE TRANSITION PERIOD*, at 35.

<sup>47</sup> The U.S. and Soviet Russia signed a “Memorandum on Trade” in January 1921. See Memorandum on Trade With Soviet Russia: Submitted to the Committee on Foreign Relations of the United States Senate, January, 1921. These estimates are tentative because significant portions of the increased trade were relief shipments by the U.S. See U.S. BUREAU OF FOREIGN AND DOMESTIC COMMERCE, *COMMERCE REPORTS*, VOL. 4, at 561 (Oct. to Dec., 1922). In March 1921, the RSFSR also extended the Anglo-Soviet Trade Agreement of March 16, 1921, though disputes with Great Britain over the Wrangell Islands and the intervention led to a slight decrease in trade in 1923.

<sup>48</sup> Taracouzio, *supra* note X, at 143-50.

<sup>49</sup> *Ibid.*

<sup>50</sup> KOROVIN, *INTERNATIONAL LAW OF THE TRANSITION PERIOD*, at 69 (discussing the purpose of the Soviet consulates as being limited to: “(a) protection of *economic* and legal interests of the RSFSR; (b) official representation of RSFSR and other Soviet organs in the given states; (c) the protection of interests—*economic*, legal and social—of citizens of the RSFSR and its legal entities and firms.”) (emphasis added).

agricultural and industrial production returned to pre-war (pre-1913) levels.<sup>51</sup> By 1930, Soviet administrators and scholars openly prided themselves on the exponential increase in trade with European powers and with the U.S. during the 1920s.<sup>52</sup>

The benefits of these bilateral trade treaties, of course, flowed both ways. From the Soviet side, the treaties were conditioned on explicit recognition of the Soviet state under international law.<sup>53</sup> Therefore, the USSR acquired significant leverage and legitimacy from initiating trade relations. In turn, the bilateral treaties of commerce provided Western European powers and U.S. firms with access to Russian goods and concessions. In essence, the bilateral trade agreements provided most-favored nation guarantees, either in absolute form, or under the “form of a conditional (compensational) favoredness, occasionally giving way to preferential regulations more or less extensive in scope.”<sup>54</sup> Two concrete examples—the issue of concessions and foreign debt—show the extent to which Soviet leaders bowed to foreign pressure during this time. This in turn, helps to contextualize the IP reforms in the crucial early years of the Soviet state.

*Concessions.* Prior to 1928, the Soviet Union recognized three forms of foreign involvement in the Soviet economy: (1) direct concessions; (2) foreign investment in Soviet firms established pursuant to Soviet law; (3) operation of foreign firms on Soviet soil.<sup>55</sup> With the start of the first five-year plan (1928-1933), the Soviet Union did not award a single additional concession, and sought to restrict existing concessions on the basis of special agreements by

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<sup>51</sup> Boris Skvirsky, *Russia's Internal Situation and Foreign Policy—Russian-American Trade Relations*, 138 *Annals of the American Society of Political and Social Science* 97, 99 (1928). Skvirsky's official title before the restoration of diplomatic relations between the U.S. and U.S.S.R. was that of Director of the Soviet Union Information Bureau, Washington D.C.

<sup>52</sup> Т. Шкловский, *Вопросы организации внешней и внутренней торговли*, 7 СОВЕТСКОЕ ГОС. И РЕВОЛЮЦИЯ ПРАВА 74 (1930) [T. Shklovsky, *Questions of Organization of Internal and Foreign Trade*, 7 *Sov. Gos. i Revolutsia Prava* 74 (1930)]. Shklovsky's article contains useful data on Soviet private, coop and public foreign trade during the period 1923 to 1929.

<sup>53</sup> See Taracouzio, at 258-260. Taracouzio, however, incorrectly dates the first of the economic agreements between the USSR and Western Powers as being the March 16, 1921 agreement between the USSR and Great Britain. In actuality, the US-Soviet Memorandum on Trade dated January 1921 was the first, though Taracouzio is correct that the Soviet-British agreement served as the model for the subsequent treaties with European powers. These treaties included, *inter alia*, Provisional Agreement with Germany of May 6, 1921; Provisional Agreement with Norway of September 2, 1921; Treaty of December 7, 1921 with Austria; Provisional Agreement with Italy of December 26, 1921; Provisional Agreement with Sweden of March 1, 1922; Provisional Treaty with Czechoslovakia of June 5, 1922; Agreement with Denmark of April 23, 1923.

<sup>54</sup> E.A. Korovin, *Soviet Treaties and International Law*, 22 *AM. J. INT'L L.* 753, 754 (1928). By ‘compensational favoredness,’ Korovin meant the right of the Soviet state to apply preferential regulations to commerce with bordering states, or those that formed, prior to 1917, a part of the Russian Empire. *Id.* at 756. This theme of regional trade preferences for the near-abroad is strikingly similar to recent regional integration efforts by the Russian Federation.

<sup>55</sup> М. Плоткин, *Права иностранцев на современном этапе*, 3 СОВЕТСКОЕ ГОСУДАРСТВО 75 (1934) [M. Plotkin, *The Rights of Foreigners at the Current Stage*, 3 *SOVETSKOE GOSUDARSTVO* 75 (1934)].

purchasing remainder rights from the holders.<sup>56</sup> The remaining concessions were insignificant. According to Soviet sources, private industry at the end of the first five-year plan represented only .07% of the Soviet industrial output.<sup>57</sup> Similarly, joint stock companies founded in the USSR with foreign capital during the NEP period were progressively liquidated. During the first five year period, no additional joint stock companies with foreign capital were formed.<sup>58</sup> The decrees of the Central Executive Committee dated March 11, 1931 also slightly liberalized the rules pertaining to foreign firms and their representatives operating in the Soviet Union. Pursuant to Article 12 of this decree, firms engaged in negotiations with Soviet trade representatives in Russia no longer had to register and apply for licenses prior to entering negotiations.<sup>59</sup>

The Soviet international law establishment was fully engaged in support of foreign trade. This is evident not only in the spirit of doctrinal writings, Korovin's dispatches to the *American Journal of International Law*, and so on, but also in calls for substantive reforms to existing treaties and trade agreements. For instance, by 1930-31, the Soviet legal academy was mobilized in opposition to a new round of trade tariffs from the U.S. Within months of the announcement of Article 307 of the U.S. Tariff Act of 1930 (prohibiting the importation of goods made with forced labor), Soviet international lawyers produced a series of articles critiquing the trade law on general political as well as substantive grounds.<sup>60</sup> The expectation of continued growth in foreign trade during the second five-year plan also required changes in the constitutions of the individual Soviet republics. Extensive protections were afforded to foreign enterprises and their employees operating on Soviet soil. For instance, pursuant to an instruction of the Central Executive Committee dated October 3, 1930, foreign workers were granted all formal political rights, including the right to vote.<sup>61</sup>

*Foreign Debt.* Another external constraint shaping Soviet attitudes on foreign relations and domestic legal reform was the large foreign debt owed to the U.S., France and England which the Soviet Union inherited from the

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<sup>56</sup> *Id.* at 76.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 77 (discussing liquidation proceedings against the companies Ratao and Sovpoltorg).

<sup>59</sup> *Id.* at 77.

<sup>60</sup> *Экономическая борьба капиталистических стран против СССР*, 3 СОВЕТСКОЕ ГОС. И РЕВОЛЮЦИЯ ПРАВА 113, 117 (1931) [*Economic Battle of Capitalist States Versus the Soviet Union*, 3 SOV. GOS. I REVOLUTSIA PRAVA 113, 117 (1931)] (proposing the existence of covert economic war against the Soviet Union). Raevich also published an article disputing the American allegations that Soviet goods were produced with forced labor. *Id.* at 127.

<sup>61</sup> Plotkin, *supra* note X, at 78. The favorable treatment of foreign workers (including government subsidies) was meant to demonstrate the equitable work conditions of the Soviet state. Indeed, according to one Soviet scholar, the only distinction between foreign workers and Soviet citizens was simply the conception of 'foreignness'—the existence of which was, again, necessitated by capitalist encirclement. *Id.*

Tsarist and Kerensky governments.<sup>62</sup> The original position of the RSFSR was to revoke all debt obligations to Europe and the U.S. on the basis that these debts were not incurred by the toiling masses, or on their behalf.<sup>63</sup> However, debt negotiations formed a major part of early Soviet diplomatic efforts with the West, as evidenced by Chicherin's reports of October 28, 1921 and January 1922.<sup>64</sup> These notes show that Soviet leaders could not sustain their opposition to the debt, as the issue became a major bargaining point of the Western powers towards the USSR. In response, the Soviet delegations slowly gave way on these issues. First, they acknowledged several important distinctions between classes of debt. Pre-1914 debt was acknowledged as possibly valid because it was issued for the purpose of developing Russia's economy, whereas post-1914 debt was issued to sustain the imperial war effort.<sup>65</sup> Moreover, the Soviet Union countered with a number of offsets, consisting of two classes of claims: (1) for the value of Russian assets situated abroad; and (2) for the value of damage caused by the Allied Intervention.<sup>66</sup> By 1925, the Soviet government agreed to pay outstanding debts to European states by modifying a number of terms, including reduction of the amounts of the debt.<sup>67</sup> The outstanding debt owed to the U.S., however, remained unsettled.

Diplomatic notes show the debt to have been a major point of contention between the U.S. and the Soviet Union well into the mid-1930s. In addition to setting debt repayment as a precondition for recognition of the USSR, the U.S. set the following requirements: (1) USSR had to reject its call for a world revolution and cease propaganda activities; (2) reverse its decree regarding the annulment of international debt obligations (not just U.S.);<sup>68</sup> and (3) agree to recognize its international obligations [generally].<sup>69</sup> The last point—the agreement to recognize general principles of international law—related directly to respect for foreign property rights on the Soviet territory, an issue of central importance to the present discussion. The initial Soviet response was flippant: the Soviet Union did not need any legal or *de facto* recognition from the West.<sup>70</sup> However, this posture was disingenuous as the Soviet Union certainly sought recognition from the U.S. and the Soviets were

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<sup>62</sup> KASIMIERZ GRZYBOWSKI, *SOVIET PUBLIC INTERNATIONAL LAW, DOCTRINES AND DIPLOMATIC PRACTICE* 95-97 (Leiden: Sitjhoff, 1970).

<sup>63</sup> The unilateral revocation of all outstanding debts was announced by Lenin in a decree on January 21/February 3, 1918. *International Law Reports*, 162.

<sup>64</sup> GRZYBOWSKI, *SOVIET PUBLIC INTERNATIONAL LAW*, *supra* note X, at 95-96.

<sup>65</sup> *Id.* at 96.

<sup>66</sup> *Ibid.*

<sup>67</sup> *Ibid.*

<sup>68</sup> The debt was partly due to the enormous increase in Russian-American trade (primarily exports from the U.S. to Russia during WWI. *See* GEORGE F. KENNAN, *THE DECISION TO INTERVENE* 323 (Princeton, 1958) (discussing the influence of private American interests on decision to intervene, including American-Russian Chamber of Commerce composed of bankers (A.B. Hepburn), industrialists and “thirty to forty other firms.”).

<sup>69</sup> *Id.* at 20.

<sup>70</sup> *Ibid.*



expending great diplomatic efforts to win U.S. recognition.<sup>71</sup>

In international law, Korovin justified the Soviet debt annulment by reference to his class/transition theory—essentially arguing that the Soviet social revolution created a radically new legal form that was qualitatively different from other states.<sup>72</sup> Korovin admitted that ordinarily any successor state was bound by the legal and financial obligations of its predecessor, but refused to acknowledge the Soviet debt on the basis of communist principles. Diplomatic history and the facts of the actual debt service by the Soviet state reveal a slightly different story.

First, it is important to understand that the Soviet state initially continued to service (pay interest on) the debt, even following the decree on annulment.<sup>73</sup> This supports the theory that the Soviet Union sought to project adherence to international norms and bilateral agreements even when they ran counter to the professed ideology.<sup>74</sup> For the following fifteen years, while the Soviet Union publicly espoused Korovin’s position—arguing that the debt was not legally binding on the USSR as it was carried out contrary to the wishes of the proletarian class—Soviet diplomats privately emphasized that the debt would be settled and that the USSR would fully comply with all international obligations.<sup>75</sup>

On November 16, 1933, the Soviet state publicly agreed to repay the debt in exchange for recognition by the U.S. and joining the League of Nations. To save face and maintain theoretical consistency, the debt settlement agreement between President Roosevelt and the USSR People’s Commissar for Foreign Affairs Litvinov did not expressly stipulate that the USSR would repay debt incurred by the Kerensky government. Rather, the agreement employed a creative legal device (which came to be known as the Litvinov Assignment), whereby the USSR would pay \$9 million in pre-

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<sup>71</sup> This position is surprising because the Soviet Union had worked exceedingly hard at gaining recognition of European powers. The stance vis-à-vis the U.S. may have been a negotiating tactic, but it certainly did not resemble the prior negotiation efforts.

<sup>72</sup> KOROVIN, INTERNATIONAL LAW OF THE TRANSITION PERIOD, at 30.

<sup>73</sup> Interestingly, in 1987 a class action case was brought by a firm against the Soviet Union in a U.S. district court under the Foreign Sovereign Immunities Act (“FSIA”) to recover part of the debt (\$75 million, representing a \$25 million issue in 1916 and a \$50 million issue by the Tsarist government in 1917). See *Carl Marks & Co. v. USSR*, 665 F.Supp. 323 (S.D.N.Y. 1987), *aff’d per curiam*, 841 F.2d 26 (2d Cir., 1988), *cert. denied*, 487 U.S. 1219 (1988). The court denied the claim, holding that the FSIA would not apply retroactively to the Imperial-era bond issue. After reviewing case law, the court also held that as late as 1926, the USSR (like any foreign sovereign) would have had expectation of absolute immunity from suit in the U.S. The USSR had a justified expectation that it would not be retroactively sued in the U.S. The case is noteworthy for its succinct retelling of the relevant facts of the debt issue.

<sup>74</sup> Interest was paid on the remaining three installments of the bond certificates on July 19, 1918, January 10, 1919 and July 10, 1920. Interest was also paid on the bearer bond coupons due on June 1, 1918, December 1, 1918 and June 1, 1918. *Id.* at 326.

<sup>75</sup> U.S. Department of State, *Records Relating to Political Relations Between the United States and the Soviet Union*, The National Archives of the United States 1934 [Cornell Library Microfilm, Film 5863, Roll 1] (containing diplomatic dispatches from Joseph Davies, U.S. Ambassador to the Soviet Union) [*hereafter* Davies].

inflation money to the United States in exchange for an assignment of all claims, including those due it as the successor of prior Governments of Russia, “on condition that it be notified of any recovery by the United States on such claims.”<sup>76</sup>

Why did the USSR agree to repay the obligation when most historians agree that it could have chosen to not recognize the debt?<sup>77</sup>

Unclassified diplomatic dispatches between then Ambassador to the USSR Joseph Davies and the State Department shed light upon the matter.<sup>78</sup> On the topic of debt owed to the U.S., Davies stressed the symbolic significance to the Russians of repayment. The amount of the loan itself was, in the words of Davies,

of relative unimportance of the matter to the United States and the supreme importance to the Russian people of having in the future a body of liberal public opinion in the United States sympathetic to the Russian people, particularly in view of the uncertain international situation [the threat of war].<sup>79</sup>

Indeed, since by the early 1930s the Soviet Union began to seriously contemplate the threat from fascist regimes, paying off the minor debt in effort to curry favor with the significantly more powerful U.S. government seems to have been a reasonable step to balance the deteriorating relationship with Germany. This was all the more true because by 1933, Stalin’s position was sufficiently entrenched that he would not really lose political capital domestically for settling the debt issue. In any event, it is clear from the negotiations that “it was a serious matter to [Russia] to retain the confidence of the [U.S.] government in the performance of the [debt settlement] agreement[.]”<sup>80</sup> One can surmise several other likely motivations. First, Soviet leaders began to realize the immense economic potential of trading with the U.S. and other developed countries in order to further accelerate industrialization. Second, with Soviet acquisition of Ford automobile and tractor manufacturing plants, steel refineries and general technical know-how, measurable progress in the manufacturing sector meant moving away from the status of a raw material exporter, thereby improving global standing, and giving greater support to the possibility of ‘socialism in one country.’<sup>81</sup>

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<sup>76</sup> *Carl Marks & Co. v. USSR*, 665 F.Supp. 323, 327. For a discussion of similar claims against the Soviets, see Alexander Nahum Sack, *Diplomatic Claims Against the Soviets (1918-1938)*, N.Y.U. School of Law Contemporary Law Pamphlets, Ser. 1, No. 7 (1938).

