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Avtorskoye Pravo [Author's Law]: the Reform of Russian Copyright Law Toward an International Standard

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NOTES AND COMMENTS

AVTORSKOYE PRAVO [AUTHOR'S LAW]: THE REFORM OF RUSSIAN COPYRIGHT LAW TOWARD AN INTERNATIONAL STANDARD

INTRODUCTION

The first years of Russian democracy have been turbulent. In the wake of 74 years of communist rule typified by a command economy devoted to rapid industrialization, heavy military spending, and indif-

ference to consumer interests,[1] Russia is now struggling to replace its crumbling infrastructure with one that will support a free market economy.[2] For the moment, the biggest threat to the success of democracy seems to be the sheer magnitude of the need for reform. What were social and economic problems for the Soviet government have become crises for the Russian Federation, and the public has become impatient.[3] A major concern is whether the government can stabilize the

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1. Soviet devotion to the cold war and the arms race exacted a heavy price on the standard of living. As Columbia University Professor Seweryn Bialer observed:

> The apparent proportion of Soviet military expenditures in the economy (Western estimates of which vary from 12 to 20 percent of the Gross National Product) does not even begin to tell the story of the burden that these expenditures place on the Soviet economy. The level of military expenditures deprives the civilian sector of resources, slows economic growth by limiting capital formation, and stunts the growth of the military capabilities of the future by depressing the technological level of the economy as a whole. Emphasizing military projects at the expense of the civilian economy will ultimately exert a negative influence on military preparedness itself.
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> . . . During the Brezhnev era, the military got what it wanted almost automatically.

Seweryn Bialer, *The Soviet Union and the West*, *in* GORBACHEV'S RUSSIA AND AMERICAN FOREIGN POLICY 457, 458-59 (Seweryn Bialer & Michael Mandelbaum eds., 1988).

2. The main thrust is to "privatize" formerly state-administered assets, but progress has been slow and difficult. Speaking to the Supreme Soviet, President Yeltsin said:

> In the past 11 months we have succeeded in moving the country in the direction of a market, although with enormous difficulty and at some cost.
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> Signs that the production slump is slowing have appeared. For a number of specific items, an increase in the physical volume of output can be observed. We have begun to restore ties among enterprises and to establish new ones . . . .
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> . . . Progress in the field of conversion [of military industry to civilian output] has become increasingly evident . . . .
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> About 24,000 enterprises are now privately owned. More than 160,000 private firms have been created. In January through October, private trade accounted for something like 15% of total retail trade turnover . . . .

Boris N. Yeltsin, Speech to The Seventh Congress of Russian People's Deputies (Dec. 1, 1992), *in* ROSSIISKAYA GAZETA, Dec. 2, 1992, at 3-4, *translated in*, 44 CURRENT DIG. OF POST-SOV. PRESS, No. 48, at 2 (Dec. 30, 1992) [hereinafter Yeltsin Speech to The Seventh Congress].

3. According to Mr. Yeltsin:

> Inflation is the most alarming problem of the Russian economy.
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> Price increases are doing outright harm to the well-being of the people, intensifying the production slump, destroying the ruble and impeding investment activity . . . .

country before the public declares reform a failure. For President Boris N. Yeltsin, the task is complicated by powerful political opponents who would welcome a failure of the transition and a return to the old ways.[4]

> Against the backdrop of a significant worsening in living conditions for the majority of the population, a rapid and in many ways unjustified social stratification is being felt especially acutely.

Id.

4. Mr. Yeltsin spoke of the confrontational threat from hard-line communists as follows:

> This confrontation is taking on more and more threatening and extreme forms. Recently, the old Bolshevik leaven has begun to give rise to self-styled fronts and underground governments. Things have reached the point at which paramilitary detachments of so-called guards have been formed. The point of what is occurring is obvious: to split society still more, to have the executive and legislative branches clash in a "final skirmish," to weaken the state and to sow chaos.
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> Political adventurers count on the possibility that an ungovernable Russia could once again become easy prey for them. If that happens, their triumph will be short-lived, of course. But they will make the country a battlefield for a civil war.

See id. See also James Carney, *The Dark Forces: Hard-Liners Who Want to Turn Back the Clock are Steadily Gathering Strength*, TIME, Dec. 7, 1992, at 40 (from a TIME special report issue on Russia). President Yeltsin's dilemma is exacerbated by the government's failure to adopt a new constitution that clearly delineates a separation of powers. *See generally* Boris N. Yeltsin, Speech to The Sixth Congress of Russian People's Deputies (Apr. 21, 1992), *in* ROSSIISKAYA GAZETA, Apr. 23, 1992, at 3, *translated in*, 44 CURRENT DIG. OF POST-SOV. PRESS, No. 16, at 1 (May 20, 1992). In that speech, Yeltsin said:

> The main reason for [expecting future conflict between the branches of government of our state institutions] is the ongoing constitutional crisis, which is increasingly acquiring a chronic nature.
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> The Basic Law now in effect has fallen hopelessly behind the pace of real life. We have not yet been successful in appreciably narrowing this gap through amendments. It is probably clear to all of us that the method of updating the Constitution through partial amendments has long since become obsolete.
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> The absence of a clear-cut and stable demarcation of powers between institutions of the legislative and executive branches is provoking a desire for dominance and artificial competition between them.
>
> This is undermining the very principle of the separation of powers and is making interaction between the two branches difficult.
>
> The fierce confrontation between the branches is heightening the destructive role of the shortcomings and defects of the people in power.

Id.

The conflict between the executive and the legislative branches has been most recently personified in the bitter exchanges between President Yeltsin and Chairman of the Russian Federation Supreme Soviet, Ruslan Kasbulatov. *See* Douglas Stanglin et al., *Two cheers for demokratiya*, U.S. NEWS & WORLD REP., Apr. 5, 1993, at 42.

The recent elections for the Russian Federal Assembly did little to end government gridlock and, if anything, helped to organize Yeltsin's opposition.[5] Worse, organized crime has taken advantage of the apparent relaxation of government regulation, and has become a very powerful force with which to reckon.[6] These difficulties are exacerbated by the inability of the communist-era legal system to cope with the present difficulties.[7]

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5. President Yeltsin said:

> The tragedy of Russia in the 20th century consists largely in the fact that, despite many attempts, it has not succeeded in carrying a single reform through to completion. Not so much because of resistance from reactionaries as because of the weakness of the reformist forces and their destructive struggle among themselves. The main factor is that society has been lacking in the elementary patience needed to achieve results.
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> We have paid for this with either the tragedy of revolution or the tragedy of reaction. Let's not forget this.

Yeltsin Speech to The Seventh Congress, *supra* note 2, at 2.

6. *See* Stephen Handelman, *Inside Russia's Gangster Economy: Why Capitalism and the Mafiya Mean Business*, N.Y. TIMES MAG., Jan. 24, 1993, at 12. Mr. Handelman cites a report by the Ministry of Internal Affairs recording a 40% increase in organized crime activity since the demise of the Soviet Union at the end of 1991. The report also identifies at least 2,600 separate crime groups across the country. *Id.* at 15. One individual interviewed for the article, when describing how former black marketeers have taken advantage of deregulation to expand into legitimate business operations, exclaimed, "[w]ith their old criminal connections, and their muscle, they overwhelm any competition. Eventually, you can't tell the criminals from the businessmen." *Id.* at 31.

7. For years the Russian judiciary functioned as an arm of the executive power, often enforcing the will of the communist party over concerns for justice. Russia needs an independent judiciary, where the judges and not the prosecutors control the judicial process. *See* Stephen Breyer, *Yeltsin's Radical Plans To Reform Russia's Judiciary*, S.F. CHRON., Nov. 12, 1991, at A19. Additionally, Russian judges need to be retrained. *See* Sergei Pashin, Speech to the International Press Center Club (Mar. 1, 1993), *available in* LEXIS, Europe Library, ALLEUR File (Mr. Pashin is chief of the Department of Legal Reform of the Russian Federation President). In that speech, Mr. Pashin said:

> The Soviet judicial system was devised to make a short shrift of people. The number of acquittals was insignificant. And there were lots of trials where sentences were passed on dissidents. There were monstrous mistakes when people were sentenced for murders and rape they were not to blame for.
>
> . . . .
>
> Our courts are remnants of the mechanism of suppression which came into being with the revolution of 1917. We had to brace ourselves for a major leap forward and change the system by introducing trial by jury. I often address to judges. Once when I was speaking to an audience of judges, one judge with 17 years of experience could not make a difference between an accused and a guilty party. To her everyone who was on the dock was auto-

All of this highlights a fundamental problem for Russia. To survive, Russia must attract private foreign investment.[8] Yet many potential investors are unwilling to risk their capital until Russia resolves such destabilizing problems as government gridlock, organized crime, and rampant inflation.[9] Russia must therefore move quickly to restore international confidence in its legal system. Now that a new Constitution is in place, the Yeltsin government must fill in the legal infrastructure necessary to exercise the power vested therein.[10] This means shifting the emphasis away from laws designed to support a strong centrally planned economy and dictatorial government, and replacing them with new ones that emphasize the rights of individuals. The bottom line is that Russia must become safe and attractive to foreign business.

Among the individual rights in need of greater emphasis are the rights of authors protected under the principle of copyright. Since the invention of copyright, Russia has consumed vast quantities of foreign intellectual property, and for most of its history it has done so without paying remuneration to foreigners.[11] In 1973, the Soviet Union joined the Universal Copyright Convention (UCC),[12] and for the first time

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matically guilty. So, we have no other option, but to introduce a form, where not the judge as a representative of the state, but the people itself will be the judge.

. . . .

How do we see the new legal process? Legislation and the body of judges remain practically the same. We have no chance, like Germany, to fire all the former judges and hire new ones. We can only teach the judges we have to work in a new way.

Id.

8. *See Moving on Aid for Russia*, WASH. POST, Aug. 7, 1992, at A20; Rose Brady and Deborah Stead, *Bob Strauss Learns How to Say 'Rolodex' in Russian*, BUS. WK., Aug. 3, 1992, at 42.