<sup>77</sup> The amount of the indebtedness was approximately \$200 million in 1933 dollar (when it was settled for \$9 million). The original amount was approximately \$75 million from two issues. It was held in bearer bonds and credit participation certificates.

<sup>78</sup> U.S. Department of State, *Records Relating to Political Relations Between the United States and the Soviet Union*, The National Archives of the United States 1934 [Cornell Library Microfilm, Film 5863, Roll 1].

<sup>79</sup> Davies, at 15.

<sup>80</sup> Davies, at 63-64.

<sup>81</sup> Of the over 2,500 treaties that Soviet Russia concluded during the first forty year period of its existence (1917-1957), the majority concerned economic problems and questions, chiefly matters of

The subjective element in the debt negotiations should also be noted. As Davies remarked, the Soviet diplomats went out of their way to impress upon him (with personal guarantees and gestures) that the Soviet Union would pay the debt. Likewise, Davies in his official and personal capacities made a great deal of the humanitarian similarities between the U.S. and Soviet Union. In his words:

[U.S.] did have a great body of humanitarian democratic thought which did have great influence upon world opinion among liberal minded men everywhere which might be of inestimable value to Russia at some point in the future; *and that speaking as a friend of the humanitarian impulses and purposes of the Russian people*, personally I felt compelled to say that in my opinion it would be a great pity if a cloud were to be permitted by the Soviet government to dim the confidence which my government might have in the integrity and character of the men who were running affairs here; that this was particularly true in my opinion because *there was no leadership of any of the great nations of the earth that viewed with as much sympathy the fundamental humanitarian purposes of the Russian people to the degree that President Roosevelt and Secretary of State Hull did*; that it would be too bad if a condition were to be permitted by the Soviet government to exist which would dampen or destroy their confidence in the integrity of leadership; that *financial credits and business considerations in importance faded into nothing in contrast with this matter of the principle involved*.is producing enormous agricultural and mineral wealth annually, and it will not be dependent upon import or export for many years to come. [...] While there is no question but what, in its present phase, its efficiency cannot compare with capitalist states and possibly never will, *nevertheless, in the absence of competition or necessity for competition with capitalist states, such inefficiencies need not and will not appear.*<sup>82</sup>

From the Soviet side, Marshal of the USSR and staunch Stalin-ally, Kliment Voroshilov<sup>83</sup> agreed that the financial amount involved “was relatively small” and urged to settle the matter on “big broad, general principles and that a way should be found, that he appreciated the greatness of the President of the United States.”<sup>84</sup> Aside from subjective factors,<sup>85</sup> Voroshilov and Litvinov’s

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trade and commerce. See JAN F. TRISKA, ROBERT M. SLUSSER, *THE THEORY, LAW, AND POLICY OF SOVIET TREATIES* 5 (1962) (providing an excellent overview of Soviet treaty practice during early Soviet period).

<sup>82</sup> Davies, at 64 (Moscow, February 18, 1937 – Dispatch No. 68 [Ambassador Davies to Secretary of State Hull]) (emphasis added).

<sup>83</sup> Voroshilov was appointed People’s Commissar for Military and Navy Affairs and Chairman of the Revolutionary Military Council of the USSR, a post he held until 1934, when he was elevated to Marshal of the Soviet Union.

<sup>84</sup> Davies, at 64 (Moscow, February 18, 1937 – Dispatch No. 68 [Ambassador Davies to Secretary of State Hull]).

<sup>85</sup> There are many such factors in the diplomatic notes, and they call for a critical reexamination, both generally, as well as part of a ‘rehabilitation,’ so-to-speak, of Davies who was branded ‘too soft’ on the communists by critics. For instance, it is noteworthy to observe the near-obsequiousness of the Soviet leaders in their interactions with Davies. In one example, President Kalinin warned Ambassador Davies of superficial snap judgments of Russia—“A visitor might see some drunkenness on the streets of Moscow and therefore draw the conclusion that all Russians are

desire to see the debt matter settled on 'broad principles' was highly consistent with the body of Soviet treaty practice that had developed by that time. This can be summarized as follows:

- (1) Protection of foreign property rights in the USSR via bilateral trade agreements;
- (2) Diplomatic assurances that the USSR treated investment and property claims as apolitical 'administrative' issues governed by private international law;
- (3) Increasing emphasis that competition with 'bourgeois' states was a matter of ideological difference, rather than an actual political posture;<sup>86</sup>

Of the three, the most important vehicle for the promotion of foreign trade was projecting a predictable treaty regime. But demonstrating the strength of domestic property rights regimes and enforcement mechanisms was a close corollary.

Korovin wrote extensively on this subject in his treatises and journal articles.<sup>87</sup> In his *International Law of the Transition Period*, for instance, he emphasized that treaties were the sole source of international law and were sacrosanct in Soviet practice (though not in theory<sup>88</sup>). In his 1927 article on treaties, he explained that treaties formed a backbone of Soviet foreign practice and were inviolable, save to further advance the cause of communism.<sup>89</sup> The Soviet diplomatic corps was instructed to emphasize that the Soviet Union, aside from rejecting secret diplomacy, had never violated a single treaty. Aside from projecting a predictable treaty regime and respect for international norms to attract investment, the Soviet Union also incorporated international customary and conventional law on the protection of property in its domestic legislation. This understudied issue is central to our discussion of vertical harmonization.

## 2. *The Dilemma of Reconciling Communism, NEP & IP*

The attraction and protection of foreign trade in the Soviet Union necessarily required the adoption of domestic laws to protect property, since without security, Western firms simply would not invest in Russia.<sup>90</sup> Korovin

drunkards, which, of course, was not the fact." Davies, at 28 (Moscow, January 25, 1937 – Dispatch No. 11 [Ambassador Davies to Secretary of State Hull]).

<sup>86</sup> See Davies, at 103-105 (Moscow, March 12, 1937 – Dispatch No. 116 [Ambassador Davies to Secretary of State Hull, titled "Russian Industry – How It Works and Why"] (emphasis added).

<sup>87</sup> See, e.g., E.A. Коровин, *К пересмотру "Женевской Конвенции,"* 15(3) СОВЕТСКОЕ ПРАВО 52 (1925) [E.A. Korovin, *Reexamination of the Geneva Convention*, 15(3) SOVIET LAW 52 (1925)].

<sup>88</sup> E.A. Коровин, *Оговорка rebus sic stantibus в международной практике Р.С.Ф.С.Р.,* 6(3) СОВЕТСКОЕ ПРАВО 53 (1922) [E.A. Korovin, *The Principle Rebus Sic Stantibus in International Practice of the RSFSR*, 6(3) SOVIET LAW 53 (1922)] (upholding the classic conception of *rebus sic stantibus* principle and doctrine of necessity for violating positive treaty obligations).

<sup>89</sup> E.A. Коровин, *Советские договоры и международное право* 30(6) СОВЕТСКОЕ ПРАВО 91 (1927) [E.A. Korovin, *Soviet Treaties and International Law*, 30(6) SOVIET LAW 91 (1927)].

<sup>90</sup> See, e.g., Н.В. МИРОНОВ, ПРАВОВОЕ РЕГУЛИРОВАНИЕ ВНЕШНИХ СНОШЕНИЙ СССР (1917-1970) 275 н. 29 (ИМО, 1971) [N.V. MIRONOV, *LEGAL REGULATION OF FOREIGN RELATIONS OF THE USSR (1917-1970)* at 275 n. 29 (IMO, 1971)] (discussing a decree issued by the

and subsequent Soviet authors treated the protection of property under international law as questions of *international administrative law*, as apolitical issues on which cooperation with the West was not only permissible, but encouraged.<sup>91</sup> Notwithstanding the centrality of property rights to domestic legal battles and theoretical debates, international protection of property rights, as in the case of intellectual property, was seen by Soviet theorists as a foreign policy issue, and hence subordinate to more pressing foreign trade-related policy discussions. For instance, despite not adhering to the Berne Convention of 1886<sup>92</sup> or the revision to the treaty signed at Berlin in 1908,<sup>93</sup> the early Soviet state took tremendous pains to signify its protection of foreigner’s copyright, patents and trademarks. This was done principally by harmonizing Soviet domestic legislation with international customary and conventional law—tantamount to participating in the given treaty bodies, without actually doing so.<sup>94</sup> We can trace this process by observing the evolution of Soviet domestic legislation on authors’ rights.

*Authors’ Rights.* Between 1917 and 1931, there were almost yearly radical changes to the IP regulatory framework and the administrative organs charged with implementing the laws.<sup>95</sup> The earliest Soviet law concerning authors’ rights and patent rights was a decree in 1917 nationalizing all such rights “in the interest of government,”<sup>96</sup> with limited protection for the authors. Pursuant to this decree, the duration of authors’ rights was limited to six

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NKID on May 23, 1919 ‘On the Prohibition of Protection of Property of Foreigners from States Which Have Severed Diplomatic Relations with RSFSR’); И. БЕРНШТЕЙН, Б. ЛАНДАУ, В. МАШКЕВИЧ, ПРАВОВЫЕ УСЛОВИЯ КОНЦЕССИОННОЙ ДЕЯТЕЛЬНОСТИ В СССР 26-47 (M: 1930) [I. BERNSTEIN, B. LANDAU, V. MASHKEVICH, LEGAL CONDITIONS OF CONCESSIONS IN THE USSR 26-47 (M: 1930)].

<sup>91</sup> See KOROVIN, CONTEMPORARY PUBLIC INTERNATIONAL LAW, ch. VIII (especially pages 98-102). It is curious that Western legal historians have not focused more on this aspect of Soviet law and the contradictions between Marxist conceptions of private property, Lenin’s formulation of state capitalism, and Stalin’s foreign trade relations policy. It seems the contradiction concerning property and Soviet trade and concessions with Western firms was much more fertile soil for pointing out contradictions in Soviet theory and practice than revisiting the abstract debates concerning the nature of law.

<sup>92</sup> See Berne Convention for the Protection of Literary and Artistic Works, Paris Act, July 24, 1971 (amended Sept. 28, 1979). The Berne Convention removed registration requirements to trigger copyright protection, and codified continental conceptions of moral rights. The U.S. opposed the Berne Convention because of the removal of registration requirements. By contrast, as indicated above, the USSR removed domestic registration requirements, without formally acceding to the Berne Convention.

<sup>93</sup> See Taracouzio, at 154 n. 93.

<sup>94</sup> This strategy is remarkably similar to the IP reform efforts of the Russian Federation to comply with TRIPs throughout the 2000s without being a signatory or member of the WTO, an issue that will be discussed *infra*.

<sup>95</sup> Галина Витальевна Довгань, Система государственных органов и общественных организаций в сфере изобретательства в УССР (1924-1931 гг.) [Galina V. Dovgan’, *System of State Organs and Social Organizations in the Sphere of Patent Protection in the Ukrainian SSR (1924-1931)*], available at [http://www.lomonosov-msu.ru/archive/Lomonosov\\_2008/28\\_4.pdf](http://www.lomonosov-msu.ru/archive/Lomonosov_2008/28_4.pdf)

<sup>96</sup> John N. Hazard, *Notes on Economic Law* (Prof. Amfiftiatrov, 1936) at 90 (Manuscript Collection, Columbia University Libraries, Bakhmeteff Archive).

months, after which all rights reverted to the state.<sup>97</sup>

Ivan Peretersky, writing in the journal *Sovetskoe Pravo*, analyzed these domestic legislative changes in the field of author's rights following the Bolshevik revolution.<sup>98</sup> What is immediately striking regarding these reforms was that they occurred so soon after the revolution. The first proposed decree on author's rights was issued on December 6, 1917, just one month after the Bolsheviks gained control.<sup>99</sup> Pursuant to this proposal, the length of the protected term was reduced to fifteen years, followed by a five year period where the copyright<sup>100</sup> was held by the state if the People's Commissariat of Enlightenment found them to have aesthetic or scientific value.<sup>101</sup> The proposal was *not* adopted. Instead, an *even more restrictive* regime was adopted by decree on December 29, 1917, monopolizing authors' rights in favor of the state for a period of five years.<sup>102</sup> Furthermore, on June 11, 1918, a decree was issued on the abolition of the inheritance of author's rights, except in the case of heirs below the age of majority or where they were not capable of working (*нетрудоспособные*).<sup>103</sup> Shortly thereafter, on November 26, 1918, another decree was issued "nationalizing scientific, literary and artistic works,"<sup>104</sup> remaining in force until 1923.

Pursuant to this decree, any work (published or unpublished) could be claimed by the state as its property.<sup>105</sup> The relevant state agency then had the right to publication, reproduction and public exhibition of the work.<sup>106</sup> The author was entitled to an honorarium and, in the case of minor children, remainder rights could be paid out to the heirs from the proceeds of the work.<sup>107</sup> The author's right expired *six months* after death.<sup>108</sup> Interestingly, in regulations promulgated by the People's Commissariat on Enlightenment on February 9, 1919, the old 50-year terms were used for works created prior to the nationalization, or specifically, June 1, 1919.<sup>109</sup>

These conflicting decrees were systematically reworked following the introduction of NEP, not only to protect domestic authors, but also to

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<sup>97</sup> *Id.*

<sup>98</sup> И. Перетерский, *Задачи Советского законодательства в области авторского права*, 4(1) СОВЕТСКОЕ ПРАВО 92 (1923) [I. Peretersky, *Goals of Soviet Legislation in the Field of Author's Rights*, 4(1) SOVIET LAW 92 (1923)].

<sup>99</sup> *Id.* at 92.

<sup>100</sup> I shall use the term copyright and author's rights interchangeably. The term author's rights is the preferred term in the Soviet literature (as well as in Continental jurisprudence more generally), but the concepts and legal ramifications are identical.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* (citing Article 1).

<sup>106</sup> *Id.*

<sup>107</sup> *Ibid.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 93. In addition, by decree dated August 16, 1921, all textbooks were to be published by the state publishing house ГосИздат (*Gosizdat*). *Ibid.*

incorporate international protections for the defense of foreign authors. Peretersky indicates that more than one year went into the drafting of the new law on author's rights.<sup>110</sup> This new law was intended to be a departure from the Russian Imperial code of 1911, both in substance and spirit, but Peretersky's account points to tension within the ISL in the drafting of the new code.<sup>111</sup> First, much like American opposition to the Berne Convention on the basis of moral rights, drafters had difficulty conceptualizing precisely what was being protected—whether it was the abstract “spiritualized” right of the author to his or her creation or the work product of this spiritual, “psychological” process.<sup>112</sup> Moreover, there were proposals to discard this distinction, as well as the distinction between authors' rights and patents over physical inventions, in favor of a broad principle protecting quite simply, *products of labor*, consistent with Marxist ideology.<sup>113</sup> After discussing at length the legal distinction between patents and authors' rights, Peretersky conceded the need for different terms and legal protection regimes, though the goal, in principle, was a single unitary system.<sup>114</sup>

Peretersky's Marxist critique of copyright law illuminates how Soviet theorists balanced individual versus what they considered new social rights.<sup>115</sup> According to Peretersky, the state had rights to the given work because the actual creator of the work was not merely the individual author, but also the social medium in which he or she worked.<sup>116</sup> Next, since copyright, like all law, was not a logical but a historical construct, copyright law had to take into account relevant economic relations of production and the social utility of given works.<sup>117</sup> However, it is remarkable to observe the workings of the NEP and the hold of the capitalist mindset, as Peretersky concludes that defense of authors' rights was *necessary to protect the incentives* for the creation of works—a proposition completely incompatible with Marxist thought.<sup>118</sup> Thus, Peretersky proposed reintroduction of all Imperial-era rights, such as the author's right to prevent alteration of his/her “mental child,” the right of reproduction, the right of compensation for takings, and so on.<sup>119</sup> To the extent that the government retained rights, these had to be limited so that the state could not seize works for commercial benefit.<sup>120</sup> With respect to the objects of copyright, Peretersky suggested sweeping categories, including traditional works, but also new works stemming from the introduction of film (Peretersky suggested copyright over plotlines to films, whether they were

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<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 93-94.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 94.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 95.

<sup>116</sup> *Id.* at 95.

<sup>117</sup> *Id.* at 94-95.

<sup>118</sup> *Id.* at 95.

<sup>119</sup> *Id.* at 96.

<sup>120</sup> *Id.* at 97.

written or not).<sup>121</sup> Lastly, Peretersky suggested the introduction of a uniform template publication agreement (between publishers and authors) modeled on the Swiss contract code of 1911, subjecting publication contracts to the statute of frauds.<sup>122</sup>

Peretersky's discussion elided conflicts of laws issues and international treaties, but these became major points of contention in subsequent writings. With economic growth came the decree of 1925 which established longer duration terms,<sup>123</sup> but maintained the widest possible state use and public use exceptions, such as translation of foreign works without compensation and so forth.<sup>124</sup> The Soviet Union took a favorable position on the Berne Convention (continuing the Imperial legacy).<sup>125</sup> The Berne treaty regime was affirmed in bilateral treaties with a number of European states. For example, the Soviet-German treaty 'on the defense of industrial property' dated October 12, 1925 required the USSR to apply German law and IP protections in dealings with German citizens and firms.<sup>126</sup> Despite recognizing the Berne protections, the Soviet Union entered into a number of separate agreements where the USSR claimed broad state-use exemptions in the "use of the technical and cultural heritage of the West," justified by Korovin by reference to the "[Soviet] material and cultural paucity."<sup>127</sup>

The 1925 set of fundamental principles on authors' rights were expanded in 1928, and ultimately codified in the Law on Author's Rights of October 8, 1928. Pursuant to this law, the author's right expanded from 25 years from the date of publication or presentation, to the life of the author, plus fifteen years after the author's death. In the opinion of Soviet jurists, these copyright terms were entirely consistent with international norms.<sup>128</sup> Soviet jurists were of equal opinion on the related harmonization process with respect to trademarks and patents.<sup>129</sup>

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<sup>121</sup> *Id.* at 97.

<sup>122</sup> *Id.* at 99.

<sup>123</sup> WILLIAM E. BUTLER, *INTELLECTUAL PROPERTY LAW IN RUSSIA* xiv (4th ed., 2005).

<sup>124</sup> John N. Hazard, *Notes on Economic Law*, *supra* note X, at 90.

<sup>125</sup> Korovin, *CPIL*, at 100.

<sup>126</sup> *Id.* at 99.

<sup>127</sup> *Id.* at 100.

<sup>128</sup> *See id.*

<sup>129</sup> NEP and post-NEP Soviet legislation fully protected domestic and foreign trademarks in accordance with bilateral and general principles outlined in international agreements. Writing on trademarks in 1924, S.I. Raevich began his article with a note on how "fortunate" it was that trademarks received sufficient legislative attention both during the period of war communism and the NEP and remarked how consistent Soviet patent legislation was with European standards. С.И. Раевич, *О товарных знаках по советскому праву*, 12(6) СОВЕТСКОЕ ПРАВО 64 (1924) [S.I. Raevich, *On Trademarks in Soviet Law*, 12(6) SOVIET LAW 64 (1924)]. With the adoption of the law "On Patents on Inventions" in 1924, the committee on inventions under the Supreme Soviet of the National Economy (BCHX CCCP) continued functioning, but its prerogative was greatly restricted to issuing applications, licenses for the use of models, shop drawings and trademarks. Dovgan', *supra* note X, at 1. The patent system introduced in 1924 created a patent bureau and required users to obtain permission of the patent owner prior to using the invention. *Id.* (*citing* BCHX CCCP №11 or 25.11.1925).



In fact, by 1935, Pashukanis dropped any opposition to international conventions for the defense of industrial or property rights.<sup>130</sup> In formalist fashion, he wrote about the International Council for the Defense of Industrial Property rights founded in Berne in 1883 (pursuant to the 1883 Paris Convention for the Protection of Industrial Property).<sup>131</sup> To Pashukanis, these “special questions of international law” and international administrative unions were to be analyzed based on a concrete estimate of their expected utility.<sup>132</sup> He saw no danger or conflict between these special treaty bodies and overarching Soviet principles, so long as they did not signify the wholesale adoption of bourgeois systems or were conflated into the League of Nations.<sup>133</sup>

Whereas to the early Pashukanis, the debate over property concerned the basic form/substance distinction and the legal notion of property (including socialist property concepts in Soviet law) was but a sham for what was in essence, bourgeois law,<sup>134</sup> by the late 1920s scholars like Korovin succeeded in showing that it was permissible to use seemingly bourgeois constructs during the transition stage to communism. Both Korovin and Pashukanis reconciled the seeming contradiction between intellectual property protection and Marxist theory by situating both in a broader international law and foreign policy dimension. Whereas lesser figures like Dotsenko continued to struggle to create a theoretical distinction between private property and personal property—where private property was deemed to be that which was acquired as a result of commercial enterprise (as for instance, under NEP), and personal property was that acquired as a result of work in a communal enterprise (such as the Kolkhoz)<sup>135</sup>—Korovin’s transition theory and instrumentalism obviated the need to ground intellectual property discussions in theoretical terms. Protecting intellectual property rights was indispensable to attract trade, and trade was indispensable to strengthening the Soviet state, full stop. This position was solidly endorsed by Pashukanis’ successor Adreii Vyshinsky<sup>136</sup> and continued to serve as the basis for the Soviet “stability of laws” doctrine for the remainder of the Soviet Union.

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<sup>130</sup> Е. ПАШУКАНИС, ОЧЕРКИ ПО МЕЖДУНАРОДНОМУ ПРАВУ 165-66 (Гос. Изд. Сов. Законодательство, 1935) [E. PASHUKANIS, ESSAYS ON INTERNATIONAL LAW 165-66 (State Publ. Soviet Jurisprudence, 1935)].

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* at 165.

<sup>133</sup> *Id.* at 164-165. Pashukanis observed that Article 24 of the Statute of the League subordinated existing treaty bodies to the League. However, aside from the expressed desire to see these bodies separate, Pashukanis offers no discussion of the interaction of the various administrative organs and the League.

<sup>134</sup> General Theory of Law and Marxism.

<sup>135</sup> *Id.* at 9.

<sup>136</sup> Michael Head, *The Great Debates*, at 27 (discussing Vyshinsky’s arguments in defense of law and ‘stability of laws’ by reference to property rights: “[Vyshinsky’s examples of the need for law] *all concerned the protection of private property interests*. ‘To reduce law to policy would be to ignore such tasks confronting law as that of the legal defense of personal, property, family and inheritance rights and interests, and the like.’).

### C. Late Soviet IP Protection: an Overview

Having discussed the centrality of the property rights and vertical harmonization debates in the creation of the early Soviet state, it is worthwhile to explore the late or ‘classic’ Soviet treatment of IP law. This section provides an overview of this phase of the Soviet IP regime, including the USSR’s participation in international conventions concerning intellectual property.

In the domestic realm, Soviet copyright law resembled European civil law authors’ rights protections, with a major distinction being the goal of the law. From the Soviet perspective, Soviet copyright law sought to balance the rights between authors and ‘society,’ whereas Western law was seen as being unfavorably biased towards publishers against authors.<sup>137</sup> However, despite this rhetorical position, Western commentators writing on Soviet copyright law stressed the similarities to European regimes. Western comparativists routinely remarked on the Soviet’s relatively unremarkable, and even “unexciting,”<sup>138</sup> distinctions with respect to Western copyright law, contrary to what one would expect from a socialist state. Unlike Cuba’s complete disavowal of copyright law in 1969,<sup>139</sup> for instance, the Soviet Union fully ascribed to reigning international obligations throughout its existence (whether by conforming domestic law to international standards, or by joining the relevant treaties).

On the international plane, the Soviet Union was a state party to the three principal conventions relating to authors’ rights from the mid-1970s: the Berne Convention on the Protection of Literary and Artistic Works as amended in 1971; the Universal Copyright Convention (“UCC”) as amended in 1971<sup>140</sup> (USSR ratified the UCC in 1973); and the 1971 Convention on Protection of the Interests of Producers of Phonograms Against the Illegal Reproduction of their Phonograms. The major legal maneuver exercised by the USSR concerned its accession to the UCC in 1973. The Soviet Union adopted the UCC before the 1971 Paris amendments to the UCC went into force,<sup>141</sup> so as to avoid the 1971 amendments which gave authors greater exclusive rights to their work and significantly restricted legal licenses.<sup>142</sup>

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<sup>137</sup> Dietrich A. Loeber, “Socialist” Features of Soviet Copyright Law, 23 COLUM. J. TRANSNAT’L L. 297 (1984-85) (offering an excellent introduction to Soviet copyright law) [*hereafter* Loeber].

<sup>138</sup> *Id.* at 298-302.

<sup>139</sup> *Id.* at 303 (*quoting* Fidel Castro Speaks, 214, 218 (1969)); cf. Ley No. 14 de 28 de diciembre de 1977, Ley del Derecho de Autor, available at <http://www.cenda.cu/php/loader.php?cont=legis.php&tipo=2> (harmonizing Cuban copyright law with international standards).

<sup>140</sup> Universal Copyright Convention (as revised at Paris on 24 July 1971), with Appendix Declaration relating to Article XVII and Resolution concerning Article XI 1971, available at <http://portal.unesco.org/en/>.

<sup>141</sup> See Elst, at 82 n. 147.

<sup>142</sup> *Id.* The most significant amendment made at the Paris diplomatic conference in 1971 pertained to Article VI bis (1) & (2) relating to reproduction, public use, and transmission of works by radio. See M.M. BOGUSLAVSKII, PRIVATE INTERNATIONAL LAW: THE SOVIET APPROACH 173

On February 21, 1973, six days before the USSR deposited its declaration of accession to the UCC, the Presidium of the Supreme Soviet of the USSR enacted a series of amendments to chapter IV of the 1961 Fundamentals to bring the Soviet copyright law in line with the minimum requirements the UCC imposed.<sup>143</sup>

Ultimately, in 1978 the USSR acceded to the Paris amendments, subject to a reservation granting liberal use of Soviet works by developing countries. The political justification for the USSR acceding to the treaties was explained in a separate letter (1978) from the USSR to the treaty body:

Desirous of helping to create favorable conditions for the use of the works of Soviet authors by the developing countries for educational purposes, the Union of Soviet Socialist Republics agrees to the application of the aforementioned Convention to the works of Soviets authors.<sup>144</sup>

With its accession to the UCC, scholars observed that a seemingly dual system of copyright law emerged. For works published by domestic authors (or works by foreigners which were first published on USSR territory), the Soviet copyright legislation applied. On the other hand, international law governed copyright rights for foreign works. As analyzed by Michiel Elst, the consequences of this dual system of copyright were felt particularly in the limitations of copyright.<sup>145</sup> Thus, domestic authors' rights were subject to the most far-reaching free uses and legal licenses, whereas those who fell within the purview of the UCC enjoyed broader protection.

This dual system had noticeable practical effects. For instance, if a musical work of a Soviet writer had been publicly performed, it could be freely reproduced in a film or freely broadcast on radio and television. On the contrary, public performance of a work by a foreign author did not subject the author to the free use exemptions or legal licenses of Soviet law; the author's permission was required for the same uses.<sup>146</sup> This was because the extent of fair use / legal license use in the domestic context was quite broad,<sup>147</sup> especially for educational or scientific purposes.<sup>148</sup> However, with the Soviet state often the copyright holder, and in many instances the ostensible

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(William Simons, *transl.*, Martinus Nijhoff, 1988); *see also* Records of the Conference for Revision of the Universal Copyright Convention: Unesco House, Paris, 5 to 24 July 1971 (Unesco, 1973).

<sup>143</sup> *See* Elst, at 82-83.

<sup>144</sup> *See id.* (Universal Copyright Convention, with Appendix Declaration relating to Articles XVII and Resolution concerning Article XI 1952, UNESCO Convention Documents (letter from the USSR dated August 24, 1978).

<sup>145</sup> Michiel Elst, *COPYRIGHT, FREEDOM OF SPEECH, AND CULTURAL POLICY IN THE RUSSIAN FEDERATION* 95 (Leiden: Nijhoff 2005) [hereafter Elst].

<sup>146</sup> *See* Elst, at 95-99.

<sup>147</sup> *Id.* It was also expanded domestically in 1973 to permit newspapers to reproduce any published report or scientific, artistic, literary, or oral work; either in the original or as a translation. *See* MICHAEL A. NEWCITY, *SOVIET COPYRIGHT LAW* 110-112 (Praeger, 1978). This was used famously by Soviet literary journals to publish translations of Vonnegut's *Breakfast of Champions* and Norman Mailer's *Marylin*. Due to highly-publicized protests from the West, the Soviet Union bought publishing rights to the works shortly thereafter. *Id.* at 111.

<sup>148</sup> *Id.* at 112.

copyright encroacher, copyright issues in the domestic arena were mostly moot.<sup>149</sup> With respect to traditional copyright protection issues (length of term, etc.), Soviet domestic implementation of the UCC was consistent with international standards.<sup>150</sup> The term of protection was 25 years after the death of the author with remainder rights paid out to heirs, much like in capitalist states.<sup>151</sup>

Elst correctly notes that the foreign-domestic duality in Soviet copyright law was untenable. However, when Soviet jurists recognized this discrepancy, their solution was to simply adapt the much broader free use standards found in Soviet copyright law to international law, and not vice versa.<sup>152</sup> In other words, consistent with the USSR's political and cultural policy, reconciling 'fair use' between Soviet law and international norms often meant adopting the wider fair use exemptions. For purposes of the present analysis, this can be rephrased as rejection of vertical harmonization. By insisting on its own legal standards, the Soviet Union was maintaining an exceptionalist posture on the issue of broad fair use protections.