9. *See* Don Groves and Hugh Fraser, *H'W'D Majors End Embargo on the Former Soviet Union*, DAILY VARIETY, Dec. 7, 1992, at 18; *Press Conference by the International Fund of Assistance of Privatization and Foreign Investments*, (Jan. 21, 1993), Official Kremlin Int'l News Broadcast, Jan. 21, 1993, *available in* LEXIS, Europe Library, ALLEUR File; Donald Cameron Watt, *Russians still fear Germans*, DAILY TELEGRAPH, Feb. 5, 1993, at 16; Carol Giacomo, *U.S. Business Organizes to Lobby Russia on Reforms*, REUTERS, July 1, 1992, *available in* LEXIS, Europe Library, ALLEUR File.

10. Russia's new constitution was adopted by popular vote on December 12, 1993. The new constitution is 137 articles long, and vests a great deal of power in the executive. Konstitutsiya Rossiyskoy Federatsii [Constitution] published in ROSSIYSKAYA GAZETA, Nov. 10, 1993, at 3-6.

11. *See infra* text accompanying notes 73-76.

12. Universal Copyright Convention, Sept. 8, 1952, 6 U.S.T. 2731, 216 U.N.T.S. 132, revised July 24, 1971, 25 U.S.T. 1341, 943 U.N.T.S. 178 [hereinafter UCC]. The

offered protection to the works of foreign authors. Although Soviet participation in the UCC obligated the government to protect the copyrights of foreign authors, it did little to combat the problem of individual acts of piracy on the street. Indeed, Russia has a huge piracy problem that has had a documented chilling effect on foreign trade there.[13] Russia will have to solve that problem before legal trade in copyrighted works may flourish.

Russia took a huge step in the right direction when it passed a new and comprehensive copyright law.[14] The new law replaced a piecemeal method of protection employed by the former Soviet Union whereby it protected copyright through sections of the old Brezhnev era constitution, the Fundamentals of Civil Legislation of the USSR and Union Republics,[15] the various civil codes of the union republics, and several free-standing statutes.[16] This collection of sources made it difficult to determine the exact degree of protection available to any given work. Worse, the system did not favor authors: the government substantially limited authors' rights, failed to provide an effective system for collection and distribution of royalties, and similarly failed to provide effective remedies for copyright infringement. The new law provides all of these, and should make it possible for Russia to join the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention)[17] in the near future. That should in turn encourage the foreign investment so vital to Russia's future.

This Comment will review the history of copyright protection in Russia, and then examine the new copyright law. The Comment will conclude that Russia is ready for participation in the Berne Conven-

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UCC is one of two well-established multilateral copyright conventions, the other being the Berne Convention of 1886. *See infra* note 17.

13. *See infra* notes 18-32 and accompanying text.

14. On Copyright and Neighboring Rights, Vedomosti S"ezda Narodnykh Deputatov Rossiyiskoy Federatsii i Verkhovnogo Soveta Rossiyiskoy Federatsii, Issue No. 32, Item No. 1242.

15. Fundamentals of Civil Legislation of the U.S.S.R. and Union Republics, Vedomosti S"ezda Narodnykh Deputatov SSSR i Verkhovnogo Soveta SSSR, 1991, No. 26, p. 733 (repealed Aug. 3, 1993), *translated in* SovData DiaLine - SovLegisLine, May 31, 1991, *available in* LEXIS, Europe Library, ALLEUR File. The Fundamentals of Civil Legislation were similar to a model code. They were passed by the Supreme Soviet with the expectation that each of the individual republics would adopt civil codes based upon them. *See infra* notes 146-157 and accompanying text.

16. *See infra* notes 161-183 and accompanying text.

17. Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, revised in Paris on July 24, 1971, S. TREATY DOC. No. 27, 99th Cong., 2d Sess. (1989), 828 U.N.T.S. 221 [hereinafter Berne Convention]. The United States joined the Berne Convention on March 1, 1989.

tion, although it must place special emphasis on enforcement of the law if it expects to maximize the value of trade in the objects of copyright.

I. THE PIRACY PROBLEM AND IMPACT ON FOREIGN INVESTMENT

In October of 1992, Warner Brothers Executive Gerhard Weber saw a video cassette copy of an American movie for sale at a street-side kiosk in Moscow. Significantly, the movie had not yet been released on tape in the United States.[18] The incident was remarkable because it demonstrated how rapidly films can be pirated and reproduced en masse. Indeed, the video tape appeared for sale in Russia within a few days of its premiere in American theaters.[19] The pirates apparently had video-taped the movie at a first run theater, flown to Moscow, and quickly reproduced copies for sale.[20] Through this type of practice, American movie companies incur losses estimated between ten million and one billion dollars annually.[21]

The piracy problem is not restricted to the motion picture industry. Approximately ninety-five percent of all long-playing record albums in Russia are products of illegal duplication.[22] In fact, selling audio tape copies of recordings is widely perceived as a perfectly legitimate business in Russia.[23] At many street-side kiosks, customers may present blank cassette tapes to the owner and select from a library of works from which to dub onto the tape.[24]

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18. Vladimir Mikheyev, *Russian Market Should Have No Place for 'Pirates.'—But There Should Be Ample Room for Those Who Create Intellectual Property*, IZVESTIA, Nov. 18, 1992, at 7, *translated in*, 44 CURRENT DIG. OF POST-SOV. PRESS, No. 47 at 20 (Dec. 23, 1992).

19. *Id.*

20. *Id.*

21. *EE Intellectual Property Protection Still Inadequate*, BUS. INT'L., May 4, 1992 (estimating the figure at ten million dollars); *Rampant Pirating of Software, Movies in Russia is Costing Western Companies Millions*, BALT. SUN, Nov. 16, 1992, at E8 [hereinafter *Rampant Pirating*] (estimating the figure at $200 million); Mikhail Fedotov, Press Conference By Russian Intellectual Property Agency, (July 21, 1992) (transcript available in LEXIS, Europe Library, ALLEUR File) (estimating the figure at one billion dollars).

22. *See* Mikheyev, *supra* note 18, at 7.

23. Anthony Mason, *Russia: Entrepreneurs Take Advantage of the Lack of Copyright Laws*, Inter Press Service, Nov. 14, 1992, *available in* LEXIS, Europe Library, ALLEUR File. *See also* Vadim Yurchenkov, *Private Enterprise Widens Doors To Pirates In Russia*, BILLBOARD, June 6, 1992, at 1.

24. Mason, *supra* note 23. *See also Rampant Pirating*, *supra* note 21, at E8. The author of this Comment observed several such kiosks when traveling in the U.S.S.R. and Latvia in 1991. It is unclear how much of a threat such operations really pose to foreign record companies. For one, many Russians do not listen to Western recording

The problem is similar for computer software. Out of the four million programs widely available in Russia, Russian programmers have patented only 10,000.[25] On average, pirates copy and resell nearly one million U.S. programs per year in Russia.[26] The International Intellectual Property Alliance estimates that the rate of computer program piracy in Russia approaches 100%.[27] Additionally, the Business Software Alliance claims the heavy volume of pirated material results in the loss of many possible jobs for Russian programmers.[28] Piracy also incurs a corresponding loss of tax revenue which results when governments allow underground economies to grow and flourish.[29] Of course, it follows that many foreign movie, record, software, and publishing companies will be unwilling to invest in the development of the infrastructure in their respective disciplines so long as the product of their investments remains vulnerable to plundering by pirates.

Russia's piracy problem is due in part to a long standing tradition that regarded foreign works of intellectual property as existing wholly within the public domain.[30] Until Russia joined the Universal Copyright Convention (UCC)[31] in 1973, the doctrine of "free translation" allowed Russian publishers to translate and publish any foreign work without concern for the author's copyright or payment of remunera-

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artists despite the ready availability of pirated Western recordings. Additionally, the quality of such tape-to-tape dubs, typically made on "boom box" portable cassette recorders, was extraordinarily poor. It seems as though the business had evolved this way because of a short supply of blank tapes, and a dearth of higher quality material from which to choose. It seems likely that affordable, higher quality material could eclipse the kiosk business.

25. Mikheyev, *supra* note 18, at 7.

26. *Id.*

27. *Rampant Pirating*, *supra* note 21, at E8.

28. Mikheyev, *supra* note 18, at 7; USTR, *Piracy of U.S. Copyrighted Works in Ten Selected Countries: A Report by the Intellectual Property Alliance to the United States Trade Representative* 7 (1988).

29. Mikheyev, *supra* note 18, at 7.

30. Until the Soviet Union joined the Universal Copyright Convention in 1973, foreign works remained in the public domain unless first published within the Union. Russia frequently founded its copyright laws in xenophobia. Tsarist drafters of copyright law frequently intended to limit the possible detrimental influence of Western works. They therefore crafted statutes aimed at keeping foreign language literature out, rather then at protecting any of the various rights involved. This is not to say that Russia did not consume foreign books in vast quantities, but only that it limited such consumption to Russian language translations. Thus, the 1861 bilateral copyright treaty between Russia and France which provided national treatment for each other's original works, did not apply to translations of those works, and reproduction of translated books continued unabated.

31. *See* UCC, *supra* note 12.

tion.[32] The piracy problem in Russia will be difficult to end if for no other reason than old habits die hard. Indeed, it is apparent that Russia's accession to the UCC did not persuade many of those who pirate such works to stop doing so. It is therefore doubtful that the new copyright law alone will end piracy in Russia. The solution will no doubt require strict enforcement in addition to the statutory improvements.

II. INTERNATIONAL COPYRIGHT PROTECTION

A. Early Development

Most historians agree that copyright laws evolved following the invention of movable type in the fifteenth century.[33] Prior to that time, copies were so difficult and expensive to make that infringement of authors' rights was not a big problem. Following the invention of the press, however, copying costs decreased, and European monarchies were quick to realize the social and political significance of the ability to copy and disseminate printed material.[34] Many of the earliest copying laws were really restraints on the dissemination of printed material.[35] Only after bookbinding evolved into a competitive business did governments promulgate laws concerning the economic rights of authors and printers. In England, the Statute of Anne of 1710 was the result of pressure by stationers who wanted to protect the relatively large investment necessary to publish a book from the possibility of competition with other publishers of the same book.[36] Denmark, France, Germany, Italy, Norway, Spain, and Prussia developed similar laws in the mid-eighteenth century.[37]

With the growth of an international book trade in the early nineteenth century, countries began to negotiate bilateral treaties to provide "national treatment" to each other's works. National treatment meant that each party to the treaty agreed to provide the same degree of copyright protection to author nationals from the other party as it pro-

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32. The doctrine of free translation also was used by the Soviet government to dissuade non-Russian speaking authors from publishing in non-Russian languages. *See infra* text accompanying notes 144-145.