With respect to actual enforcement of copyright claims against the Soviet Union, it should be noted that very few claims (foreign or domestic) actually proceeded through the Soviet judiciary. Peter Maggs, in his introduction to the copyright volume of Soviet Statutes and Decisions explained that this was due to the realities and context of state publishing.<sup>153</sup> The limitation on who could actually publish authors' works and control the revenues and royalties indeed presented a serious limitation on the free exercise of rights, although some transfers did occur.<sup>154</sup> Moreover, in the domestic context, copyright infringement claims were limited by the remedies available to aggrieved parties through Soviet civil, labor and administrative law, representing the interplay between the three major characteristics of the Soviet system: socialist property, economic planning, and the leading role of the Communist Party.<sup>155</sup> With respect to foreign claims, interpretation of obligations arising under international treaties was rare due to the small number of potential disputes involving foreign claimants.

By the mid-1980s advances in technology required the modernization of Soviet IP law (as in other countries) to reflect the challenge posed by new

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<sup>149</sup> SERGE L. LEVITSKY, COPYRIGHT, DEFAMATION, AND PRIVACY IN SOVIET CIVIL LAW: DE LEGE LATA AC FERENDA 420 (Martinus Nijhoff, 1979) (listing instances where copyright claims could not be invoked against the state pursuant to Soviet civil law limitations despite being enumerated as fundamental constitutional or traditional author's rights).

<sup>150</sup> Loeber, at 299-300.

<sup>151</sup> *Id.* at 300 ("As to the property rights of the deceased—the royalties—comparative lawyers would expect some 'socialist' impact on the law, such as the denial of monetary benefits to an heir on the grounds that these would accrue to him as 'unearned income.' Soviet law, however, stops short of imposing such a limitation and conforms in this respect to capitalist practices.")

<sup>152</sup> Elst, at 101.

<sup>153</sup> Loeber, *supra* note X, at 312 (citing 14 SS&D, at 5).

<sup>154</sup> *Ibid.*

<sup>155</sup> *Ibid.*

digital reproduction technologies. During this time, like most legal systems, the Soviet system only sporadically investigated the challenges posed to copyright by technical advances.<sup>156</sup>

## II

### RUSSIAN IP LAW (1992-2006): TRANSITION

#### A. Change, Transplants and Harmonization

After the collapse of the Soviet Union, Russia's IP regime underwent a radical series of transformations. Generally speaking, they can be divided into three periods. The first, lasting from 1992 to 1994 was a period of indigenous change, with law reform proposals originating from working groups established in the dying days of the USSR. The second period, roughly from 1995 to 2006 was a period of legal transplantation,<sup>157</sup> and vertical harmonization.<sup>158</sup> Vertical harmonization here characterizes the relationship between Russia and international trade bodies, like the WTO, as well as perception of more diffuse norms or general principles of international law.<sup>159</sup> This period is notable because it coincided with what Gianmaria Ajani identified as the second stage of transition and law reform in Russia, "marked by a more critical approach towards 'paper laws' and by a more conscious attitude towards the 'Anglo-American thinking' of legal advisers and of international financial institutions."<sup>160</sup> Because IP reform in Russia followed other reforms, this period may also reveal how Russian policymakers internalized the lessons of preceding reforms in other substantive fields, if at all. Lastly, the third period of IP reform corresponds to the adoption of Part IV of the Russian Civil Code on November 24, 2006 (effective January 1, 2008)—intended to supersede all previous legislation relating to intellectual property and to bring Russian law into compliance with international obligations.

Scholars have chronicled the evolution of Russia's IP regime in exceedingly detailed accounts,<sup>161</sup> so there is no need to retell the reform process, save but in general strokes. As a state successor to the USSR, the Russian Federation remained a state party to each of the treaties discussed

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<sup>156</sup> Elst, at 109.

<sup>157</sup> See ALAN WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* (Edinburgh, 1974); Gianmaria Ajani, *By Chance and Prestige: Legal Transplants in Russia and Eastern Europe*, 43 AM. J. COMP. L. 93, 93 n.1 (1995).

<sup>158</sup> Peter Maggs, *The Process of Codification in Russia: Lessons Learned from the Uniform Commercial Code*, 44 MCGILL L. REV. 281 (1999).

<sup>159</sup> See Larry Cata Backer, *Introduction and Analysis*, in *HARMONIZING LAW IN AN ERA OF GLOBALIZATION: CONVERGENCE, DIVERGENCE, AND RESISTANCE* 13 (Larry Cata Backer, ed., 2007) (discussing vertical integration, and defining harmonization as the "effect of approximation or coordination of different legal provisions or systems by eliminating major differences and crating minimum requirements or standards.").

<sup>160</sup> Ajani, *supra* note X, at 96.

<sup>161</sup> See generally Elst.

above.<sup>162</sup> Aside from inheriting Soviet treaty obligations, the Russian Federation was also heir to a new Soviet intellectual property law which was to go into effect in the USSR in January 1, 1992, but actually went into force in the new Russian Federation in August 3, 1992. This legislation lasted only one year, replaced by the Law on Author's Rights and Neighboring Rights which went into force on August 3, 1993.<sup>163</sup>

In a clean break with the Soviet past, the 1993 Russian Constitution also recognized and protected by law 'intellectual property' as an aggregate of exclusive rights to the results of intellectual activity.<sup>164</sup> The use of the term "intellectual property" versus authors' rights is significant as it was the first time the term was used in Russian legislation since the early 1920s. As relevant to the discussion below, the Russian Constitution also enshrined additional limited guarantees with respect to mass information. For instance, Article 29(4) provides: "Each shall have the right to freely seek, receive, transmit, produce, and disseminate information by any legal means."<sup>165</sup> Similarly, Article 29(5) provides that "The freedom of mass information shall be guaranteed." These rights must be interpreted in light of the copyright law, and vice versa, but Russian courts have yet to rule on any likely conflicts.<sup>166</sup>

Equally important, the 1993 Russian Constitution codified a monist conception of international law.<sup>167</sup> Article 15, section 4 proclaimed that

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<sup>162</sup> In 1994, Victor Chernomyrdin issued a governmental decree to clarify that Russian Federation inherited its international treaty obligations with respect to IP. See Russian Federation, decree no. 1224/1994: *О присоединении Российской Федерации к Бернской конвенции об охране литературных и художественных произведений в редакции 1971 года, Всемирной конвенции об авторском праве в редакции 1971 года и дополнительным Протоколам 1 и 2, Конвенции 1971 года об охране интересов производителей фонограмм от незаконного воспроизводства их фонограмм*, November 3, 1994 (Russian) [Governmental decree no. 1224 from 1994, signed by Viktor Chernomyrdin, Regarding Russia's Accession to the Berne Convention, UCC, and the 1971 Additional Protocols to the UCC], available <http://www.copyrighter.ru/full/index.html?berne4.htm>.

<sup>163</sup> WILLIAM E. BUTLER, *INTELLECTUAL PROPERTY LAW IN THE RUSSIAN FEDERATION* xvi (4th ed., London: Wildy, Simmonds & Hill, 2005); ЗАКОН РОССИЙСКОЙ ФЕДЕРАЦИИ ОБ АВТОРСКОМ ПРАВЕ И СМЕЖНЫХ ПРАВАХ (Москва, Республика, 1993) [LAW OF RUSSIAN FEDERATION ON AUTHOR'S RIGHTS AND NEIGHBORING RIGHTS (Moscow, Republic, 1993)].

<sup>164</sup> See Article 44.

<sup>165</sup> W.E. Butler, *RUSSIAN LAW* 710 (2d ed., 2003) (providing English translation of 1993 Russian Constitution). Similarly, Article 29(5) provides that "The freedom of mass information shall be guaranteed."

<sup>166</sup> The above provisions respecting freedom on information have been interpreted to refer to the government's duty to release information. However, as explained fully below, this provision may also be read more broadly to suggest a protection of the means of access to mass information, such as the Internet. For instance, such a broad protection may be employed to immunize Russian Internet service providers from their customers' copyright violations.

<sup>167</sup> In the USSR, the relationship of treaties to municipal law was one of the most hotly-contested issues in international law. The general consensus was that the act of ratification of a treaty by the Presidium of the USSR Supreme Soviet was a special normative act imparting legal force to international treaty norms. Another view held that transformation of to national legislation was necessary before an international treaty became part of municipal law. Third, according to Article 21 of the 1978 USSR Law on the Procedure for the Conclusion, Execution, and Denunciation of International Treaties, certain treaties became automatically binding upon incorporation pursuant to

general principles of international law, customary international norms and international agreements to which Russia is a party shall henceforth be constitutive norms of the Russian legal system.<sup>168</sup> Pursuant to the plain language of Article 15, international treaties were elevated higher even than domestic legislation: under Section 4, if an international convention contravenes other laws, then the international convention trumps domestic law.<sup>169</sup> Article 15, section 4 itself did not stipulate whether international law requires national implementation, translation, transformation, or whether international treaties are self-implementing.<sup>170</sup> Accordingly, the constitutional provision immediately became the locus of a major debate in post-Soviet international legal theory.<sup>171</sup> This debate, by and large, has continued to the present day.<sup>172</sup>

Returning to the copyright law, the 1993 Law on Author's Rights and Neighboring Rights was not well received by either Russian scholars nor Western observers. While the law recognized individuals' property rights in cultural and artistic works of their own creation, it considerably reduced the list of free uses, a longstanding custom in Soviet IP law. Remaining free uses were defined much more narrowly than before and compulsory licenses were

Article 21. See W.E. Butler, *Comparative Approaches to International Law*, 190 RECUEIL DES COURS 13, 53 (1985).

<sup>168</sup> CONSTITUTION OF RUSSIAN FEDERATION, Art. 15, Official Government Publication (Russian), available at <http://www.gov.ru/main/konst/konst11.html> (“Общепризнанные принципы и нормы международного права и международные договоры Российской Федерации являются составной частью ее правовой системы. Если международным договором Российской Федерации установлены иные правила, чем предусмотренные законом, то применяются правила международного договора.” – “General principles and norms of international law, and international treaties to which Russian Federation is a party, are constitutive parts of Russia’s legal system. If national law contradicts international treaties, then international law supersedes national legislation.”).

<sup>169</sup> *Id.*

<sup>170</sup> Гаврилов, В. В. *Теории трансформации и имплементации норм международного права в отечественной правовой доктрине*. 2 МОСКОВСКИЙ ЖУРНАЛ МЕЖДУНАРОДНОГО ПРАВА 39-61 (2001), available at <http://www.law.edu.ru/article/article.asp?articleID=162606> [V.V. Gavrillov, *Theories of Transformation and Implementation of International Legal Norms in Russian Legal Doctrine*, 2 MOSCOW JOURNAL OF INT’L LAW 39, 40 (2001).]

<sup>171</sup> Е. Т. Усенко, *Соотношение и взаимодействие международного и национального права и Российская Конституция*, 2 МОСКОВСКИЙ ЖУРНАЛ МЕЖДУНАРОДНОГО ПРАВА 16 (1995) [E.T. Usenko, *Correlation and Interrelationship of International and Domestic Law and the Russian Constitution*, 2 Moscow J. of Int’l L. 16 (1995)]; В.В. Гаврилов, *Теории трансформации и имплементации норм международного права в отечественной правовой доктрине*. 2 МОСКОВСКИЙ ЖУРНАЛ МЕЖДУНАРОДНОГО ПРАВА 39-61 (2001) [V.V. Gavrillov, *Theories of Transformation and Implementation of Norms of International Law Within Domestic Legal Doctrine*, 2 Moscow J. of Int’l L. 39, 39-61 (2001)], available at <http://www.law.edu.ru/article/article.asp?articleID=162606> (last accessed November 2, 2009).

<sup>172</sup> See K.N. Ratsiborinskaya, *Application of International Law by Russian Courts*, in RUSSIAN LAW: THEORY & PRACTICE 59 (2004) (attaché of the legal department, Russian Ministry of Foreign Affairs); O.A. Ishchenko & E.G. Ishchenko, *Implementation of International Law in Russian Legislation*, 2 RUSSIAN LAW: THEORY & PRACTICE 196 (2008); L.L. Ponomareva, *International Law in Decisions of Russian Criminal Courts*, 1 RUSSIAN LAW: THEORY & PRACTICE 52, 55 (2008) (citing Surgut District Court, Case No. 073/06, discussing court’s failure to consider international standards and extradition rules, and proposing legislative changes to require courts to explain analytical process in court decisions).

abolished altogether.<sup>173</sup> From the West's viewpoint, the 1993 law reform package lacked many of the basic elements found in Western practice such as the right to alienate and encumber intellectual property rights.<sup>174</sup> Accordingly, the legislative package was quickly tabled for amendment. Incidentally, this was to have positive consequences, as it allowed legislators to assess the impact of emerging information technologies and to compare similar reform projects then-being proposed in various jurisdictions, as well as internationally.

The Russian civil code was incrementally amended in 1995 and 2004, to further conform Russian domestic law with evolving TRIPs<sup>175</sup> and bilateral obligations.<sup>176</sup> Generally speaking, the 1995 and 2004 reforms kept with longstanding Soviet practice and the civil law tradition. Rights were based on the moral theory of authors' rights; that is, an author has exclusive rights to use his works, including the rights of reproduction, distribution, "communication to the general public by cable," and others (all referred to as the "property rights"). The copyright law applied broadly to any work, whether or a technical, artistic, or other nature, and in all reproducible media.<sup>177</sup> The 2004 reform also added to the list of exclusive rights an "Internet right"<sup>178</sup>—that is, the right of "communication of a work in such a

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<sup>173</sup> Elst, at 370-375.

<sup>174</sup> *Id.*

<sup>175</sup> See Agreement on Trade-Related Aspects of Intellectual Property Rights, April 15, 1994, Marrakesh Agreement Establishing the WTO, Annex 1C, Legal Instruments—Results of the Uruguay Round vol. 31; 33 I.L.M. 1125 (1994) [hereafter TRIPs Agreement]. The text of the TRIPs Agreement can be found on the WTO website at [http://www.wto.org/english/docs\\_e/trips.pdf](http://www.wto.org/english/docs_e/trips.pdf).

<sup>176</sup> Закон Российской Федерации "Об Авторском Праве и Смежных Правах" [Law of the Russian Federation on Copyright and Neighboring Rights] No. 5351-1 of July 9, 1993, Ведомости Съезда Народных Депутатов Российской Федерации И Верховного Совета Российской Федерации [Вед. РФ] [Bulletin of the Congress of People's Deputies of the Russian Federation and Supreme Council of the Russian Federation] 1993, No. 32, Item 1242, amended by Federal Law No. 110-FZ of 19 July 1995, Собрание Законодательства Российской Федерации [SZ RF] [Russian Federation Collection of Legislation] 1995, No. 30, Item 2866 (compiled translation available from Garant-Service, document no. 10001423) and Federal Law No. 72-FZ of July 20, 2004, Собрание Законодательства Российской Федерации [SZ RF] [Russian Federation Collection of Legislation] 2004 No. 30, Item 3090 (translation available from Garant-Service, document no. 12036318) (hereinafter collectively the Russian Copyright Law); Sergey Budylin & Yulia Osipova, *Is AllofMP3 Legal? Non-Contractual Licensing under Russian Copyright Law*, 7 J. HIGH TECH. L. 1, 3 n.16 (2007) [hereafter Budylin & Osipova].

<sup>177</sup> In addition to the general Law on Author's Rights, there also exists a 1992 Law on the Legal Protection of Programs of Electronic Computers and Data Bases (as amended 24 December, 2004). Pursuant to this law, computer programs are treated as works of literature, and data bases, as collections. The substantive provisions of the law are similar to the Law on Author's Rights. See W.E. Butler, INTELLECTUAL PROPERTY, at xxii. A Russian Agency for the Legal Protection of Computer Programs, Data Bases, and Integral Microcircuits was formed to register computer programs, data bases, and topologies and contracts assigning such (pursuant to the 1992 law on Computers and Data Bases, amended in 2004). However, it is unclear how many computer programs were or are voluntarily registered with this agency.

<sup>178</sup> In 2006, the Supreme Court of the Russian Federation issued an advisory opinion seeking to clarify the then-existing copyright law, delineate civil and criminal jurisdiction, procedure and evidentiary rules, and highlight the need for further reform as a result of challenges posed by the Internet. See Supreme Court of the Russian Federation: *О вопросах, возникших у судов при рассмотрении*



way that it is accessible for any person in the interactive mode from any place and at any time at his choice (right of making available to the general public).”<sup>179</sup> A limited fair use exemption was provided in Articles 20-24 covering traditional cultural, educational and scientific uses.<sup>180</sup> Part IV of the Russian Civil Code was adopted in 2006 and became effective on January 1, 2008.

These reforms were meant to be evolutionary, to gradually modernize and bring Russian law into line with international norms. However, aside from mandatory harmonization required by Article 15(4) of the Russian Constitution, Russia also sought to voluntarily harmonize its domestic IP regime with WTO-related IP norms. How did Russia interpret these obligations? To what extent did Russia succeed in coordinating its domestic legal regime with TRIPs? We can analyze these questions through Russia’s evolving conceptions of fair use/free license in copyright policy. Fair use is a useful analytical frame because it illustrates where a legal regime strikes the balance between individual rights to a given work and social or public rights. For instance, if during Soviet times legal doctrine avoided the term ‘intellectual property’ altogether—criticizing it for not only its inaccuracy but for being bourgeois and exploitative<sup>181</sup>—and provided fairly broad fair use exceptions to copyright, analyzing fair use in the post-Soviet context elucidates the continuities/changes between Soviet and post-Soviet sensibilities<sup>182</sup> towards intellectual property more broadly.

Prior to embarking on the fair use analysis, however, a review of the driving forces (domestic and international) behind the harmonization reforms is necessary.

#### B. Policy-Driven Harmonization (2000-Present)

Effective January 1, 2008, Russia’s entire intellectual property regime is codified in a new Part IV of the Russian Civil Code.<sup>183</sup> The stated purpose of Russia’s new Part IV of the Civil Code (hereafter “New Copyright Law”) was to bring Russian copyright law into line with international copyright norms.<sup>184</sup>

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*гражданских дел, связанных с применением законодательства об авторском праве и смежных правах*, Plenum decision no. 15 of June 19, 2006 [On Questions Regarding the Application of the Copyright Law], available at [http://www.supcourt.ru/vscourt\\_detale.php?id=4349](http://www.supcourt.ru/vscourt_detale.php?id=4349).

<sup>179</sup> See Budylin & Osipova, *supra* note X, at 4 (this provision went into effect on September 1, 2006, but has since been superseded by Part IV of the Russian Civil Code).

<sup>180</sup> 1993 Law on Author’s Rights, Arts. 20-24 (author’s translation).

<sup>181</sup> W.E. Butler, *INTELLECTUAL PROPERTY LAW IN RUSSIA* X (4th ed. 2005).

<sup>182</sup> ‘Sensibility’ here refers to the opinions of legal scholars and policymakers regarding a given proposition. Research has revealed no opinion polls, or ethnographic data, on the topic of intellectual property rights in the late 1980s and early 1990s from the perspective of Soviet citizens. The assertions, therefore, are based on logical inferences, doctrinal writings, and a small unscientific opinion sample from Russian colleagues.

<sup>183</sup> Alexander L. Makovsky, *On the Fourth Part of Russia’s Civil Code*, in *CIVIL CODE OF THE RUSSIAN FEDERATION, FOURTH PART 24* (Peter Maggs, Alexander Makovsky, eds., 2008) (offering a parallel English-Russian translation).

<sup>184</sup> R.F. Civil Code, Part IV, available at <http://copyright.ru/ru/library> (Russian).

The express goal was harmonization of Russia's entire IP regime—not merely individual normative acts, but the entire regulatory and enforcement system—with the standards set forth in multilateral conventions, namely TRIPS, but also other conventions.<sup>185</sup> The law reform project followed more than ten years of advisory work from the U.S., the WTO and international IP organizations.<sup>186</sup> The reform project was championed by a number of domestic actors, such as the Moscow Media Law and Policy Institute and media industry groups, who sought to clarify the confusing maze of rights and obligations under previous legislation. But a foreign lobby also took active part in shaping the new law. A common overarching political reality for both camps was that perceived success/failure of the reforms would influence Russia's accession to the WTO.<sup>187</sup>

#### 1. *WTO, TRIPs, & the American Lobby*

Russia's long road to WTO membership began almost twenty-five years ago. Even under the Soviet Union, it should be remembered, one of the first steps of the Gorbachev administration was to apply for membership to the GATT in August 18, 1986 and to participate in the Uruguay rounds, both of which were rejected by the West.<sup>188</sup> The Russian Federation re-applied for

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<sup>185</sup> V.N. Monakhov, Conference Presentation, "Mass Information in Internet: Freedom and Responsibility," Moscow State University, Faculty of Journalism (October 12-13, 2007). A draft version of the present section was presented at the conference. Sample treaties include the Berne Convention for the Protection of Literary and Artistic Works (September 9, 1886, last amended 1979) (In force in the Russia Federation since March 13, 1995); Brussels Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite (May 21, 1974) (In force in Russian Federation since January 20, 1989); Madrid Agreement for the Repression of False or Deceptive Indications of Source on Goods (April 14, 1981) (Revised at Washington on June 2, 1911, at The Hague on November 6, 1925, at London on June 2, 1934, and at Lisbon on October 31, 1958 and was added to in Stockholm on July 14, 1967); Paris Convention for the Protection of Industrial Property (March 20, 1883, last amended 1979) (In force in Russian Federation since August 12, 2009); Patent Law Treaty (September 1, 2000)(Currently there are 62 signed parties. In force in Russian Federation since August 12, 2009); Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms (October 29, 1971) (Currently there are 80 parties who have signed, Russian Federation in force since March 13, 1995); Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (October 26, 1961) (In force in Russian Federation since May 26, 2003); Trademark Law Treaty (October 27, 1994) (77 signers, Russian Federation signed May 11, 1998); Washington Treaty on Intellectual Property in Respect of Integrated Circuits (May 26, 1986) (Ten signers include Zambia, Serbia, Saint Lucia, Liberia, India, Guatemala, Ghana, Egypt, China, Bosnia and Herzegovina); WIPO Copyright Treaty (December 20, 1996); WIPO Performances and Phonograms Treaty (WPPT) (December 20, 1996).

<sup>186</sup> Ольга Плешанова, *Гражданский кодекс разошелся с требованиями ВТО*, Коммерсантъ (24.07.2006) [Olga Pleshanova, *Civil Code Departs from Demands of WTO*, Kommersant (July 24, 2006), available at, <http://www.kommersant.ru/doc.aspx?DocsID=692256> (last accessed June 7, 2007).

<sup>187</sup> RUSSIA IN THE INTERNATIONAL CONTEXT: PRIVATE INTERNATIONAL LAW, CULTURAL HERITAGE, INTELLECTUAL PROPERTY, HARMONIZATION OF LAWS, Festschrift for Mark M. Boguslavskij (A. Trunk, R. Knieper, A.G. Svetlanov, eds., Berlin, Berliner Wissenschafts-Verlag, 2004).

<sup>188</sup> KAZIMIERZ GRZYBOWSKI, *SOVIET INTERNATIONAL LAW AND THE WORLD ECONOMIC ORDER* 187 (Duke, 1987).

GATT membership in 1993, one year after the dissolution of the USSR.<sup>189</sup> Russia's WTO accession process has been tumultuous, and reflects many of the broader anxieties about liberalization reforms in Russia over the past twenty years. This is not the place to delve into the large literature on Russia and the WTO,<sup>190</sup> but a review of the debate over TRIPs<sup>191</sup> and IP reform is necessary.

Russia's IP regime first gained widespread global attention around the late 1990s and early 2000s, when a vocal opposition to Russian piracy, coupled with lax IP regulation, began to take shape in the West.<sup>192</sup> The West's criticism had several roots. First, Russia's large, highly-educated and technologically-savvy work force (diminished and, perhaps, emboldened by the "brain drain" of the 1990s) began to use the Internet to download vast amounts of copyrighted Western-sourced media, including video games, computer programs, film, music, and electronic books. Second, around the late 1990s the rate of high-profile hacking, spamming and phishing attacks originating from Russia began to multiply exponentially. These attacks raised public awareness of the danger posed by emerging technologies, especially in light of then-impending Y2K crisis. A third publicized source of tension between America and Russia was America's allegation that the Russian government was complicit in its public's obsession with Internet piracy by completely disregarding its obligations to protect copyright with respect to new and emerging technologies.<sup>193</sup> This was seen as due to weak enforcement mechanisms, corruption, low penalties, and "lack of education and training for law enforcement and judicial officers."<sup>194</sup>

A common sentiment among Western observers in the early to mid-2000s was that among the world leaders in global music piracy, Russia had

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<sup>189</sup> Elmira Danelyan, *Russia's Long Journey to the WTO: Whose Interests Will Be Served if Russia Joins the World Club?*, 1:4 LANDSLIDE 52, 52 (2009).

<sup>190</sup> Chiedu Osakwe, David Tarr, James Collins, Aleksey Shishayev, Uri Dadush, *Russia's Accession to the WTO*, CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE (December 10, 2009), available at <http://www.carnegieendowment.org/events/?fa=eventDetail&id=1496>; see also Jasmine Cameron, *WTO Accession and Legal Tradition in the Area of Intellectual Property Rights: A Comparative Case Study of Kyrgyzstan and Russia*, 11 J. OF EAST EUROPEAN LAW 1, (2004) (referring to a speech by Mike Moore, Director-General of the WTO at the Fifth Annual Russian Economic Forum on "Russia and the WTO: Reintegration in the World Economy" ¶2 (April 19, 2002) available at [http://www.wto.org/french/news\\_f/spmm\\_f/spmm84\\_f.htm](http://www.wto.org/french/news_f/spmm_f/spmm84_f.htm); Harry G. Broadman, *Russian Trade Policy Reform for WTO Accession*, WORLD BANK DISCUSSION PAPERS, v. 401, at 41, 51-53 (1999); see also Christian Broadbent & Amanda M. Mcmillian, *Russian and the World Trade Organization: Will TRIPS be a stumbling block to accession?* 8 DUKE J. COMP. & INT'L L. 519 (1998).

<sup>191</sup> The TRIPs Agreement, in concordance with the general WTO regime, prohibits intellectual property laws from offering any benefits to local citizens which are not available to citizens of other TRIPs signatories.

<sup>192</sup> See David E. Miller, *Combating Copyright Infringement in Russia: a Comprehensive Approach for Western Plaintiffs*, 33 VAND. J. TRANSNAT'L L. 1203, 1220 (2000).

<sup>193</sup> *Id.* at 1207-1212.

<sup>194</sup> *Hearing to Explore Permanent Normal Trade Relations for Russia: Before the Subcommittee on Trade of the House of Representatives, Committee on Ways and Means, 107th Congress (April 11, 2002)* (Statement of Thomas R. Pickering, Boeing).

one of the largest piracy problems, due to inadequate laws and inadequate enforcement mechanisms.<sup>195</sup> Despite a computer-literacy and population rate that was a fraction of China's, the Russian threat was perceived as equaling, if not exceeding, China's. This was partly due to China's earlier adoption of IP regulations (China joined the WTO in 2001), but may also have reflected Cold War-era mistrust and apprehension. Rhetoric from American industry groups like the Recording Industry Association of America (RIAA) and political leaders bears this out. In 2005, for instance, Sen. Orrin Hatch (R-UT), stated that before he votes on Russia's accession to the WTO, "many of us will have to be convinced that the Russian government is serious about cracking down on theft of U.S. intellectual property."<sup>196</sup> In addition to copyright claims, the U.S. contended that Russian law does not provide TRIPS-consistent protection against unfair commercial use of test data and other data submitted to obtain marketing approval for pharmaceutical and agricultural chemical products.<sup>197</sup> The 2006 annual U.S. Trade Representative 'Section 301' report, for instance, refers to deficiencies which include the "lack of an effective and deterrent criminal enforcement system[...], the lack of effective plant inspection [for optical media production and distribution] [...]; the lack of civil *ex parte* search procedures; an extremely porous border; delays in criminal prosecutions and adjudications; and infrequent destruction of seized pirate goods."<sup>198</sup>

To overcome this impasse, in November 2006, U.S. and Russia signed a 'market access agreement' requiring Russia to take action to address piracy, along with continuing law reform, before the United States would consent to Russia joining the WTO.<sup>199</sup> In a side letter to the market access agreement, the U.S. singled out Russian optical media (CD, DVD) factories and Internet servers that manufactured or distributed foreign copyrighted works, calling on

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<sup>195</sup> Michael Mertens, *Thieves in Cyberspace: Examining Music Piracy and Copyright Law Deficiencies in Russia as it Enters the Digital Age*, 14 U. MIAMI INT'L & COMP. L. REV. 139, 143 (2006) [citing *The Recording Industry Commercial Piracy Report 2* (2004)]; see also *Russia loses WTO bid as G8 begins*, <http://news.bbc.co.uk/2/hi/europe/5183892.stm> (16 July, 2006), last visited September 6, 2007 (describing Bush-Putin talks prior to G8 summit relating to enforcement of Russian laws against the piracy of American music, computer programs and DVDs).

<sup>196</sup> Bradley S. Butterfield, Kevin J. Mason, Joseph B. Payne, and Robert R. Trumble, *Human Resources and Intellectual Property in a Global Outsourcing Environment: Focus on China, India, and Eastern Europe*, 15 SPRING INT'L H.R. J. 1 (2006).

<sup>197</sup> Office of U.S. Trade Representative, 2005 SPECIAL 301 REPORT, available at <http://jakarta.usembassy.gov/econ/annual/2005%20USTR%20Special%20301%20Report.pdf> (last accessed Feb 24, 2010).

<sup>198</sup> Laurence R. Helfer, *The New Innovation Frontier? Intellectual Property and the European Court of Human Rights* Note 218, 49 HARV. INT'L L.J. 1 (2008). Helfer also refers to Gary G. Yerkey, *Russia Needs to Do 'Much More' Before U.S. Will Sign Off On WTO Accession Agreement*, 6 WTO REP. (BNA) No. 184 (Sept. 22, 2006).