33. Historians generally attribute the invention of movable type to German Johann Gutenberg who probably created the first such press in the 1440's. *See* UNESCO, THE ABC OF COPYRIGHT 13 (1981).

34. *Id.* at 13.

35. *Id.*

36. *Id.* at 14.

37. *Id.* at 15.

vided to its own authors.[38] The principle of national treatment became the basis for several regional treaties in Central America, as well as two larger multilateral treaties.[39] The two major international agreements for the protection of intellectual property are the Universal Copyright Convention of 1952 (UCC),[40] and the Berne Convention for the Protection of Literary and Artistic Works of 1886.[41] Both conventions emphasize the principle of national treatment, and both are intended to increase and standardize the level of copyright protection on a global scale.

B. The Berne Convention

The Berne Convention for the Protection of Literary and Artistic Works was completed in 1886, and has been revised six times since then.[42] The Convention protects the literary and artistic works of authors, and includes written material such as books, pamphlets, musical compositions, architectural designs, and scientific works.[43] The Convention advances three basic principles regarding intellectual property protection: (1) national treatment (discussed above);[44] (2) automatic pro-

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38. "National Treatment" is a term of international trade. The Restatement (Third) of the Foreign Relations Law of the United States defines the term. "[N]ational treatment is an obligation to treat the nationals or goods of another state as the state treats its own nationals or goods." RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 801(2) (1986).

39. UNESCO, *supra* note 33, at 63.

40. *See* UCC, *supra* note 12.

41. *See* Berne Convention, *supra* note 17.

42. The convention was concluded September 9, 1886, and revised at Paris on May 4, 1896, Berlin on November 13, 1908, Rome on June 2, 1928, Brussels on June 26, 1948, Stockholm on July 14, 1967, Paris on July 24, 1971, and amended there on October 2, 1979.

43. Berne Convention *supra* note 17, art. 2, para. 1, 828 U.N.T.S. at 227.

> 1. The expression "literary and artistic works" shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatic or dramatico-musical works; choreographic works and entertainments in dumb show; musical compositions with or without words; cinematographic works to which are assimilated works expressed by a process analogous to cinematography; works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works to which are assimilated works expressed by a process analogous to photography; works of applied art; illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science.

Id.

44. *Id.* art. 5, 828 U.N.T.S. at 231-33. Article 5 reads in pertinent part:

tection,[45] and; (3) independence of protection.[46] Protection is automatic in the sense that the Convention does not require adherence to formalities as a prerequisite.[47] Protection is independent in the sense that the level of protection is not dependent on the law of the country of origin (as is sometimes the case with protection awarded under the UCC).[48] Generally, the Convention protects an author's right to arrange, broadcast, perform, reproduce, and translate his or her own work.[49] Additionally, the Convention protects the "moral right" of the author in his work.[50] The moral right is the right of the author to control the disposition of the work even after she has sold or licensed other economic rights to it. Thus, a painter always retains the right not to have the painting distorted or her work misrepresented.

C. The Universal Copyright Convention

The UCC entered into force in 1955 and was amended at Paris in 1971.[51] The Convention was drafted by the Institute of Intellectual Cooperation of the League of Nations and its successor, the United Na-

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1. Authors shall enjoy, in respect of works for which they are protected under this Convention, in countries of the Union other than the country of origin, the rights which their respective laws do now or may hereafter grant to their nationals, as well as the rights specifically granted by this convention.

. . . .

3. Protection in the country of origin is governed by domestic law. However, when the author is not a national of the country of origin of the work for which he is protected under this Convention, he shall enjoy in that country the same rights as national authors.

45. *Id.* art. 5, para. 2, 828 U.N.T.S. at 233. Article 5, paragraph 2 reads:

The enjoyment and the exercise of these rights shall not be subject to any formality; such enjoyment and such exercise shall be independent of the existence of protection in the country of origin of the work. Consequently, apart from the provisions of this Convention, the extent of protection, as well of the means of redress afforded to the author to protect his rights, shall be governed exclusively by the laws of the country where protection is claimed.

46. *Id.*

47. *Id.*

48. *Id. See also id.* art. 2, para. 6, 828 U.N.T.S. at 229.

49. *See id.* arts. 8, 9, 11, 11 <bis>, 12, 828 U.N.T.S. at 239-43.

50. *Id.* art. 6<bis>, 828 U.N.T.S. at 235. Article 6<bis> reads in pertinent part:

1. Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.

51. *See supra* note 12.

tions Educational, Scientific, and Cultural Organization (UNESCO).[52] They intended the Convention to provide some basis for standardized international treatment of copyrighted works for countries that, because of differing cultural background or philosophical disagreement with some of the Berne Convention principles, had not joined that Convention.[53] The UCC requires its member nations to provide a certain minimum standard of copyright protection to ensure that authors from the member countries can expect relatively uniform treatment of their works.[54] Generally, the UCC requires that: (i) members provide "adequate and effective" protection of the rights of authors;[55] (ii) contracting nations offer national treatment to the published and unpublished works of authors in other contracting nations;[56] (iii) each nation provide a minimum term of protection of twenty-five years, or the life of the author plus twenty-five years, depending on the practice that was in effect when the Convention came into force;[57] and, (iv) each nation

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52. UNESCO, *supra* note 33, at 64.

53. *Id.*

54. See Jan D'Alessandro, *A Trade-Based Response to Intellectual Property Piracy: A Comprehensive Plan to Aid the Motion Picture Industry*, 76 GEO. L.J. 417, 448-49 (1987).

55. UCC, *supra* note 12, art. I, 943 U.N.T.S. at 195. Article I reads: "Each Contracting State undertakes to provide for the adequate and effective protection of the rights of authors and other copyright proprietors in literary scientific and artistic works, including writings, musical, dramatic and cinematographic works, and paintings, engravings and sculpture." Unfortunately, the convention does not define what types of protections are adequate and effective.

56. *Id.* art. II, 943 U.N.T.S. at 195. Article II reads in pertinent part:

> 1. Published works of nationals of any Contracting State and works first published in that State shall enjoy in each other Contacting State the same protection as that other State accords to works of its nationals first published in its own territory, as well as the protection specially granted by this Convention.
>
> 2. Unpublished works of nationals of each Contracting State shall enjoy in each other Contracting State the same protection as that other State accords to unpublished works of its own nationals, as well as the protection specially granted by this Convention.

57. *Id.* art. IV, para. 2.(a), 943 U.N.T.S. at 196. Article IV, paragraph 2.(a) reads:

> 2.(a) The term of protection for works protected under this Convention shall not be less than the life of the author and twenty-five years after his death. However, any Contracting State which, on the effective date of this Convention in that State, has limited this term for certain classes of works to a period computed from the first publication of the work, shall be entitled to maintain these exceptions and to extend them to other classes of works. For all these classes the term of protection shall not be less than twenty-five years from the date of first publication.

honor the author's exclusive right to authorize reproduction of any kind including performance, broadcast, and translations.[58]

D. American Participation

The United States joined the UCC on September 6, 1952,[59] but did not join the Berne Convention of 1886 until March 1, 1989.[60] The Berne Convention is more comprehensive and sets higher standards than does the UCC. The higher standards were the reason the United States delayed joining the Convention.[61] The "moral rights" provision of the Berne Convention was especially unpalatable to American supporters of the principle of freedom of contract.[62] U.S. film producers, among others, feared the effect of observing the moral rights provision,[63] because they feared suit by authors and screen writers who might invoke the right to collect damages for films that turned out differently from the way they originally were conceived.[64] Owners of art similarly feared the possibility of suit for displaying works of art in ways that were contrary to the desires of the artists.[65]

The need to join the Berne Convention was not always pressing.

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58. *Id.* arts. IV<bis>, V, 943 U.N.T.S. at 196-97. Article IV<bis> reads in pertinent part:

> 1. The rights referred to in Article I shall include the basic rights ensuring the author's economic interests, including the exclusive right to authorize reproduction by any means, public performance and broadcasting. The provisions of this article shall extend to works protected under this Convention either in their original form or any form recognizably derived from the original.

Article V reads in pertinent part: "1. The rights referred to in Article I shall include the exclusive right of the author to make, publish and authorize the making and publication of translations of works protected under this Convention."

59. 32 I.L.M. 1467 (1993).

60. 32 I.L.M. 1688 (1993).

61. In 1985, Congress created an Ad Hoc Working Group to determine the extent of compatibility between U.S. copyright law and the Berne Convention. The group determined that the U.S. Copyright Act provisions relating to jukebox licenses (17 U.S.C. § 116 (1988)), notice requirements (17 U.S.C. § 401 (1988)), registration (17 U.S.C. §§ 405, 411 (1988)), and renewal and duration (17 U.S.C. §§ 302, 304 (1988)) were incompatible with the convention. D'Alessandro, *supra* note 54, at 450.

62. Glenn Groenewold, *Congress in Action; Copyright Legislation*, 7 UNIX REV. 28 (1989); Doriane Lambelet, *Internationalizing the Copyright Code: An Analysis of Legislative Proposals Seeking Adherence to the Berne Convention*, 76 GEO. L.J. 467, 489, 489 n.114 (1987).

63. Groenewold, *supra* note 62, at 28.

64. *See id.*

65. *See id.*

Because the United States is a signatory of the UCC and because American publishers could achieve copyright protection under the Berne Convention through the "back door," that is, by arranging for first or simultaneous publication of American works in a Berne signatory country, Congress did not perceive an urgent need to undergo domestic copyright reform to make U.S. law compatible with the Berne Convention.[66] In 1984, however, President Reagan suspended U.S. participation in UNESCO, which oversees the UCC, citing the agency's leftist political agenda, financial irresponsibility, and frequent anti-American statements.[67] Accordingly, the ability of the United States to influence members of the Convention was reduced significantly.[68] The loss of influence, together with a rapid growth in the number of acts of international piracy of American works of intellectual property, made adherence to the Berne Convention an increasingly desirable objective.[69] After amending the Copyright Act of 1976 in order to bring U.S. law into compliance with the Convention,[70] the United States formally joined on March 1, 1989.[71] By joining the Convention the United States added twenty-four countries to the list of countries with which it shares copyright protection.[72]

E. Russian Participation

Russia did not help draft, nor did it sign the Berne Convention of 1886. The treaty's national treatment principle, and its application to translations of material first published abroad,[73] were unattractive characteristics to Russia. Russia, as a tremendous consumer of translated foreign works (particularly French literature), most probably did not join the Convention because of the anticipated cost of paying royalties to Convention members.[74] Russia instead preferred to negotiate bilateral treaties with its preferred trading partners, and continued to of-

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66. *See* D'Alessandro, *supra* note 54, at 449.

67. Joanne Omang, *UNESCO Withdrawal Announced; U.S. Faults Agency's Financial Actions, Political Move to Left*, WASH. POST, Dec. 20, 1984, at A1.

68. Lambelet, *supra* note 62, at 474 & n.32.

69. *Id.* at 468 & nn.7-8.

70. *See* Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (1988).

71. 31 I.L.M. 1257 (1992).

72. *See* 1 B.D.I.E.L. 711 (1990) (listing member countries to the Berne Convention); 1 B.D.I.E.L. 811 (1990) (listing member countries to the UCC).

73. Berne Convention, *supra* note 17, art. 3, 828 U.N.T.S. at 231.

74. *See* MICHAEL A. NEWCITY, COPYRIGHT LAW IN THE SOVIET UNION 13 (1978).

fer protection to foreign authors only if their works were first published in Russia.[75] Countries dedicated to obtaining copyright protection inside Russia often had to resort to including such protection as a conditional provision of larger trade agreements.[76] Indeed, it is a method of obtaining copyright protection sometimes practiced to this day.[77]

After the Bolshevik revolution in 1917, the Soviet Union continued to avoid participation in either the Berne Convention or the UCC. The Soviets refused to participate because of their alleged belief that Western copyright law benefited capitalist publishers at the expense of authors.[78] No doubt, the Soviet government also was concerned that joining one of the conventions would obligate the U.S.S.R. to pay huge sums in hard currency royalty fees to foreign authors.[79] It was not until the Soviet government began seriously to consider ways to increase dissemination of Soviet products that it began to contemplate joining the UCC.[80] After several negotiating sessions with American trade representatives, during which the Americans made it clear the United States would not lower taxes on Soviet products sold in the United States unless the Soviets provided copyright protection for American materials published in the U.S.S.R., the Soviets concluded it would be economically advantageous for them to join the Convention.[81] In February of 1973, the Soviet government amended the Fundamentals of Civil Legislation to bring Soviet copyright law into harmony with the Convention, and on February 27, 1973, Foreign Minister Gromyko signed the UCC on behalf of the Soviet Union.[82]

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75. *Id.*

76. Russia did sign bilateral treaties with Austria-Hungary, Belgium, Denmark, Germany, and France at the beginning of the twentieth century. *Id.* at 13-15.

77. *See, e.g.*, U.S.S.R.-U.S. Agreement on Trade Relations, June 1, 1990, U.S.S.R.-U.S., 29 I.L.M. 949. Article VIII of the agreement contains various conditions regarding the future protection of intellectual property between the two countries, including the promise that the U.S.S.R would join the Berne Convention.

78. NEWCITY, *supra* note 74, at 32.

79. *Id.* at 33. In the years between 1946 and 1970, Soviet publishers churned out 26,737 separate works by foreign authors. The total circulation was 1,088,295,000 copies. The Soviets believed the royalty payments they would be required to pay on the volume of foreign works the country consumed would be prohibitively burdensome, and would act as a strong disincentive to Soviet publishers who produced Russian language translations of foreign works. *Id.*

80. *See id.* at 33, 41.

81. *Id.* at 43.

82. *Id.* at 44; E.A. FLEISHITS & A. MAKOVSKY, THE CIVIL CODES OF THE SOCIET SOCIALIST REPUBLICS 224 (Konstantin Kostrov trans., Camble Creighton ed., 1976).

F. U.S.-Russian Bilateral Negotiations

In the June 1, 1990 trade agreement between the United States and the former Soviet Union, the United States offered to grant "most-favored nation" status to the U.S.S.R. in exchange for its promise to join the Berne Convention.[83] Most favored nation status reduces the tariffs charged by the United States on imported goods from countries which enjoy the status from an average of fifty percent ad valorem to an average of five percent. Following the dissolution of the Soviet Union in September of 1991, the Russian Federation assumed responsibility for the trade agreement in a letter to the U.S. Department of State dated June 17, 1992.[84] By the terms of the agreement, the Russian Federation agreed to "provide adequate and effective protection and enforcement of intellectual property rights, . . . draft laws necessary to carry out the obligations of this Article . . . and . . . enhance [its] copyright relations through adherence to the Berne Convention for the Protection of Literary and Artistic Works (Paris 1971)."[85] Congress approved the trade agreement on November 20, 1991, and it entered into force on June 18, 1992.[86]

In June of 1992, the United States and Russia held a business summit at which both parties signed taxation and bilateral investment treaties.[87] The bilateral investment treaty guarantees non-discriminatory treatment for U.S. investments in Russia, ensures U.S. companies the right to repatriate profits from rubles into hard currency, and provides for adequate compensation in the event of an expropriation.[88] Additionally, the treaty provides the right to third party international arbitration in the event of a dispute between U.S. investors and the Russian government.[89]

The tax accord signed during the summit replaces a 1973 tax treaty between the two countries. It provides relief from "double taxation" in the form of a cap on the tax rate Russia charges on dividends paid by Russian companies to a maximum of ten percent; interest and royalty exemptions such that U.S. citizens are exempt from Russian taxes on interest and royalty income on their Russian investments; and

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83. *See* Agreement on Trade Relations, *supra* note 77.

84. Note Expressing Consent to be Bound, June 17, 1991, 31 I.L.M. 790 (1992).

85. Agreement on Trade Relations, *supra* note 77, art. VIII, pt. 2.

86. Igor Barsukov, *U.S.-U.S.S.R. Trade Agreement Approved*, TASS, Nov. 21, 1991.

87. Thomas J. Duesterberg, *United States and Russia Begin New Commercial Relationship*, BUS. AM., June 29, 1992, at 2.

88. *Id.*

89. *Id.*

the general promise of mutual non-discriminatory tax treatment between the two governments.[90]

Although the United States is very concerned about intellectual property protection in Russia, thus far it has not threatened to take unilateral action against Russia in the form of action under section 301 of the Trade Act of 1974.[91] The United States appears primarily to be concerned with supporting the stabilization of the new Russian government, and probably does not want to take any action that might threaten the success of continuing democratic and free market reform there. For its part, the Russian government appears to be making rapid enough progress toward satisfactory intellectual property protection to avoid placement on one of the United States Trade Representative's "watch lists."[92]

III. Historical Development of Russian Copyright Law

Russian copyrights are protected by multiple legal sources. The civil code, various statutes, treaties, and the constitution all have applicable sections. In fact, the multiplicity of protection is one difficulty in determining the degree of protection provided to any given work. The following sections trace the development of copyright protection in Russia, arriving ultimately at its present state.

A. Evolution of the Russian Civil Law

1. Influence of Christianity

Although Russia has been influenced through the centuries by the legal traditions of various cultures and nomadic peoples, it is sufficient to note here that the Russian and Western legal traditions share the

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90. *Id.*

91. The United States Trade Representative (USTR) monitors the compliance of America's trading partners with various trade agreements. When a country appears to be in violation of a trade agreement it has negotiated with the United States, the USTR places that country on a "watch list." Countries on the watch list are urged to remedy the deficiencies in their trading practices. Countries that do not take action to comply quickly enough are then placed on a "priority watch list." If those countries on the priority watch list do not take rapid affirmative steps to rectify the trading problem, the U.S. President may approve unilateral measures against the offending countries under section 301 of the Trade Act of 1974 as amended by the Omnibus Trade and Competitiveness Act of 1988. *See USTR Fact Sheet on Special 301 Released April 30, 1993*, BNA Int'l Trade Rep., May 5, 1993, *available in* LEXIS, Europe Library, ALLEUR File.

92. *See supra* note 91.

influence of the Roman empire and of Christianity.[93] Particularly notable is the five hundred year difference in the effect of that common influence: Clovis, the king of the Franks, converted to Christianity in the year 486, whereas Vladimir, the ruler of Kievian Russia, did not convert until 988.[94] Thus, although Russian law underwent an evolutionary process similar to its Western counterparts, that process began some five centuries later.

2. Effect of Mongolian Occupation

It was probably the Mongol invasion of the thirteenth century that ended the evolutionary similarity between the Russian and Western legal traditions. For nearly 250 years, Mongol domination had a distinct chilling effect on the evolution of the Russian legal system which did not hinder legal development in the West.[95] The Mongols were primarily interested in the extraction of tribute, and to that end they were uninterested in changing the Russian social structure or its legal system.[96] The overall effect, therefore, was to freeze development of Russian society throughout the period of domination. Some scholars argue that the style of Mongolian autocratic rule strongly influenced the development of similarly autocratic institutions in the surviving Russian state.[97] Whatever the reason for Russia's tradition of autocracy, it was a well-practiced style of government by the time of the October 1917 Revolution.[98]

3. The Civil Code

Russia's legal system historically has followed the civil law tradition.[99] The first Russian code of laws appeared in the *Russkaia*

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93. HAROLD J. BERMAN, JUSTICE IN THE U.S.S.R. 188-89 (rev. ed., enlarged 1963); MEDIEVAL RUSSIAN LAWS 3 (W.T.H. Jackson ed., George Vernadsky trans., Octagon Books 1965).

94. BERMAN, *supra* note 93, at 191.

95. *Id.* at 193-94.

96. *Id.* at 194; NICHOLAS V. RIASONOVSKY, A HISTORY OF RUSSIA 73-74, (4th ed. 1984).

97. BERMAN, *supra* note 93, at 194-95.

98. Indeed, the present-day conflict between President Yeltsin and legislative branch leaders such as Ruslan Khasbulatov seems to illustrate the difficulty Russian society has accepting the notion of separation of powers. During travels two years ago, this author recalls frequently hearing the opinion that what the Soviet Union really needed was a strong leader like Stalin to get the country back on track.

99. *See* BERMAN, *supra* note 93, at 206-12; Carla Thorson, *Russia: Toward the Rule of Law*, RADIO FREE EUR./RADIO LIBERTY RES. REP., 3 July 1992, at 11 & n.2.