<sup>199</sup> See Susan Butler, *U.S. Labels Target Russian Music Site [AllofMP3.com]*, BILLBOARD 17 (January 27, 2007); Office of U.S. Trade Representative, *Fact Sheet, Results of Bilateral Negotiations on Russia's Accession to the World Trade Organization* (November 19, 2006), available at <http://www.ustr.gov/>.

the Russian government to aggressively target these offenders.<sup>200</sup> In exchange for Russia's agreement to step-up enforcement and to streamline the passage of Part IV of the Civil Code, the U.S. promised to provide further training and advisory support for the Russian Ministry of Economic Development and Trade.<sup>201</sup>

Notwithstanding the market access agreement and assurances from Russian leaders, losses from IP infringement originating in Russia continue to rise. An annual report compiled by the the Office of the U.S. Trade Representative pursuant to section 182 of the U.S. Trade Act of 1974 provides a glimpse into the alleged losses from copyright infringement in countries like Russia.<sup>202</sup> In year 2009 alone, the estimated losses from Russian piracy of business software were nearly \$1.9 billion.<sup>203</sup> In sum, the American copyright industry estimates that it loses at minimum, an estimated \$2.5 billion dollars to Russian piracy each year, and these figures do not include estimates for losses of records and music, motion pictures, entertainment software, and books. Consequently, the United States Trade Representatives maintains Russia on its "Priority Watch List". By comparison losses due to Chinese piracy (with its significantly larger population and computer and internet access rates) amount to \$3.5 billion.<sup>204</sup>

## 2. *Russian Civil Code (Part IV) and Legal Licenses*

The following section outlines several substantive provisions relating to legal licenses / fair use, and compares them with established American fair use standards to determine the extent of likely actual harmonization. The U.S. copyright law and fair use exemption are chosen as a functional equivalent<sup>205</sup> for the rich number of cases interpreting and applying the fair use doctrine

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<sup>200</sup> Office of U.S. Trade Representative, U.S. Russia Bilateral Market Access Agreement - Side Letter on Intellectual Property Rights (November 19, 2006), *available at* [http://ustraderep.gov/assets/World\\_Regions/Europe\\_Middle\\_East/Russia\\_the\\_NIS/asset\\_upload\\_file148\\_10011.pdf](http://ustraderep.gov/assets/World_Regions/Europe_Middle_East/Russia_the_NIS/asset_upload_file148_10011.pdf); U.S.-Russia Bilateral Market Access Agreement on Intellectual Property Rights, *available at*, [http://ustraderep.gov/Trade\\_Sectors/Intellectual\\_Property/Russia/Section\\_Index.html](http://ustraderep.gov/Trade_Sectors/Intellectual_Property/Russia/Section_Index.html).

<sup>201</sup> *Id.* (Side Letter from Minister of Economic Development and Trade of Russian Federation, German Gref, to U.S. Trade Representative Susan C. Scwab dated November 19, 2009).

<sup>202</sup> The "Special 301" Report is an annual review of the global state of intellectual property rights (IPR) protection and enforcement, conducted by the Office of the United States Trade Representative (USTR) pursuant to Section 182 of the Trade Act of 1974, as amended by the Omnibus Trade and Competitiveness Act of 1988 and the Uruguay Round Agreements Act (enacted in 1994). See 19 U.S.C., Ch. 12 § 2101 *et seq.*

<sup>203</sup> These statistics are compiled by the International Intellectual Property Alliance (IIPA) and incorporated into the Special 301 Report. See IIPA 2010 'Special 301' Recommendations, *available at* <http://www.iipa.com/rbc/2010/2010SPEC301LOSSLEVEL.pdf>. By comparison, the 2008 losses from Russian piracy of business software were nearly \$2.8 billion (and \$2.3 billion in 2007). Globally, annual American losses due to IP violations amount to more than \$100 billion, according to one U.S. trade group, the Coalition Against Counterfeiting and Piracy (headed by NBC VP Rick Cotton). See Darrell A. Hughes, *NBC VP: US Needs Intellectual-Property Rights Protection Plan*, WALL STREET JOURNAL (February 18, 2010), *available at* <http://online.wsj.com/article/BT-CO-20100218-714295.html>.

<sup>204</sup> *Id.*

<sup>205</sup> See Graziadei, *supra* note X.

and the dominance of the U.S. approach in international IP regulation regimes. Copyright infringement claims in Russia and the U.S. also often arise from similar factual circumstances, especially in cases involving copyright infringement on the Internet.

Article 1245 of the Civil Code of the Russian Federation (all subsequent article references are to the New Copyright Law) governs the reproduction of copyrighted works in the form of “home copies”—limited copies of copyrighted musical works for private use. Even “home” reproduction of such musical works must be compensated. As before, copyrighted musical works are protected more strictly than other audiovisual electronic works, notwithstanding the fact that currently, more and more books, academic materials, and other works containing scientific, artistic, photographic or other non-musical works take the form of electronic (easily reproducible) works. The distinction between musical and other audiovisual electronic works made in Article 1245 illustrates the ambiguity of the current scheme. Thus, traditionally protected right to “home copy” musical works for personal archive needs is eliminated, while allowing home reproduction of non-phonographic or non-musical works. Such ambiguities abound in the new law.

Article 1266 protects authors’ rights to prohibit alterations of their works.<sup>206</sup> Pursuant to this law, the author’s written permission is required to make any additions, alterations, deletions, provision of illustrations, to issue a preface, postscript, or add comments or explanations to a text. In short, all alterations of a work are prohibited without the author’s express consent, save the separately preserved right for parodies and caricatures. This Article marks a strong departure from the previous right against alteration. Currently, the author’s right to his/her “reputation” is invoked solely in instances where the alterations may have caused an infringement on the author’s reputation or honor.

Article 1273 provides for a limited “private use” exemption. Pursuant to this Article, reenactment of a copyrighted work is permitted so long as it is strictly performed for private use.<sup>207</sup> However, similarly to Article 1245 (Right to “Home Copy”), the private use exemption is ambiguous on its face. Applied to the Internet context, the provision becomes doubly unclear. First, the term “reenactment” (воспроизведение) does not clearly define a particular set of permissible rights/acts. Secondly, “private use” is notoriously fuzzy when applied to the Internet. For instance, is posting a clip of copyrighted music on a private Internet message board so that the individual

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<sup>206</sup> These rights are properly titled the rights of inviolability over a given copyrighted work (права на неприкосновенность произведения).

<sup>207</sup> See Статья 1273 (Свободное воспроизведение произведения в личных целях допускается без согласия автора или иного правообладателя и без выплаты вознаграждения воспроизведение гражданином исключительно в личных целях.) [Article 1273 (The free right of reproduction for private use is allowed without the permission of the author or the holder of author’s rights and without compensation.)].

can enjoy clips of such music remotely considered private use, or does the fact that the music clip is reproduced and hosted on a remote server sufficient to constitute illegal reproduction?

Article 1274 contains a limited “cultural use” exemption.<sup>208</sup> This section provides a legal license for free use of copyrighted material in “informational,” scientific, educational or cultural contexts. Although the educational/cultural exemption seems broad, the exemption itself is subject to several very broad limitations. For instance, pursuant to Article 1274, section 2, libraries may lend electronic versions of copyrighted works (CDs, DVDs, VCR cassettes, e-books) only so long as the works are viewed in library facilities, under conditions making reproduction impossible. Immediately, such a limitation bans legitimate educational/cultural uses of films and musical works in the home or classroom context. Clearly, the limitation on libraries’ rights to lend cuts deeply into the educational and cultural prerogatives of the libraries, namely the free and reasonable dissemination of knowledge and literary/cultural works.<sup>209</sup> Moreover, beyond restricting citizens’ longstanding rights to fair, uncompensated use of copyrighted works via the libraries, the article arguably infringes on legitimate, constitutionally-protected rights to access information, especially of those who are unable to travel and/or visit libraries.

Article 1275 echoes the restrictive and outdated spirit of Article 1274. This article grants libraries the right to reproduce one copy of a copyrighted work without compensation for purposes of archiving the given work. Like Article 1274, Article 1275, section 2 contains a draconian limitation, prohibiting the reproduction or storage of reproduced works via electronic means.<sup>210</sup> In other words, libraries may reproduce works via facsimile with

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<sup>208</sup> See Статья 1274 (Свободное использование произведения в информационных, научных, учебных или культурных целях.) [Article 1274 (The free use of copyrighted works for informational, scientific, educational/teaching and cultural purposes).].

[...]

2. В случае, когда библиотека предоставляет экземпляры произведений, правомерно введенные в гражданский оборот, во временное безвозмездное пользование, такое пользование допускается без согласия автора или иного правообладателя и без выплаты вознаграждения. При этом выраженные в цифровой форме экземпляры произведений, предоставляемые библиотеками во временное безвозмездное пользование, в том числе в порядке взаимного использования библиотечных ресурсов, могут предоставляться только в помещениях библиотек при условии исключения возможности создать копии этих произведений в цифровой форме.

[2. When a library offers samples of works that have been legally introduced into public use, for temporary non-profit use, this use is allowed without the consent of the author, the holder of the author’s rights, and without compensation. Electronic copies of works, including works introduced for reciprocal use of resources, may be lent only in the library facilities and under conditions prohibiting the possibility of creation [reproduction] of these works in digital form.]

<sup>209</sup> See Janice T. Pilch, *Fair Use and Beyond: The Status of Copyright Limitations and Exceptions in the Commonwealth of Independent States*, 65(6) COLLEGE AND RESEARCH LIBRARIES 468–504 (November 2004) (discussing the evolution of fair use in Russia between the 1995 and 2004 legislation).

<sup>210</sup> See Статья 1275 (Свободное использование произведения путем репродуцирования) [Article 1275 (Free use of works using reproduction)].

[...]

the aid of any technical devices, but so long as the devices do not yield electronic copies of the works.

To put it mildly, the “one analog copy” rule is a relic of an analog past.<sup>211</sup> Moreover, this rule, far from enabling a vibrant multi-media academic atmosphere, stifles research, by reducing legitimate fair electronic uses to paper reproductions.<sup>212</sup> The practical effect of Articles 1274 and 1275 read together is shocking. Schools are permitted to reproduce paper excerpts of given texts, but may not distribute identical excerpts in electronic form to students.

Article 1276 codifies a limited “public domain exemption.”<sup>213</sup> Pursuant to this provision, if an architectural or artistic object is in the public domain, reproductions may be made of it and distributed via airwaves or via electronic means. As with the foregoing limited copyright exemptions, the scope of this exemption in the Internet context remains unclear. Nevertheless, this provision offers substantive justification for an expanded conception of free licensed use on the Internet. Thus, photographs of copyrighted works which are found in public squares may be broadcast on the Internet. However, it is unclear whether reproductions of copyrighted works appearing in publicly-accessible museums would fall within this exemption. As will be analyzed below, this positive provision should be interpreted to allow distribution of works in all public (i.e., public squares) and quasi-public (i.e., museums) domains via electronic means such as the Internet.

## 2. *Russian Legal Licenses v. U.S. ‘Fair Use’ & Berne Convention*

As shown above, the New Copyright Law seeks to bring Russian law into line with strict international copyright norms. Consistent with the Berne three-part test, the New Copyright Law provides only the most limited legal licenses or so called “fair use” exemptions to copyright. The following section shall compare the legal licenses afforded by Russian law with the right

2. Под репродуцированием (репрографическим воспроизведением) понимается факсимильное воспроизведение произведения с помощью любых технических средств, осуществляемое не в целях издания. Репродуцирование не включает воспроизведение произведения или хранение его копий в электронной (в том числе в цифровой), оптической или иной машиночитаемой форме, кроме случаев создания с помощью технических средств временных копий, предназначенных для осуществления репродуцирования.

[2. Reproduction (reprographic reproduction) is understood to mean facsimile reproduction of a given work with the help of any technical device, aside from the initial production. Reproduction does not include reproduction or storage of copies in electronic (including digital), optical or other machine form, except in instances of creation with the aid of technical devices of temporary copies, for the purpose of reproduction.]

<sup>211</sup> Pnina Shachaf and Ellen Rubenstein, *A Comparative Analysis of Libraries’ Approaches to Copyright: Israel, Russia, and the U.S.*, 33:1 JOURNAL OF ACADEMIC LIBRARIANSHIP 94–105 (2006).

<sup>212</sup> For instance, Article 1275, section 1, subsection 2, provides that reproductions of *excerpts* of copyrighted works may be made upon request from private citizens, but also for educational/scientific uses. This is a subtle but drastic departure from the existing law which contains language seemingly allowing *entire* works to be reproduced for educational use.

<sup>213</sup> Статья 1276. Свободное использование произведения, постоянно находящегося в месте, открытом для свободного посещения. [Article 1276 (uncompensated use of likeness of work located in a public place)].



to “fair use” embodied in U.S. copyright law.

The “fair use” exemption to the U.S. Copyright Act is codified in 17 U.S.C. section 107.<sup>214</sup> Section 107 also sets out four factors to be considered in determining whether or not a particular use is fair:

- (1) the purpose and character of the use, including whether such use is of commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) amount and substantiality of the portion used in relation to the copyrighted work as a whole;
- (4) and the effect of the use upon the potential market for or value of the copyrighted work.<sup>215</sup>

All four of these factors require fact-based analysis, and require a court to look at the specific work at issue and the surrounding circumstances of its copying to determine whether an infringement has occurred.<sup>216</sup> As the U.S. Supreme Court has stated in one of its most recent copyright decisions:

[T]he “fair use” defense allows the public to use not only facts and ideas contained in a copyrighted work, but also expression itself in certain circumstances. . . . *The fair use defense affords considerable latitude for scholarship and comment.*<sup>217</sup>

The scope of this “considerable latitude” is varied in U.S. Supreme Court jurisprudence. Nevertheless, the ambiguity in the scope allows for a wide range of ostensibly permissible uses, with only the risk of *post-facto* sanctions for copyright infringement. In other words, rather than providing a strict positive enactment of permissible uses, the U.S. copyright law establishes a flexible retroactive “fair use” limitation.<sup>218</sup> In over 150 years of common law litigation (prior to codification in 1976<sup>219</sup>), this system has proven flexible yet procedurally and substantively fair by forcing plaintiffs to guard and enforce

<sup>214</sup> “[T]he fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.” 17 U.S.C. § 107 (2004). The U.S. Berne Convention Implementation Act of 1988, an amendment to the Copyright Act of 1976, modified several aspects of U.S. copyright law to harmonize with the requirements of the Berne Convention (Paris Act, 1971) and entered into force on March 1, 1989. The Berne Implementation Act granted limited moral rights to authors of visual works within complex limits, but did not modify the ‘fair use’ regime.

<sup>215</sup> FL-102, Revised July 2006, US Copyright Office, [www.copyright.gov/fls/fl102.html](http://www.copyright.gov/fls/fl102.html) (last accessed on May 11, 2007).

<sup>216</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577-78 (1994) (“[Fair use in copyright] is not to be simplified with bright-line rules,” but rather in “case-by-case analysis” in which the four factors “are to be explored, and the results weighed together, in light of the purposes of copyright [and the equities].”); see also WILLIAM F. PATRY, *THE FAIR USE PRIVILEGE IN COPYRIGHT LAW* 261-65 (2nd ed., 1995).

<sup>217</sup> *Eldred v. Ashcroft*, 537 U.S. 186, 219-220 (2003) (emphasis added).

<sup>218</sup> See generally Gervais, Daniel J., *Towards A New Core International Copyright Norm: The Reverse Three-Step Test*, 9 *MARQUETTE INT. PROP. L. REV.* 1, 10 (Spring 2005) [hereafter Gervais, *Reverse Three-Step Test*].

<sup>219</sup> The U.S. Copyright Act of 1976 was a comprehensive revision of the 1909 Copyright Act. It became effective on January 1, 1978.

their rights.<sup>220</sup>

There are a number of practical consequences of this “reverse” approach. First, it gives private individuals and educational/cultural institutions the right to independently assess their own conduct and develop unique policies for non-infringement, based on their own capacities for risk, litigation, etc. Thus, educational bodies such as universities may interpret the first factor in the “fair use” test—whether the use is for a commercial purpose or a non-profit educational purpose—rather broadly (perhaps as a dispositive factor), and opt to provide clearly copyrighted material to their students under the guise of “fair use”.<sup>221</sup>

The Russian legal licenses provided in the New Copyright Law correspond to the “fair use” standard found in U.S. copyright law. Major categories of historically protected use are respected in the New Russian Law. Thus, the major academic rights are adequately protected: the right to use excerpts of works in an academic setting; the right to create an archival reproduction of copyrighted works; the right to reproduce works for “personal use”. In the traditional print and durable media context, these major rights are uncontroversial.