Pravda, a text compiled during the reign of Yaroslav the Wise (1015-1054).[100] That text originally provided standardized remedies for various injuries in tort, and later included crimes and punishments as well.[101] The method by which Russian courts of that period determined justice resembled methods earlier employed by the Germanic and Anglo-Saxon systems, complete with the concepts of trial by oath, trial by ordeal, and trials which at times depended on the recitations of numerous oath-helpers.[102]

Russia's first modern comprehensive civil code was the *Svod Zakonov* (Body of Laws) of 1832.[103] Like the Napoleonic Code of 1804 and the *Corpus Juris Civilis* of Justinian, the fifteen volume code was intended wholly to replace previous law.[104] In contrast to these earlier works, however, the *Svod Zakonov* was not intended simultaneously to promulgate a new social order, nor to make the law accessible to every citizen.[105] Rather, it was the result of a hundred year effort initiated

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100. BERMAN, *supra* note 93, at 191. The *Russkaia Pravda* exists in several versions. Yaroslav's *Pravda* listed remedies to be paid from one citizen to another depending on the nature of their dispute. Later, Yaroslav's sons added sections designed to bolster princely authority and to protect their servitors and estates. MEDIEVAL RUSSIAN LAWS, *supra* note 93, at 4.

101. *See* BERMAN, *supra* note 93, at 192; *see also* MEDIEVAL RUSSIAN LAWS, *supra* note 93, at 12. For an English translation of the *Russkaia Pravda*, see MEDIEVAL RUSSIAN LAWS, *supra* note 93, at 26-56.

102. BERMAN, *supra* note 93, at 192-93, 196; DANIEL H. KAISER, THE GROWTH OF THE LAW IN MEDIEVAL RUSSIA 148-52 (1980); MEDIEVAL RUSSIAN LAWS, *supra* note 93, at 11-12.

103. BERMAN, *supra* note 93, at 208. The *Zvod Zakonov* replaced an earlier code, the *Ulozhenie* of 1649. The *Ulozhenie* was compiled at the direction of Tsar Aleksei Romanov who ordered the hasty compilation and systemization of existing Russian laws in the wake of a Cossack uprising that threatened his power. Although the *Ulozhenie* had been a great improvement to the justice system, and had standardized the administration of justice across Russia, it was not a comprehensive text, and had not attempted to rearrange the basic social structure of Russian society. *See* RIASANOVSKY, *supra* note 96, at 178-79.

104. BERMAN, *supra* note 93, at 205. *See also* JOHN H. MERRYMAN, THE CIVIL LAW TRADITION 27 (2d ed. 1985).

105. *See* BERMAN, *supra* note 93, at 209; RIASANOVSKY, *supra* note 96, at 328. In contrast to Professor Merryman's description of the French Civil Code of 1804 as "a kind of popular book that could be put on the shelf next to the family Bible . . . that would allow citizens to determine their legal rights and obligations by themselves," MERRYMAN, *supra* note 104, at 28, Professor Berman described the *Svod Zakonov* as

> a highly technical document [that required] a class of professional lawyers and judges and administrators—a class which in 1832 was only barely beginning to emerge in Russia. . . . [I]t left the masses of people, the peasantry, outside and below the law, and the rulers, the emperors, above and beyond it.

BERMAN, *supra* note 93, at 209-10.

by Peter the Great who recognized that many of Russia's statutes had been passed in contradiction to the existing code.[106] The recodification process was a housekeeping action of the first magnitude, sweeping away centuries of piecemeal and contradictory proclamations, and replacing them with a single standardized text.[107] While volume ten of the code (the volume devoted to the civil law) was patterned stylistically on the Napoleonic Code, the substantive law remained wholly Russian.[108] Thus, although the *Svod Zakonov* replaced the previously existing laws, it did not materially change many of them.[109] The *Svod Zakonov* remained in effect until after the Bolshevik Revolution.[110] It was periodically reissued in updated editions, and in 1887, for the first time codified previously existing Russian copyright statutes.[111]

Not surprisingly, the provisions pertaining to copyright were deleted from the text of the first Soviet civil code.[112] Lenin's vision for a socialist society incorporated Marx's view of the state and of the law as instruments of oppression wielded by those who controlled the "mode of production"[113] against the proletariat.[114] In theory, the establishment of a truly socialist society would coincide with the disintegration of the previously existing bourgeois infrastructure, including its system of laws.[115] Theoretically then, no codes would be necessary. Lenin re-

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106. The existing code was the *Ulozhenie* of 1649. By the time Tsar Peter I (The Great) came to power in 1682, over fifteen hundred legislative acts had been passed since the *Ulozhenie*, many of which contradicted that code. Peter created a commission to arrange the various laws, but the commission labored for three years without success. Finally, he decided to abolish all decrees that were contradictory to the 1649 code, and created a second commission to determine which laws were contradictory to it. That commission sat for five years with only limited effectiveness. Finally, in 1826, Tsar Nicholas I assigned the task to jurist Michael Speransky who first produced a chronological list of the 30,000 legislative enactments which had been passed in the period since the *Ulozhenie*, and later produced the *Zvod Zakonov* itself. *See* BERMAN, *supra* note 93, at 205-09. *See also* RIASANOVSKY, *supra* note 96, at 328.

107. *See* BERMAN, *supra* note 93, at 205-09.

108. *Id.* at 208-09.

109. *Id.*

110. RIASANOVSKY, *supra* note 96, at 328.

111. *See* BERMAN, *supra* note 93, at 209 (listing the years in which the first three editions of the *Zvod Zakonov* were issued). *See also* NEWCITY, *supra* note 74, at 7-8. The copyright provisions originally appeared as part of an 1828 censorship statute.

112. NEWCITY, *supra* note 74, at 20.

113. BERMAN, *supra* note 93, at 15.

114. *See* BERMAN, *supra* note 93, at 25. *See generally* BERMAN, *supra* note 93, at 15-24 (explaining classical Marxism and its implications for the state and legal institutions); W.E. BUTLER, SOVIET LAW 26-29 (1983) (detailing the relationship between the Marxist-Leninist theory of state and the law).

115. *See* BERMAN, *supra* note 93, at 22.

garded copyright and other related rights in the domain of private law (property, contract, etc.) as contrary to the concept of socialist society.[116] He did not order the promulgation of a civil code until it became obvious the revolution would not immediately transform the theory into reality.[117] The first Soviet civil code took effect on January 1, 1923.[118] It was based largely on the earlier Russian code as well as the German, Swiss, and French codes of the period, although (as was the case with the removal of the copyright provisions) it was adapted to support the new communist vision.[119] The code remained in effect until 1961 when the Supreme Soviet of the U.S.S.R. passed the Fundamentals of Civil Legislation of the U.S.S.R. and Union Republics (Fundamentals).[120] Each of the republics in turn amended their own civil codes to echo the law as promulgated by the Fundamentals.[121]

B. Copyright Statutes

1. Imperial Decrees

Revolution did not come to Russia until 129 years after it came to France.[122] It should not be surprising then that Russia's first copyright law, published during the interim period, more closely resembled that of earlier press-fearing monarchies than the rights-based enactments of post-revolutionary France.[123] The first printed book in Russia was published in 1564 during the reign of Ivan the Terrible.[124] The first copy-

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116. *See id.* at 25-26. *See also* BUTLER, *supra* note 114, at 164.

117. *See* BERMAN, *supra* note 93, at 32-34.

118. NEWCITY, *supra* note 74, at 20; BUTLER, *supra* note 114, at 165.

119. BERMAN, *supra* note 93, at 33; BUTLER, *supra* note 114, at 165.

120. Fundamentals of Civil Legislation of the U.S.S.R. and Union Republics art. 134, Vedomosti S"ezda Narodnykh Deputatov SSSR i Verkhovnogo Soveta SSSR, 1991, No. 26, at 733 (repealed August 3, 1993), *translated in* SovData DiaLine - SovLegisLine, May 31, 1991, *available in* LEXIS, Europe Library, ALLEUR File.

121. E.A. FLEISHITS & A. MAKOVSKY, *supra* note 82, at 8.

122. The French revolution occurred in 1789, and the Russian revolution in 1917.

123. Following the invention of movable type, European monarchies were quick to realize the power of the printing press and quick to control its output. Until the English Statute of Anne in 1710, most printing was controlled by royal license. The concern was not so much for the promotion of science and the arts, nor for protecting the rights of the printers, but for controlling the potential threat posed by the press to the various monarchies. *See* UNESCO, *supra* note 33, at 13. In Russia, printers were prohibited from publishing foreign material until 1771. NEWCITY, *supra* note 74, at 5. The nearly 100 years between the introduction of the printing press to Russia and the publication of the first foreign books demonstrates the skepticism with which the tsars regarded the new invention.

124. The book was *Acts of the Apostles and Messages of the Blessed Apostle*

right law was part of a statute on censorship published in 1828 under Tsar Nicholas I.[125] The law granted basic rights to authors such as: the exclusive right to publish, copy, and distribute their own works; the right to receive payment for other people's reproductions of their work; and the right to transfer these rights to their heirs, who could then benefit from the rights for twenty-five years after the author's death.[126] Notably, no law applied to the works of foreign authors that were first published abroad.[127] Russian printers were thus perfectly free to publish foreign works, either in the original language or translated into Russian.[128]

The 1828 law was revised and separated from the censorship proclamation in 1887, but, like the earlier law, it still did not apply to foreign works that first were published abroad.[129] The 1887 statute was replaced in 1911 with a statute modeled on the German copyright law of 1901.[130] Under the 1911 law, foreign works that first were published abroad remained in the public domain and could be translated freely into Russian by anyone. The foreign author, however, had to grant permission before the foreign work could be published in Russia in its original language.[131] The 1911 law remained in effect until after the October revolution of 1917.[132]

2. Soviet Statutes

Following the Bolshevik revolution of 1917, the new Soviet government rescinded all treaties signed under the tsars.[133] The Bolsheviks were intent on using the press to further their cause of worldwide revolution.[134] When it became clear that the new Soviet society would not result in the immediate dissolution of the old bourgeois infrastructure, they responded with laws shaping copyright relations to their own

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Paul. NEWCITY, *supra* note 74, at 4. The book followed the introduction of the printing press to Russia in 1563 by one year. 1 A HISTORY OF CIVILIZATION 303 (Crane Brinton, et al eds., 5th ed. 1976).

125. *See* NEWCITY, *supra* note 74, at 6.

126. *Id.* at 6-7.

127. *See id.* at 8.

128. *See id.*

129. *Id.*

130. *Id.* at 8-9.

131. *Id.* at 9. Consistent exclusion of Russian language translations tends to demonstrate a general Russian belief that Russian language materials are beyond the reach of international copyright protection.

132. *Id.* at 10.

133. *Id.* at 15.

134. *Id.* at 17.

purposes. The Soviets passed a "fundamental" copyright statute in 1925[135] and revised it soon afterward in 1928.[136] Both laws protected the rights of authors to publish, perform, and distribute their works, but neither law allowed completely free alienation of copyrights, nor did they protect the works of foreign authors first published abroad.[137] The RSFSR passed its version of the 1925 copyright law on October 11, 1926, and its version of the 1928 statute on October 8, 1928.[138]

By 1959, the 1928 statute had fallen behind the times. Technological advances like television, the development of new legal theories, and the actual practice of copyright protection had evolved beyond the text of the statute. The 1959 law did away with the formality of registration, since registration was not a prerequisite of protection, and many authors were not bothering to comply with the requirement. The new law also lifted the three year limitation on production contracts.[139]

Having given itself the tools with which to control the publishing industry, the new communist government turned its attention to providing incentives to produce works that expressed the proper communist ideology. In 1934, the Council of People's Commissars created the Literary Fund of the U.S.S.R. that supported publishers, book stores, and writers' clubs.[140] The Council created similar funds to encourage favorable works of art, music, and architecture.[141]

The government also attempted to encourage politically correct materials through the structure of the official royalty fee schedule. In 1947, the government introduced a royalty schedule that offered different royalty amounts depending on the official evaluation of an author's work as either satisfactory, good, or outstanding.[142] In 1960, the government issued a revised royalty schedule which ended the practice of requiring royalty payments to authors of non-Russian language works when their works were translated into other non-Russian languages of the Soviet Union.[143] Under the revised schedule, royalties were only paid when works of non-Russian language authors were translated into Russian.[144] The intended effect of the change in policy was probably to

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135. *Id.* at 21.

136. *Id.*

137. *See id.* at 21-25.

138. *Id.* at 21, 24.

139. *Id.* at 27.

140. *Id.* at 26.

141. *Id.*

142. *Id.* at 28. The criteria presumably measured the author's work in terms of its value to Soviet society.

143. *Id.*

144. *Id.*

provide incentive for Soviet authors to write and publish in Russian, since works published in non-Russian languages were then vulnerable to "free translation" (piracy) into other non-Russian languages. All of these laws supposedly had been designed by the Soviet government to liberate authors from what the Bolsheviks believed were abuses of authors by the powerful publishers of tsarist Russia.[145] Yet the fee schedules seemed to subject Soviet authors to an entirely new system of abuse.

3. The Fundamentals of Civil Legislation

In the Soviet system of government, the Supreme Soviet had the authority to pass "fundamentals" or "general principles" of law which were analogous to model codes; each of the individual republics were to use them as a basis for their own laws.[146] The 1961 Fundamentals for the first time integrated the laws on copyright into the civil code.[147] The republics each passed their own version of the 1961 Fundamentals between 1963 and 1964.[148] The Russian republic passed its version of the Fundamentals on 11 June 1964.[149] The copyright provisions were contained in part IV of that code, and consisted of 11 articles outlining the basic rights and relationships applicable to works subject to the law.[150]

The copyright provisions of the Fundamentals were by no means comprehensive. Many articles deferred specific protection to regulations to be promulgated elsewhere.[151] Some of the specifics that were provided included the ability to invoke protection without observance of formalities,[152] and a copyright duration which lasted for the life of the author plus fifty years.[153] Translations were allowed only with the permission of the author, who also enjoyed a moral right in his works such that supposedly he could seek judicial remedy for any distortion of

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145. *Id.* at 32.

146. *See* NEWCITY, *supra* note 74, at 29. *See generally* BUTLER, *supra* note 114, at 39- 46 (explaining the hierarchy of laws in the Soviet system).

147. E.A. FLEISHITS & A. MAKOVSKY, *supra* note 82, at 18.

148. *Id.* at 8.

149. *Id.* at 7.

150. PROGRESS PUBLISHERS, FUNDAMENTALS OF SOVIET CIVIL LEGISLATION AND CIVIL PROCEDURE 70-76 (from the Soviet Legislation Series) (1968).

151. *See id.*

152. *See* Fundamentals of Civil Legislation of the U.S.S.R. and Union Republics, art. 134, Vedomosti S"ezda Narodnykh Deputatov SSSR i Verkhovnogo Soveta SSSR, 1991, No. 26, p. 733 (repealed August 3, 1993), *translated in* SovData DiaLine - SovLegisLine, May 31, 1991, *available in* LEXIS, Europe Library, ALLEUR File.

153. *Id.* art. 137.

them.[154] The 1961 Fundamentals, and the civil codes modeled after them, remained in effect until 1973 when the Soviet Government amended them in preparation for the its accession the Universal Copyright Convention.[155] The Fundamentals themselves most recently were amended by the former Soviet Union on May 31, 1991, and those amendments were adopted by the Russian Federation after the Union dissolved.[156] The copyright provisions of the Fundamentals were replaced by the most recent copyright law, "On Copyright and Neighbor-

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154. *Id.* arts. 135, 143.

155. PROGRESS PUBLISHERS, *supra* note 150, at 224.

156. The Supreme Soviet adopted the Fundamentals of Civil Legislation of the former Soviet Union in a resolution dated 14 July, 1992. The *Resolution of the Russian Federation on the Regulation of Civil Legal Relations During the Period of Carrying Out of Economic Reform* reads:

> The Supreme Soviet of the Russian Federation, with the goal of guaranteeing uniform application of the regulations which are regulated and secured in various acts of legislation regarding civil legal relations in the period of carrying out of economic reform, resolves:
>
> 1. Henceforth, until the passage of a new Civil Code of the Russian Federation, the foundations of civil legislation of the U.S.S.R. and republics (Register of the U.S.S.R. Congress of Peoples Deputies and the U.S.S.R. Supreme Soviet, 1991, No. 26, p733), which were affirmed 31 May, 1991, will apply on the territory of the Russian Federation with the exception of regulations which are the established authority of the U.S.S.R. in the realm of civil legislation to the extent they do not contradict the constitution of the Russian Federation and the legislative acts which have been adopted by the Russian Federation after 12 June 1990.
>
> 2. The regulations of the RSFSR Civil Code affirmed by RSFSR law on 11JUNE1964 (Register of the RSFSR Supreme Soviet 1964, No. 24, p406), toward civil legal relations will apply, if they do not contradict legislative acts of the Russian Federation passed after 12JUNE1990, and other acts operating in the established order on the territory of the Russian Federation.

Resolution of the Russian Federation, EKONOMIKA I ZHIZN' [EKNON. I ZH.], Aug., 1992, No. 32. Ruslan I. Kasbulatov, then-Speaker of the Russian Federation Supreme Soviet, signed the Resolution on 14 July 1992 at the Moscow House of Supreme Soviets. The adopting resolution arranged the order of precedence of civil laws in the Russian Federation so that the Constitution of the Russian Federation became the highest authority, followed by Russian Federation statutes, followed by the statutes of the former Soviet Union, followed by the Fundamentals of Civil Legislation of the former Soviet Union, followed, apparently, by the Russian Federation civil code which was modeled on the Fundamentals, and passed on 11 June, 1964. One problem with the adopting resolution is the confusing way in which this precedence is spelled out. It is unclear, for example, if the Russian Federation civil code is lower in precedence to the Fundamentals of Civil Legislation. The civil code is listed as lower in precedence in this article because it was the last element addressed by the adopting resolution, and because it has not been amended as recently as the Fundamentals.

ing Rights," which came into force on August 3, 1993.[157]

IV. THE PRESENT STATE OF RUSSIAN COPYRIGHT LAW

There are now three copyright laws in force in Russia: Two are independent statutes devoted to (i) the protection of computer programs and databases, and (ii) the protection of integrated circuits.[158] The third is the new and comprehensive law "On Copyright and Neighboring Rights,"[159] which has replaced section IV of the Fundamentals of Civil Legislation as part of Russia's civil code.[160] Upon review, it appears the new law supplies duplicate coverage for the areas protected by each of the independent statutes. These laws therefore could be repealed without limiting available protection for the objects of copyright in the Russian Federation. For the moment, however, they remain as part of the legal landscape.

A. Computer Software Law

On September 23, 1992, the Supreme Soviet of the Russian Federation passed the law "On the Legal Protection of Computer Programs and Data Bases,"[161] (software law) which provided additional protection to computer software beyond what was provided by the Fundamentals of Civil Legislation.[162] The additional protection was required specifically under the U.S.-Russian trade agreement,[163] and was an improvement over the Fundamentals because it was tailored to address concerns unique to computer programming. That improvement was offset somewhat by the law's separation from the new and more compre-

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157. *New Russian Copyright Law Published, Took Effect Aug. 3*, BNA INT'L TRADE REP., Aug. 11, 1993, at 1340.

158. *See infra* notes 161-83 and accompanying text.

159. Vedomosti S"ezda Narodnykh Deputatov Rossiyiskoy Federatsii i Verkhovnogo Soveta Rossiyiskoy Federatsii, Issue No. 32, Item No. 1242.

160. *See* Resolution of the Supreme Soviet of the Russian Federation, On Enactment of the Law of the Russian Federation 'On Copyright and Neighboring Rights,' para. 10, EKNON. I ZH., Aug., 1993, No. _____.

161. On the Legal Protection of Computer Programs and Data Bases, Vedomosti S"ezda Narodnyikh Deputatov Rossiyskoy Federatsii i Verkhovnogo Soveta Rossiyiskoy Federatsii, [Computer Software and Database Protection Act] Issue No. 42, Item No. 2325, *translated in* SovData DiaLine - SovLegisLine, Sept. 23, 1992, *available in* LEXIS, Europe Library, ALLEUR File.

162. *Id.*; *Russian Law on Computer Programs Offers Copyright Protection, but Fundamental Flaws Exist*, RUSSIA AND COMMONWEALTH BUS. L. REP., Dec. 11, 1992, at 1.