Nevertheless, with respect to emerging technologies, the positive limited legal license approach is unworkable. For instance, one can imagine myriad legitimate educational uses of copyrighted musical or film works in the home or classroom setting. Accordingly, many U.S. libraries with flexible interpretations of the “fair use” standard allow their borrowers to rent copyrighted musical works, videos, DVDs, etc. in furtherance of their educational/cultural missions. Of course, certain other U.S. libraries do not have faith in the purely educational motives of their patrons and restrict borrowing of these materials out of fear that the materials are being illegally reproduced.<sup>222</sup> The important point, however, is that these libraries have an independent right to interpret their patrons’ habits and devise policies which they feel adequately embody true “fair use”. In other words, there is a freedom to make new technologies available, but the freedom imposes on libraries, and their borrowers, the responsibility to use the technologies in a responsible, copyright-friendly manner. Depending on their preference for risking copyright infringement lawsuits, libraries can adapt to completely new technologies (providing copyrighted works via electronic means to their patrons) or opt in favor of tried and true paper book lending models.<sup>223</sup> As a

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<sup>220</sup> cf. D. Nimmer, *Fairest of them All and Other Fairy Tales of Fair Use*, 66 LAW & CONTEMP. PROBLEMS 263 (2003) (describing inconsistency in applying the ‘fair use’ standard).

<sup>221</sup> Indeed, this is the rationale employed by multiple major research universities in the United States (such as the University of Michigan) for allowing the Google Books project to scan, copy and reproduce their entire collections.

<sup>222</sup> I draw on my personal experiences with public, private, academic and general use libraries in the U.S. and experiences with libraries in Russia.

<sup>223</sup> For instance, the Cornell University library system (along with several other American Ivy League universities) currently allows patrons to request portions of copyrighted works to be electronically imaged and sent to the borrowers via e-mail. This benefit is intended to serve Cornell

result, new technologies are used in innovative and efficient ways, contributing to broader dissemination of the original copyrighted work in question.

The new Russian model employs a completely different approach. By banning libraries from reproducing works in electronic form, Articles 1274 and 1275 reduce libraries to traditional book lending institutions, without much opportunity to become more. Not only are these acts unenforceable, but they unnecessarily inhibit innovation towards the development of more efficient library models.<sup>224</sup> Likewise, the new acts seem to outlaw existing innovative technological library projects such as the Open Russian Electronic Library<sup>225</sup> of the Russian State Library or the digitization efforts started by the Russian State Library in 1999 (ADAMANT project).<sup>226</sup> Cases like *ZAO Kommersant, Publishing House v. ZAO Public Library & OOO Vector Info* will likely be resolved even more forcefully against private companies wishing to establish limited public access online libraries.<sup>227</sup>

More generally, in the words of one commentator, “fair use is a much more flexible and adaptable doctrine with respect to new forms of use than purpose-specific exception, most of which are not technologically neutral.”<sup>228</sup> This is not to say that the current “fair use” standard in American law is fully workable or theoretically sound with respect to alleged Internet copyright violations; it is not. The only real advantage of the fair use standard is its relative flexibility. Scholars know that they may use works “fairly” and act fairly according to their own meanings of what is “fair”. One student standing at a Xerox® may copy 5 pages of a textbook and deem it fair;

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scholars residing away from the main Ithaca, NY campus. The borrower of course assumes the duty to use the work in ways consistent with U.S. copyright laws.

<sup>224</sup> *Gevorkyan v. Moshkov*, <http://lenta.ru/news/2005/03/31/lib/>.

<sup>225</sup> *Открытая русская электронная библиотека*, <http://orel.rsl.ru> (last visited September 17, 2007) [with over 8,655 online books]; see also National Electronic Library, at <http://rusnel.ru/index.php> (last visited September 17, 2007) [providing free access to multiple current copyrighted literary works (i.e., 10 of Boris Akunin’s stories and plays, etc.)]. It should be noted that in its charter, the National Electronic Library requires member libraries and contributors to the electronic fund to be copyright holders or to act pursuant to the Law on Author’s and Neighboring Rights. See Section 1.1, Legal Basis, Charter of Russian Electronic Library, available at <http://rusnel.ru/conception.htm> (last visited September 17, 2007).

<sup>226</sup> The ADAMANT project was started in 1999 with the goal of digitizing (creating digital copies) of the entire Russian State Library collection, over 40 million works. The ADAMANT project eventually evolved into the Open Russian Electronic Library and the National Electronic Library. See <http://www.ifla.org/IV/ifla66/papers/056-142e.htm> (last visited September 6, 2007).

<sup>227</sup> V.B. Naumov, *LAW AND THE INTERNET: ESSAYS ON THEORY AND PRACTICE* 199-205 (Moscow: University Publishing House 2002). The case involved a private for-profit company which included copyrighted material in its paid library without the copyright holders’ consent. The court applied the law on libraries to the private company, holding that the company did not have a right to use the content. The holding rested on several factors: (1) the access to the website was on a subscription or paid basis; (2) the publication on the Internet differed from traditional library uses in that it was permanent. A modern case involving similar “embedded” content with a “time-bomb” (file expires after certain time) would have probably passed the court’s scrutiny under the current law. However, under the New Copyright Law, this act would probably constitute infringement.

<sup>228</sup> See Gervais, *Reverse Three-Step Test*, at 27.

another may copy 5 books and deem it fair academic use. Depending on the context, both instances may be legitimate fair use. The key is that it is not necessary to draw bright lines, to impose page limits on copies, or to restrict the modes of reproduction. Some students or professors may be caught copying books and may be forced to pay compensation, but most will know they have a reasonable right to copy, and more importantly, *will continue to copy*.

However, compared to the relatively flexible “fair use” standard which may be litigated following particular alleged copyright violations, the legal license approach works the opposite way – it seeks to enumerate specific rights that institutions have, but by doing so (and doing so ambiguously) it stifles the institutions’ rights to invent novel teaching techniques, experiment with new technologies in the classroom (multi-media teaching, playing films in cultural centers) *etc.*

To be sure, these problems are not unique to Russia. Nearly two decades of IP litigation in the US has not produced a workable “fair use” standard with respect to the copyright obligations of Internet service providers, Internet cataloguers, Internet encyclopedias and so forth. However, it is perhaps the failure to produce a comprehensive catalog of Internet rights and liabilities which has contributed to the dramatic growth of the information technology sector, and the Internet in particular. As renowned Internet law expert Lawrence Lessig and others have argued, it was perhaps a great boon to the IT industry and to American pop culture that many of the most popular Internet uses remained in legal limbo, or in the gray shadow of legitimacy in the first decade of the Information Age.<sup>229</sup> Even today, the most important issues of copyright law—the scope of the fair use exemption—are being tested and reshaped by Google (i.e., GoogleBooks) and numerous other Internet pioneers eager to stake legitimate legal claims to virgin Internet territory.<sup>230</sup> Despite new legislation in the U.S. such as the Digital Millennium Copyright Act (heightening penalties for copyright infringement on the Internet), U.S. law remains uncertain with respect to key copyright issues. Not surprisingly, as the law remains uncertain, innovation continues.

The Russian experience with Internet innovation has been equally if not more so spectacular since the early 1990s, precisely because of a similar legal uncertainty regarding the status of the Internet. For this reason, sites like AllofMP3 sprung onto the international stage, gaining wide following. Russian Internet use surged and a vibrant lucrative information technology

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<sup>229</sup> See generally LAWRENCE LESSIG, *FREE CULTURE* (2006), available at <http://www.free-culture.cc/freecontent/> (last accessed May 11, 2007).

<sup>230</sup> For instance, the right of search engines to display portions of other websites was extensively debated within academic circles in the early years of the Internet, with the courts ultimately ruling that search engine displays were permissible fair uses. See Wikipedia, Google Book Search, available at [http://en.wikipedia.org/wiki/Google\\_Book\\_Search](http://en.wikipedia.org/wiki/Google_Book_Search) (see fn. 18, noting that German court dismissed lawsuit against Google Book Search based on theory that Google’s display of portions of copyrighted work in Google Book Search engine was similar to search engines’ display of result data) (last accessed May 11, 2007).

sector was able to develop throughout Russia and the former Soviet Union countries, including smaller nations like Moldova. Immediately after its launch in 2000, AllofMP3 became embroiled in domestic lawsuits by international firms, including the American RIAA (Recording Industry Association of America). The disputes continued throughout the 2000s. Despite mounting international opposition, the legal theories being litigated before the local Moscow courts pointed to a growing appreciation among Russian jurists for American-style ambivalence in Internet law.<sup>231</sup> Uncertainty in Russian law on non-contractual licensing is also encouraging.<sup>232</sup>

In June 2007, the site was shut down due to pressure from the Russian government. Not coincidentally, the lawsuit by the RIAA was dropped shortly thereafter.<sup>233</sup> Since 2008, the New Copyright Law has signaled the start of a new era in Russian Internet law, marked by increasingly detailed positive laws relating to property rights in non-traditional media, Internet and over products of intellectual activity. Aside from an expected decrease in experimentation and innovation by information technology firms due to exposure to litigation risk, this new era is also marked by greater cooperation between Russia and Western firms in defense of these rights.

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The forecast for the immediate future of copyright in Russian Internet law seems filled with challenges. With the enactment of the New Copyright Law, Russia seems poised to take on an ambitious range of enforcement measures aimed at “cleaning up” its Internet, as well as its image with respect to copyright enforcement before the international community. The end result promises to be harmonization between Russian, EU and broader international copyright law, all aimed at supporting Russia’s accession to the WTO.<sup>234</sup>

Will Russia need to further amend its New Copyright Law to conform to WTO standards? It is doubtful that further law reform will be necessary, as the current law seems to codify the existing Berne three-step test<sup>235</sup> and is

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<sup>231</sup> On August 27, 2007, a Moscow district court rules that AllofMP3.com operated within the law, <http://www.allofmp3.ru/press.shtml> (last visited September 17, 2007).

<sup>232</sup> Budylin & Osipova, at 1.

<sup>233</sup> See Music Industry Drops Copyright Suit Against Russian Music Site, *available at* <http://www.allofmp3.ru/press.shtml> (last accessed September 24, 2009).

<sup>234</sup> Jasmine D. Cameron, *WTO Accession and Legal Tradition in the Area of Intellectual Property Rights: a Comparative Case Study of Kyrgyzstan and Russia*, 11 J. EAST EUR. L. 1 (2004).

<sup>235</sup> The Berne three-step test is a clause that has been included in several international treaties on copyright (notably the TRIPs Agreement, the WIPO Copyright Treaty, the EU Copyright Directive and the WIPO Performances and Phonograms Treaty). It imposes constraints on the possible limitations and exceptions to exclusive rights under national copyright laws. The most important version of the test is that included in Article 13 of TRIPs. It reads,

Members shall confine limitations and exceptions to exclusive rights to [1] certain *special cases* which [2] *do not conflict with a normal exploitation of the work* and [3] *do not unreasonably prejudice the legitimate interests of the rights holder*.

(The three steps have been italicized for emphasis.)

strictly applied in practice.<sup>236</sup> Thus far, the scope of this three-part test has not been delimited on the international plane, and application of the test has produced only general guidelines.<sup>237</sup> Furthermore, Russia has recently acceded to the WIPO Internet Treaties.<sup>238</sup>

Over the near term, one can expect that in the near term Russia will seek to further restrict fair use exemptions, particularly in the Internet context. To effect enforcement, Russia may even experiment with new anti-piracy measures such as Internet trolls, restrictive firewalls, and similar measures currently used and being developed by governments like China to restrict Internet access. With a large, highly sophisticated pool of information technology specialists, Russia is particularly well-equipped to experiment with disastrous Internet monitoring measures under the guise of copyright enforcement. The threat of such measures for media and particularly Internet freedom in Russia cannot be understated, especially in light of Russia's historical experience with state censorship and restrictions on information flows.

The New Copyright Law accomplishes exactly what its writers set out to do—it marks a complete break with any vestiges of Soviet thought that were remaining in the 1993 Law on Author's Rights (such as the broad academic/cultural use exemption) and harmonizes Russian law with existing international copyright norms. As has been argued elsewhere,<sup>239</sup> instead of developing workable parameters for copyright exceptions for the Internet or invoking new technologies which mitigate the threats against copyrights,<sup>240</sup> the New Copyright Law, rather than drawing a flexible line between copyrights and exceptions—freedom and responsibility—can have the unintended consequence of chilling the exercise of free speech. As a result of the strict New Copyright Law and out of fear of litigation, companies, organizations and individuals will be less likely to exercise their constitutionally protected speech and access to information rights not only in the Internet context, but also more generally. Subsequent waves of IP law reform in Russia will most likely attempt to delineate previously ambiguous

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<sup>236</sup> Research has not produced a sufficient number of Russian cases interpreting the New Copyright Law. Therefore, the analysis regarding likely application in practice based on first hand empirical research and discussions with Russian IP attorneys and scholars.

<sup>237</sup> See Gervais, *Reverse Three-Step Test*, at 13-19 [analyzing application of three-part test to US Copyright Act by 2001 WTO panel].

<sup>238</sup> The WIPO Internet Treaties refers to the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). The WCT and the WPPT entered into force on March 6, 2002, and May 20, 2002, respectively. See World Intellectual Property Organization, WIPO INTERNET TREATIES, available at [http://www.wipo.int/freepublications/en/ecommerce/450/wipo\\_pub\\_l450in.pdf](http://www.wipo.int/freepublications/en/ecommerce/450/wipo_pub_l450in.pdf).

<sup>239</sup> "Fair Use" In Russia's New Internet Regulation Regime—A Law and Economics Perspective, Conference Presentation, "Mass Information in Internet: Freedom and Responsibility," Moscow State University, Faculty of Journalism (October 12-13, 2007).

<sup>240</sup> For instance, Digital Rights Management, or legal recognition of viable read-only alternatives to text versions of e-books (i.e., non-printable, non-copyable Adobe .pdf files – such as Антон Сепро, ИНТЕРНЕТ И ПРАВО (2002), available at [http://internet-law.ru/book/text/book\\_5.pdf](http://internet-law.ru/book/text/book_5.pdf)).

rights.

The significance of domestic reforms in the IP sector are symptomatic of several developments in Russian international legal theory. First, they signify a general willingness to conform to customary and evolving international norms. The clear delineation of property rights, as I have argued above, and the domestic implementation of international norms aimed at defending these rights, constitutes a core function of public international law. Russian international lawyers are fully aware that state relations are no longer confined to matters of war and peace, but increasingly encompass commercial concerns. In Russia, economic practices and firm activity are perceived as having an impact on Russia's image as a responsible economic actor. The image of a predictable economic actor is also bolstered by actions which demonstrate predictable state action, and vice versa. This means that, for the immediate term at least, Russia will continue its efforts to strengthen its IP regime, especially in high-profile copyright infringement cases.

### C. Policy Tradeoffs, Resistance, Values and Interests

The historical outline provided above allows us to draw several normative lessons. First, and most significant, the WTO's continued opposition to Russia's accession has had the very real effect of forcing Russia to explore alternative economic integration arrangements, often along lines resembling the previous Soviet economic union.<sup>241</sup> Russia's surprise announcement in July 2009 that that it intended to accede to the WTO as a regional customs body along with Kazakhstan and Belarus (instead of as a state party) sent ripples of discontent in the international trade community. However, this resistance was to be expected. Russian international law doctrine has been voicing these concerns for at least the past five years.<sup>242</sup> Leading Russian jurists involved in the IP harmonization efforts, like Victor A. Dozortsev, genuinely hoped that their efforts would be rewarded with WTO accession and were surprised, if not outright offended,<sup>243</sup> when the U.S.