163. U.S.S.R.-U.S. Agreement on Trade Relations art. VIII, pt. 1(a), June 1, 1990, U.S.S.R.-U.S., 29 I.L.M. 949 (1990).

hensive copyright law. As long as computer programs are protected in a separate statute, it remains possible for Russian courts to construe the statute narrowly, and provide less protection for software than they might if software was clearly protected under the same standard as other objects of copyright. Additionally, significant confusion may arise if the Federal Assembly does not repeal the computer software law now that the new and more comprehensive law is in place.

The software law provides many of the protections necessary to be compatible with the Berne Convention. Along with providing exemptions from formalities,[164] the law grants copyright protection for the life of the author plus fifty years.[165] Additionally, authors enjoy the exclusive right to control publication, reproduction, distribution, and modification, including translation of programs from one language to another.[166] Authors may transfer their economic rights by contract,[167] and the economic rights of employee-created works vest in the employer unless contracted otherwise.[168] The law stipulates that copyright owners may demand infringement to stop, and may receive damages in the amount of 5,000 to 50,000 times the statutory minimum monthly wage.[169] The law further permits seizure of any illegal copies, and the equipment used to make them.[170]

One drawback is that the law only offers copyright protection to programs that result from an author's "creative effort."[171] The language seems to imply that an element of creative input is prerequisite to protection. If so, the law imposes a higher standard than does the Berne Convention, which grants protection to "every production in the literary, scientific, and artistic domain" regardless of the mode or form of expression.[172] The requirement of creativity will force Russian courts to evaluate a computer program's creative content—a task that, given the highly technical nature of many computer programs, few in the judiciary may be competent to perform. The drafters of the software

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164. Computer Software and Database Protection Act art. 4, para. 1.

165. *Id.* art. 6, para. 1.

166. *Id.* arts. 10-11.

167. *Id.* art. 11.

168. *Id.* art. 12.

169. *Id.* arts. 18-19. The remedy is expressed as a function of the national monthly minimum wage instead of actual ruble amounts in order to account for the rapid and continuing devaluation of that currency. Pinning the penalty to the minimum wage ensures it will continue to deter infringement even if the currency continues to devalue.

170. *Id.*

171. *Id.* art. 3.

172. Berne Convention, *supra* note 17, art. 2, 828 U.N.T.S. at 227-29.

law apparently recognized some of the possible problems with the creativity language, because the law directs courts to assume the author's effort was creative until proved otherwise.[173] The direction is helpful but leaves open the possibility that some programs will not be protected if found particularly uncreative.

Another drawback is that the law does not clearly define the right to control software rentals. The copyright owner should be able to control rentals in order to discourage wide-scale abuses of rentals for the purpose of creating illegal copies. Additionally, the law only applies to software created after its own effective date of October 20, 1992.[174] The law is somewhat ambiguous as to the legal status of a huge body of illegal software that already exists in Russia. One interpretation is that the law applies to all illegally obtained programs, no matter when the programs were obtained, and becomes enforceable on the effective date.[175] Another interpretation is that the law only applies to programs which are obtained illegally after the effective date, leaving all of the previously existing illegal copies beyond the reach of the law.[176] Although it is impossible to tell exactly how Russian courts will interpret the statute, it seems reasonable that most enforcement actions would involve relatively deep-pocket commercial violators who stand to lose more than individual transgressors.

A further concern is that the law does not protect programs as "literary works" as specified by the U.S.-Russian trade agreement.[177] That omission leaves open the possibility that future laws may try to differentiate between the amount of protection awarded to literary works and the amount awarded to computer programs. The possibility thus remains that computer programs could be singled out for lesser protection and therefore exposed to abuse.

The law would provide a greater incentive to respect copyrights if it included specific criminal penalties in addition to civil penalties.[178] Changing the behavior of an entire society that is comfortable with copyright infringement will require strict enforcement and the imposition of heavy penalties. Exporters of software to Russia would be better served by a single, comprehensive copyright law. That way there would

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173. Computer Software and Database Protection Act, art. 3.

174. *Russian Law on Computer Programs, supra* note 162, at 3.

175. *Id.*

176. *Id.*

177. *Id.*

178. Generally, criminal liability is imposed "under the law," but the law does not specify what penalties may be imposed. Computer Software and Database Protection Act, art. 20.

be no doubt that software would receive the same standard of protection applied to literary works. A single law would also reduce the level of confusion, which history has shown may result from the piling on of one decree after another, with little attempt to harmonize or reconcile their provisions.

B. Integrated Circuit Law

The Supreme Soviet passed the law "On the Protection of Integrated Circuit Topology" (integrated circuit law) on September 23, 1992.[179] The law offers copyright protection to integrated circuit designs. Structurally, the law closely resembles the computer software law that the Supreme Soviet of the Russian Federation passed the same day. Like the software law, the integrated circuit law offers protection to "original" circuit designs which are the result of the author's creative efforts.[180] It therefore creates the same possibility for narrow construction as the software law. Article 10 of the integrated circuit law grants the author of a circuit design a ten year period of exclusive use.[181] The ten year period will not block Russia's membership in the Berne Convention (which requires protection for the life of the author plus fifty years),[182] because article 14 of the integrated circuit law gives precedence to the rules contained in the international treaties to which Russia is a party.[183] Still, just as with the computer software law, Russia would have been better served by including integrated circuits in a single comprehensive copyright law to avoid possible conflict and confusion.

C. The New Copyright Law

On July 9, 1993, the Supreme Soviet of the Russian Federation passed a new and comprehensive copyright law entitled "On Copyright

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179. Integrated Circuit Topology Protection Act, SovLegisLine, Sept. 23, 1992, *available in* LEXIS, Europe Library, ALLEUR File.

180. *Id.* art. 3, para. 2. Article 3, paragraph 2 reads: "2. Original topology shall be topology developed as a result of the author's creative effort. Topology shall be deemed original in the absence of proofs to the contrary."

181. *Id.* art. 10.

182. Berne Convention, *supra* note 17, art. 6<bis>, para. 1, 828 U.N.T.S. at 235.

183. Integrated Circuit Topology Protection Act, art. 14. Article 14 reads in pertinent part: "Where [an] international treaty of the Russia Federation lays down rules other than those contained in the present Act, the rules of the international treaty shall apply."

and Neighboring Rights."[184] The law came into force on August 3, 1993, upon its publication, and replaced the copyright provisions provided by section IV of the Fundamentals of Civil Legislation.[185] The new law represents a vast improvement over the Fundamentals.[186] The law is divided into five sections: (i) General Provisions, describing the relation of the law to other Russian laws and providing basic definitions; (ii) Copyright, describing the sphere of application, scope, subjects of, and works subjects to copyright; (iii) Neighboring Rights, describing the rights of performers, record producers, and broadcasting and cable organizations; (iv) Collective Administration of Economic Rights, allowing the creation of a body to collect and distribute royalties; and, (v) Protection of Copyright and Neighboring Rights, providing a wider range of remedies than did previous law.

The new law regulates relationships that arise in conjunction with the creation and use of scientific, literary and artistic works (copyright) and those that arise in connection with phonograms, performances, broadcasts, and cable transmissions (neighboring rights).[187] The law extends copyright protection to the following: literary works (including

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184. *Russian Supreme Soviet Introduces Copyright Law*, BBC SUMMARY OF WORLD BROADCASTS AND MONITORING REPS., July 14, 1993.

185. Resolution of the Supreme Soviet of the Russian Federation, On Enactment of the Law of the Russian Federation 'On Copyright and Neighboring Rights,' para. 10, EKNON. I ZH., Aug., 1993, No. _____. Paragraph 10 of the resolution proclaims: "[The Supreme Soviet of the Russian Federation has decided t]o declare null and void from the enforcement date of this Law the Chapter IV of the Fundamental Principals of the Civil Legislation of the USSR and the republics adopted by the USSR Supreme Soviet on May 31, 1991." *See also* On Copyright and Neighboring Rights, art. 2, Vedomosti S"ezda Narodnykh Deputatov Rossiyiskoy Federatsii i Verkhovnogo Soveta Rossiyiskoy Federatsii, Issue No. 32, Item No. 1242. Article 2 provides in pertinent part:

> Legislation of the Russian Federation on copyright and neighboring rights comprises this Law which is a part of the civil legislation of the Russian Federation applicable on the entire territory of the Russian Federation, other acts of the legislation of the Russian Federation issued in accordance with this law, Law of the Russian Federation "On Legal Protection of Computer Programs and Databases", as well as the legislative acts of the republics within the Russian Federation adopted on the basis of this Law.

Id.

186. The law does not limit the author's rights as severely as did the Fundamentals. The law appears to value the concept of freedom of contract in that many of the restrictions on authors' contracts have been removed. Additionally, the law allows for the creation of a collective administration to collect and distribute royalty fees and provides a wider range of remedies. Thus, the law favors the author far more than did previous laws. *See* On Copyright and Neighboring Rights, arts. 30-34, 44-50.

187. *Id.* art. 1.

computer programs); dramas, musicals, and scripted works; choreography and pantomime; movies, television, video tapes, and other films; paintings, sculpture, graphics, designs, and comics; buildings and architectural designs; photographic works similar to photography (photocopies); and, geographic, geological, and topographic works, including maps, plans, and sketches, that are the result of creative activity.[188] Expressly excluded from protection are (i) official documents such as laws, court judgments, and other governmental texts; (ii) national symbols such as flags, coats of arms, and monetary designators; (iii) folk art; and (iv) information about events such as news stories.[189]

Under the law, copyright lasts for the life of the author, plus fifty years.[190] If an author discloses a work anonymously, the law limits the duration to fifty years from the date of first disclosure.[191] If an author's work was banned from publication by the Soviet government during the life of the author, but later cleared and legally published after the author's death, the copyright endures for fifty years from the date of the first legal publication.[192] The law protects the works of joint authors for fifty years following the death of the last surviving author.[193] Neighboring rights endure for fifty years from the date of first disclosure.[194] Similar to copyright, if disclosure of the work was repressed by the Soviets during the right holder's lifetime, and later rehabilitated after his death, the right endures for fifty years from the date of first legal disclosure.[195] For both copyright and neighboring rights, the period is extended to fifty-four years if the right holder was a veteran of World War II.[196] The law's terms of duration do not have retroactive effect, however, President Yeltsin's resolution, which gave effect to the law, indicated that copyrights in effect when the law was passed would endure for fifty years from the date of their first legal disclosure or fifty years from their first creation if the work was not disclosed. The resolution appears to reduce retroactively the level of protection for previous right holders, since the Fundamentals of Civil Legislation, as amended on May 31, 1991, had provided protection for the life of those right

188. *Id.* arts. 6-7. The list is non-exhaustive.
189. *Id.* art. 8.
190. *Id.* art. 27.
191. *Id.*
192. *Id.*
193. *Id.*
194. *Id.* art. 43.
195. *Id.* art. 43(b).
196. *Id.* arts. 27, 43.

holders plus fifty years.[197]

Authors retain moral rights to their works under the copyright law even after they have transferred their economic rights. The moral rights include the right to be regarded as the author of the work (right to authorship), the right to use or authorize use of the work under the author's true name or pseudonym, or to publish the work anonymously (right to name), the right to disclose or authorize disclosure of the work in any form (right of disclosure), the right to protect the work from any distortion that might injure the honor and dignity of the author (right to protection of the author's reputation), and in the case of fine art, the right of access to the work (*droite de suite*) which includes the right to reproduce the work of art, and to share in the proceeds of any resale in the amount of five percent of the resale price.[198]

Economic rights include the authors' exclusive rights to display, distribute, import, perform, reproduce, rent, sell, use, and communicate their works by broadcast, cable transmission, or similar medium.[199] Except for the rights associated with fine art and the right to receive proceeds from rentals, the author's economic rights are exhausted upon first sale of the works.[200] Authors retain the exclusive right to collect the proceeds from any rent of their works regardless of who owns them.[201]

The new law favors authors' rights far more than did the Fundamentals. The new law provides that authors may transfer their economic rights by contract without the involvement of any government agency. The law contributes to the protection of authors by carefully describing how contracts may be used to transfer their economic rights. For instance, contracts must be in writing,[202] and may not transfer a right to use a work in a manner that is unknown at contract formation.[203] Neither may the contractual recipient of a right resell the right unless the right to resale is included expressly in the original contract.[204] The right to use future creations of the author may not be the

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197. Fundamentals of Civil Legislation of the U.S.S.R. and Union Republics art. 137, Vedomosti S"ezda Narodnykh Deputatov SSSR i Verkhovnogo Soveta SSSR, 1991, No. 26, p. 733 (repealed Aug. 3, 1993), *translated in* SovData DiaLine - SovLegisLine, May 31, 1991, *available in* LEXIS, Europe Library, ALLEUR File.

198. On Copyright and Neighboring Rights, arts. 16 (rights to authorship, name, disclosure, and reputation) -17 (*droit de suite*).

199. *Id.* art. 16.

200. *Id.* art. 16(3).

201. *Id.*

202. *Id.* art. 32.

203. *Id.* art. 31(2).

204. *Id.* art. 31(4).

subject of contracts, nor may the contracts include conditions that restrict the author's freedom to produce works on particular subjects or in certain areas.[205]

Neighboring rights are held by the performers and producers of record albums, and broadcasting and cable companies.[206] Performers hold exclusive rights to: their name; the defense of the integrity of their performances; the broadcast or transmission via cable, provided the performance has not been recorded or broadcast previously; the recording of a performance not previously recorded; and the rental proceeds accumulated through the rent of a recording of the performance.[207] Record producers enjoy the exclusive right to reproduce, alter, adapt, distribute, and import the records they produce.[208] Broadcasting and cable organizations retain the exclusive rights to broadcast via air or cable, record transmissions, copy recordings of transmissions, and transmit works for consumption by fee-paying members of the public.[209]

The new copyright law allows for the creation of an authors' society to oversee the collection and distribution of royalty payments.[210] The law directs the authors' society to negotiate the amount of remuneration due to authors, to issue licenses to holders of economic rights, to collect and distribute royalty fees, to report to authors concerning the volume of use of their works, and to take whatever legal action may be necessary to defend its right of administration.[211] On October 7, 1993, President Yeltsin abolished the Russian Intellectual Property Agency and approved the Russian Author's Society to be the administrative body that would fulfill these responsibilities.[212]

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205. *Id.* art. 31(5)-(6). Authors may however sign commission contracts whereby they are paid to produce a work meeting certain specifications stipulated in the contract. *Id.* art. 33.

206. *Id.* art. 36.

207. *Id.* art. 37.

208. *Id.* art. 38. The producer's exclusive right to import records includes copies of the record that were made with the producer's consent. *Id.* This power to prevent parallel imports offers greater protection to Russian record producers than is required for compatibility with the Berne Convention. It is more protection, for instance, than is enjoyed by record producers in the European Union. *See* Case 78/70, Deutsche Grammophon Gesellschaft gmbh v. Metro-SB-Grossmärkte Gmbh & Co. KG, 1971 E.C.R. 487, 10 C.M.L.R. 631 (1971) (European Court of Justice determined record producers cannot assert neighboring rights to prevent parallel import of a recording once it has been marketed somewhere within the European Community).

209. On Copyright and Neighboring Rights, arts. 40-41.

210. *Id.* arts. 44-46.

211. *Id.* arts. 46-47.

212. *State Policy in the Protection of Copyright and Related Rights*, RF

The new law provides civil penalties for copyright infringement, but indicates that administrative and criminal penalties will be promulgated elsewhere.[213] Remedies provided by the law include: the author's ability to demand recognition of his rights; compensation for damages[214] and return to the economic position in which he stood prior to the infringement; and confiscation of counterfeit copies as well as the equipment used to make them.[215] The law considers counterfeit copies to include copies imported from a jurisdiction where the copies were legally made, unless the Russian copyright owner consents to importation.[216]

Perhaps the biggest problem with the new law, at least from the American perspective, is its failure to increase the level of protection for works copyrighted before August 3, 1993. Thus, major exporters of intellectual property material will continue to lose millions of dollars through the "piracy" of pre-existing works. American authorities are very concerned about the issue of retroactive copyright protection in virtually every market. Few countries that agree to increase their level of international copyright protection, either by joining an international Convention or by drafting new copyright laws, also agree to offer retroactive protection to works published before the publication of those new laws.[217] Thus, the continued unauthorized reproduction of works that enjoy copyright protection in the United States, but which continue to

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President's Edict No. 1607, *available in* LEXIS, Europe Library, ALLEUR File.

213. On Copyright and Neighboring Rights, art. 48.

214. *Id.* art. 49. Alternatively, the author may elect to receive the income received by the infringer on account of the infringement, or to receive a sum not less than ten and not more than 50,000 times the amount of the minimum wage salary as determined by a court or arbitration panel. *Id.* The alternatives probably are included to ensure that authors will not be robbed of their recovery on account of currency devaluation between infringement and judgment.

215. *Id.* arts. 49-50.

216. *Id.* art. 48.

217. Japan, for instance, only last year amended its copyright laws to prevent Japanese compact disc rental shops from renting American products without the American copyright owner's permission. The new Japanese law also extends the period of protection from thirty years to fifty years which is the international standard. *RIAA Warns CD Rental Shops of Changes to Copyright Law*, BNA PAT., TRADEMARK & COPYRIGHT L. DAILY, Jan. 10, 1992. In November of 1991, then Secretary of State James Baker negotiated an agreement with China whereby China agreed to join the Berne Convention by June of 1993. One of the areas that remained to be negotiated was the time frame under which China will provide retroactive copyright protection to foreign works of intellectual property. *Secretary of State Pressures China on Human Rights, Trade-Related Issues*, BNA PAT., TRADEMARK & COPYRIGHT L. DAILY, Nov. 25, 1991.

exist in the public domain overseas because of their creation prior to the passage of various foreign copyright laws, causes American intellectual property exporters to lose billions of dollars across the world. In Russia, American film and record exporters would seem to be prime candidates for injury, since many works which are protected here seem likely to remain in the public domain over there.

A secondary consequence of this shortfall is that a primary market in current works may never develop. There is little incentive to pay royalties for current films and records if a larger body of older, but still fresh and unfamiliar works are available for free. Given the present state of the Russian economy, it seems unlikely many Russians would spend the money on current works if there were cheaper alternatives. The problem will not be quite as severe once the Russian Federation joins the Berne Convention, since the new copyright law's conflict of laws clause would ensure that works protected under the Convention would be similarly protected in Russia.[218] Nevertheless, because the United States only joined the Convention effective May 31, 1989, there are plenty of pre-1989 American works which are not covered by the Convention, and which would therefore remain in the public domain within Russia.

V. CONCLUSION

Russia has a long history of providing copyright protection only to works first published on its territory. Although Russia has succeeded the Soviet Union as a member of the Universal Copyright Convention, and despite its stated intention to join the Berne Convention prior to March of 1994, Russia has yet to join.[219] Still, the new Russian copyright law is a huge step in the right direction since its provisions almost certainly meet the Berne standards.

Additionally, Russia must emphasize enforcement of its new law. This may be a difficult task given that few in the Russian legal system are familiar with infringement and fair use litigation.[220] An important component to change will be training for judges and prosecutors, as

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218. On Copyright and Neighboring Rights, art. 3.

219. *See* Sergei Leskov, *Serious Protection of Intellectual Property Desired*, IZVESTIA, Oct. 15, 1993 at 2, *translated in* 45 CURRENT DIG. OF POST-SOV. PRESS, No. 41 at 24 (Nov. 10, 1993).

220. As of July 21, 1992, no Russian court had yet heard a case of copyright infringement. Mikhail Fedotov, Press Conference by Russian Intellectual Property Agency, (July 21, 1992) (transcript available in LEXIS, Europe Library, ALLEUR File).

well as campaigns to heighten public awareness.[221] The level of piracy is not likely to decline, nor the level of international confidence in Russian copyright likely to increase, until it becomes clear that copyright infringement brings about consistent and predictable consequences.

Because the new law duplicates the protections provided by the computer software and the integrated circuit laws, the Federal Assembly really should repeal those laws. This repeal would avoid confusion and remove the possibility that independent case law will develop. If Russia continues to modify existing law without repealing the prior law, it will not be very long before the judicial system becomes paralyzed, just as it did more than 150 years ago when Michael Speransky assumed the difficult task of untangling the centuries-old pile of contradictory imperial decrees.[222] Of course, back then, the ultimate solution was the Bolshevik Revolution.

Christopher Boffey

221. Dissemination of information to the public was one of the goals identified by the Russian Intellectual Property Agency. *See id.* Of course, that agency ceased to exist when President Yeltsin approved the transfer of oversight of copyright to the independent Russian Author's Society.

222. *See supra* note 106 and accompanying text.