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<sup>241</sup> HIROSHI ODA, *RUSSIAN COMMERCIAL LAW* (2nd rev. ed., Nijhoff, 2007).

<sup>242</sup> Г.М. ВЕЛЪЯМИНОВ, *МЕЖДУНАРОДНОЕ ЭКОНОМИЧЕСКОЕ ПРАВО И ПРОЦЕСС* § 588 (Волтерс Клавер, 2004) (“Соответствующий договорно скрепленный синдром безответственности питает отчасти, наряду с прочими мотивами, и американское сопротивление формально давно назревшему приему России в ВТО, ибо в рамках этой организации придется отказаться от дискриминационной безответственности перед Россией.”) [G. M. VELYAMINOV, *INTERNATIONAL ECONOMIC LAW AND PROCEDURE* § 588 (WaltersKluwer, 2004) (“The corresponding and contractually binding syndrome of irresponsibility [regarding the U.S.-Russian bilateral agreement absolving U.S. firms of liability in Russia] partially feeds into, along with other motives, the American opposition to Russia's accession to the WTO, which is formally long overdue. As a result, Russia will likely be forced to withdraw from the discriminatory treatment [of the WTO].”). Velyaminov, a professor of law and a chief researcher at the ISL, is one of Russia's leading experts on international economic and trade law.

<sup>243</sup> Александр Л. Маковский, *Американская История*, 7(1) ВЕСТНИК ГРАЖДАНСКОГО ПРАВА 165-196 (2007) [Alexander L. Makovsky, *American History*, 7(1) VESTNIK GRAZHDANSKOGO PRAVA 165-196 (2007)] (discussing the involvement of individual U.S. Senators during the development of Part IV, and personal dissatisfaction with their conduct); See U.S. Senate Committee on Finance Letter to Acting U.S. Trade Representative (April 14, 2005), available at

continued to stall Russia's integration efforts.<sup>244</sup> American demands that copyright violations be governed by criminal, rather than civil law, and that software programs carry patent protection rather than copyright, were extensively debated in the Russian working group, but ultimately rejected on policy grounds, such as the fact that no Western European state afforded such protections.<sup>245</sup>

Second, America's insistence on further law reform—even after the passage of Part IV of the Civil Code—seems unlikely to resonate due to America's failure to deliver on *its* promises (most significantly, dropping opposition to WTO accession). For instance, in its 2009 'section 301' report, the Office of the U.S. Trade Representative looks to Russia to make further progress by ensuring that the Russian Customs Code, Civil Code and Law on Medicines comply with the IPR Bilateral Agreement and the relevant TRIPS Agreement obligations that will take effect upon Russia's accession to the WTO.<sup>246</sup> While these recommendations are certainly warranted, they are

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<http://finance.senate.gov/press/Gpress/2005/prg041405.pdf> (letter from Sens. Chuck Grassley and Max Baucus concerning reservations about Russia's accession to WTO due to IP infringement). Alexander L. Makovsky (b. 1930) is one of the leading civil law jurists in Russia and a renowned authority on intellectual property law. He was the deputy chair of the working group that developed Part IV. *See also* АЛЕКСАНДР Л. МАКОВСКИЙ, О КОДИФИКАЦИИ ГРАЖДАНСКОГО ПРАВА (1922-2006) (M: Статут, 2009) [Alexander L. Makovskii, On the Codification of Civil Law (1922-2006) (Moscow: Statute, 2009)], abstract *available at* [http://www.estatut.ru/pdf/161209\\_02.pdf](http://www.estatut.ru/pdf/161209_02.pdf); А.Л. Маковский, *Обращение к читателю*, ВЕСТНИК ГРАЖДАНСКОГО ПРАВА ("Создание нового российского гражданского законодательства еще не завершено. Далеко не все в уже принятых и действующих законах себя оправдало — это и многие «американизмы» в корпоративном праве и нормативных актах от инвестиционных ценных бумагах, и крайне противоречивое законодательство о некоммерческих организациях, и многое другое. Ряд крупных законов нуждается в продуманном совершенствовании. Не является в этом отношении исключением и Гражданский кодекс.") [Alexander L. Makovsky, *Appeal to the Reader*, VESTNIK GRAZHDANSKOGO PRAVA ("The creation of a new Russian civil code is not yet complete. By far not all of the adopted and active laws were vindicated [by history]—along with a number of "Americanisms" in corporate law and normative acts on investments and negotiable instruments, and contradictory legislation on NGOs, and much else. A series of major laws is in need of measured reevaluation, not excluding the civil code."), *available at* [http://www.mvgrp.ru/full\\_obr/](http://www.mvgrp.ru/full_obr/)].

<sup>244</sup> *See generally* ВИКТОР А. ДОЗОРЦЕВ, ИНТЕЛЛЕКТУАЛЬНЫЕ ПРАВА: ПОНЯТИЕ, СИСТЕМА, ЗАДАЧИ КОДИФИКАЦИИ (СБОРНИК СТАТЕЙ) (M: Статут, 2005) [VICTOR A. DOZORTSEV, INTELLECTUAL PROPERTY: CONCEPTION, SYSTEM AND PROBLEMS OF CODIFICATION (COLLECTED ARTICLES) (Moscow: Statute, 2005)]. Dozortsev (1928-2003) was one of the leading Russian jurists in the working group developing Part IV of the Civil Code. *See also*

<sup>245</sup> Ольга Плешанова, *Гражданский кодекс разошелся с требованиями ВТО*, Коммерсантъ (24.07.2006) [Olga Pleshanova, *Civil Code Departs from Demands of WTO*, Kommersant (July 24, 2006), *available at*, <http://www.kommersant.ru/doc.aspx?DocsID=692256> (last accessed June 7, 2007)]. U.S. copyright law also provides mainly civil remedies, though the U.S. government may file criminal charges for any violation of the Copyright Act provided that such infringement is undertaken "willfully" and "for purposes of commercial advantage or private financial gain." 17 U.S.C. § 506(a). However, the U.S. has moved more aggressively towards criminalizing copyright infringement, particularly to fight piracy over the Internet. *See, e.g.*, No Electronic Theft (NET) Act, Pub. L. No. 105-147, 111 Stat. 2678 (1997).

<sup>246</sup> Office of the United States Trade Representative, 2009 Special 301 Report (April 30, 2009) *available at* <http://www.ustr.gov/sites/default/files/Full%20Version%20of%20the%202009%20SPECIAL%20301%20REPORT.pdf>



increasingly perceived by Russian elites as disingenuous.

In contrast to the U.S., the EU has been consistently in favor of Russian accession notwithstanding Russia's evolving IP regime.<sup>247</sup> This may be reflected in the EU's own complex process of standardization in the realm of IP throughout the 1990s.<sup>248</sup> The underlying rationale behind EU standardization in the IP domain is similar to any harmonization project:

The underlying philosophy of standardization—to put ideas into the public domain—and the philosophy of intellectual property rights to maintain ideas or expression as private properties—are, to some extent, inconsistent and that [national] tensions between them could inhibit the rapid adoption of Community standards.<sup>249</sup>

However, the EU proceeded with the understanding that actual *de facto* harmonization could only occur as the result of actual trade, contestation, and revision over a prolonged period of time.<sup>250</sup> The EU's position on Russian intellectual property reform is informed by this pragmatic experience, and borne out by the harmonization reforms in former socialist countries that have since joined the EU. The principal lesson of EU harmonization in the IP domain was that even as states adopt formal European Community directives, emerging technologies will continue to challenge traditional IP forms.<sup>251</sup>

Third, while there is a dissenting isolationist strain in Russian foreign policy discourse,<sup>252</sup> Russian leaders and elites are fully committed to the view that increasing economic and cultural interconnectedness (the process of globalization) is a good thing. This thinking has been entirely consistent with the historical development of international law in the West<sup>253</sup> and in Russia since the collapse of communism. The notion that individuals and firms have

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<sup>247</sup> For EU-Russia trade issues related to Russia's accession to the WTO, see Rafael Leal-Arcas, *The European Union and New Leading Powers: Towards Partnership in Strategic Trade Policy Areas*, 32 *FORDHAM INT'L L.J.* 345 (2006); *Despite Obstacles, EU Expects Russia to Join WTO This Year*, INTERNATIONAL CENTRE FOR TRADE AND SUSTAINABLE DEVELOPMENT (June 2008), available at <http://ictsd.org/i/news/bridgeweekly/12267/>.

<sup>248</sup> MICHAEL A. EPSTEIN, RONALD S. LAURIE, LAWRENCE E. ELDER, *INTERNATIONAL INTELLECTUAL PROPERTY – THE EUROPEAN COMMUNITY AND EASTERN EUROPE* ¶ 12.5 (Prentice Hall & Business, 1993).

<sup>249</sup> *Id.* (citing European Commission, *Communication on the Development of European Standardization—Action for Faster Technological Integration in Europe*, COM (90) 456 final, 1991 (C 20) 1 [Green Paper], at 25).

<sup>250</sup> See Larry Catá Backer, *Harmonizing Law in an Era of Globalization – Convergence, Divergence, and Resistance: An Introduction and Analysis*, in *Harmonizing Law in an Era of Globalization* 3-17 (Larry Catá Backer, ed., Carolina, 2007) (suggesting that harmonization and convergence is primarily the result of, and in furtherance of, economic activity).

<sup>251</sup> See Peter Smulders, *The European Community and Copyright* § 4[2], in *INTERNATIONAL COPYRIGHT LAW AND PRACTICE* (Paul Edward Geller, ed., LexisNexis 2009).

<sup>252</sup> Вадим Цымбурский, *Остров Россия*, РУССКИЙ АРХИПЕЛАГ (2002) [Vadim Tsimburgskii, *The Island of Russia*, RUSSIAN ARCHIPELAGO (2002)], available at, [http://archipelag.ru/ru\\_mir/ostrov-rus/cymbur/island\\_russia/](http://archipelag.ru/ru_mir/ostrov-rus/cymbur/island_russia/).

<sup>253</sup> BEIN STELL, *MANUEL HINDS, MONEY, MARKETS & SOVEREIGNTY 11* (Council on Foreign Relations, Yale Univ. Press, 2009).

universal fundamental *economic* rights that transcend the will of national rulers has strong resonance in contemporary Russia. As we saw in the historical overview, even during the Soviet period, the USSR subordinated its ideological posture to concrete economic realities. Recent advances in economic analysis of international law<sup>254</sup> are likely to validate this intuition. At the same time, Russian leaders are noticeably sensitive to what they perceive as American international trade gamesmanship, arrogance,<sup>255</sup> and imposition.<sup>256</sup> Russia has closed nearly all outstanding international aid projects and reform initiatives.<sup>257</sup> Russia has also begun reassessing its reliance on Western economic models in the wake of the financial crisis, although what tangible changes will result remains to be seen.<sup>258</sup>

### CONCLUSION

Despite ascribing to a communist ideology and professing an exceptional ‘socialist international law,’ in the domain of international intellectual property law (specifically, copyright law), the Soviet Union consistently worked to harmonize its domestic law with general developments in international law. This was done to facilitate trade in material and intellectual property with Western powers. Soviet international law scholars reconciled legal

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<sup>254</sup> Alan O. Sykes, *International Law*, in 1 HANDBOOK OF LAW AND ECONOMICS 764 (Mitchell Polinsky & Steven Shavell, eds. 2007); JACK L. GOLDSMITH, ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* (Oxford, 2005).

<sup>255</sup> Bureau Report, *US Can Never Regain Its Status in Global Market: Putin*, ZEENEWS (October 9, 2008), available at <http://www.zeenews.com/articles.asp?aid=475091&sid=bus>; see also VINCENT BARNETT, *A HISTORY OF RUSSIAN ECONOMIC THOUGHT* ix (London: Routledge, 2005) (explaining Western economists’ view of Russian counterparts as “inferior”).

<sup>256</sup> Katherine Verdery, *WHAT WAS SOCIALISM, AND WHAT COMES NEXT?* 15, 18-19 (2002) (pointing out that a common theme in postsocialist writing is transferring Western institutions, such as markets and democracy, to non-Western settings).

<sup>257</sup> World Bank Project No. P008831 (Russian Legal Reform Project) (June 13, 1996 to December 31, 2005), <http://web.worldbank.org/external/projects/>; see also World Bank Report No. T-6883-RU, Appendix G (setting forth priority substantive areas of law such as international trade and property law). The project was administered by the Russian Foundation for Legal Reform (RFLR), a governmental non-profit organization founded in April 1996 pursuant to Presidential Decree No.81 of February 2, 1996. The founders were Administration of the President of Russian Federation, Ministry of Finance, Ministry of Justice, Federal Commission on Securities and Stock Market of RF Federal Government, Russian Academy of Science. The EU also participated in Russian law reform (Tacis Project EDRUS 9607) from December 1997 to March 2001. Strengthening the State of Law and Legal Education Under New Market Relations, Tacis Project EDRUS 9607, available at <http://iupld.free.fr/edrus9607.htm> (last accessed September 22, 2009). Smaller mainly European-funded law reform research projects continued in Russia through 2008, such as that administered by the Dutch Center for International Legal Cooperation. See DUTCH CENTER FOR INTERNATIONAL LEGAL COOPERATION, *ANNUAL REPORT 18 (2007)*, available at <http://www.cilc.nl/annualreport2007.pdf> (three-year Matra-funded project to assist the harmonization of Russian civil and administrative procedure law ended in July 2008).

<sup>258</sup> Robert Jellinek, *Russia and the Global Meltdown: Domestic and Foreign Policy Responses to the International Financial Crisis*, CARNEGIE CENTER, available at [http://www.carnegie.ru/en/pubs/booklet/11895Jellinek\\_Russia\\_and\\_the-Global\\_Meltdown.pdf](http://www.carnegie.ru/en/pubs/booklet/11895Jellinek_Russia_and_the-Global_Meltdown.pdf). Jellinek’s analysis of Russia’s response offers an excellent introduction to Russia’s measures in the wake of the crisis.

harmonization with communist principles by employing a number of novel rhetorical and argumentative structures, such as: (1) the *transition theory* to justify temporary concessions and compromises; (2) *international legal instrumentalism* to justify the ends over the means; (3) de-politicization of substantive international law matters to make intellectual property protection a matter of *administrative international law*, and hence not subject to theoretical contestation with the West.

Since the collapse of the USSR, Russia has implemented at least four major law reform projects in the IP domain (1993, 1994, 2004, 2008) to further harmonize domestic law with emerging international norms. The latest round of reforms is intended to be a definitive domestic codification of Russia's outstanding international obligations in the realm of intellectual property. In anticipation of, and in furtherance of, WTO accession, Russia has harmonized its domestic legislation with all outstanding TRIPs obligations, including the WIPO Internet Treaties. Comparative analysis of Russian copyright law with U.S. 'fair-use' standards reveals Russian copyright law to be as, if not more, stringent than its U.S. counterpart.

The WTO's continued refusal to permit Russian accession is based, in part, on Russia's lax enforcement of IP protections. Considering that Russia has coordinated its formal domestic legislation with international norms, it is unclear how long Russia must wait to demonstrate acceptable levels of enforcement. This ambiguous position has generated resentment among leading Russian policy-makers and jurists. This is likely to hinder future reform projects, spawn further resistance to WTO mandated reforms, and interrupt the organic legal harmonization efforts underway in Russia.