Copyright, Freedom of Speech, and Cultural Policy in the Russian Federation

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I dedicate this volume to my father, who passed to me his love for writing on law, to my mother, for always being present, to my wife Tanja, and to our children Bronia, Saskia, and Nastassia, for their patience and impatience…

LIST OF ABBREVIATIONS

Editorial Abbreviations

amend., amends.	amendment (s)
a.o.	among others
app., apps.	appendix, appendices
art., arts.	article(s)
ch., chs.	chapter(s)
cl., cls.	clause(s)
comm.	commentary
e.g.	*exempli gratia*, for instance
et al.	*et alii*
ed., eds.	editor(s)
etc.	*et cetera*
esp.	especially
ff.	following
Ibid., *Id.*	*ibidem*
i.e.	*id est*
inter alia	among others
Izd.	*Izdatel'stvo* (publishing house)
loc.cit.	*locus citatum*
MFN	Most-favored-nation treatment
No., Nos.	number(s)
op.cit.	*opus citatum*
p., pp.	page(s)
para.	paragraph(s)
p.m.a.	*post mortem auctoris*
resp.	respectively
sec., secs.	section(s)
vol., vols.	volume(s)

Abbreviations of Normative Acts

BC	Berne Convention for the Protection of Literary and Artistic Works (Paris, 24 July 1971)
CA 1911	Russian Copyright Act of 20 March 1911
CA 1926	RSFSR Copyright Act of 11 October 1926
CA 1928	RSFSR Copyright Act of 8 October 1928
CC RSFSR	RSFSR Civil Code of 11 June 1964
CC RF	RF Civil Code of 21 October 1994 (Part One) and 26 January 1996 (Part Two)

CL 1993	RF Copyright Law of 9 July 1993
Const.1936	USSR Constitution of 1936
Const.1977	USSR Constitution of 1977
Const.1978	RSFSR Constitution of 1978
Const.1993	RF Constitution of 1993
CrC 1960	RSFSR Criminal Code of 27 October 1960
CrC 1996	RF Criminal Code of 13 June 1996
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
Fundamentals 1925	USSR Fundamentals of Copyright of 30 January 1925
Fundamentals 1928	USSR Fundamentals of Copyright of 16 May 1928
Fundamentals 1961	Fundamentals of Civil Legislation of the Soviet Union and the Union Republics of 8 December 1961
Fundamentals 1991	Fundamentals of Civil Legislation of the USSR and the Republics of 31 May 1991
GC	Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms of 29 October 1971 (the Geneva Convention)
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICCPR	International Covenant on Civil and Political Rights
NMA RF	RF News Media Act of 27 December 1991
NMA USSR	USSR Act on the Printed Press and the News Media of 12 June 1990
MPC	Model Publishing Contract for Literary Works of 24 February 1975
MPrC	Model Production Contract for the Creation of a Dramatic Work of 1 September 1976
MSC	Model Screenplay Contract for Artistic Movies of 21 February 1978
PA	Agreement on Partnership and Cooperation of 24 June 1994 between the European Communities and its Member States, and the RF
RC	International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations of 26 October 1961 (the Rome Convention)

SSA	RF State Secrets Act of 21 July 1993
UCC	Universal Copyright Convention (Geneva, 6 September 1952)
UDHR	Universal Declaration of Human Rights of 10 December 1948

Abbreviations of State Bodies, Place Names, Names of Legal Acts etc.

	In Russian
GAASP	*Gosudarstvennoe agentstvo SSSR po avtorskim i smezhnym pravam* (USSR State Agency for authors' and neighboring rights)
KPSS	*Kommunisticheskaia Partiia Sovetskogo Soiuza* (Communist Party of the Soviet Union)
Narkompros	*Narodnyi Komissariat po prosveshcheniiu* (People's Commissariat for Education)
PKS	*Postanovlenie Konstitutsionnogo Suda* (Decree of the Constitutional Court)
PP	*Postanovlenie Pravitel'stva* (Governmental Decree)
PPVS	*Postanovlenie Plenuma Verkhovnogo Suda* (Decree of the Plenum of the Supreme Court)
PSM	*Postanovlenie Soveta Ministrov* (Decree of the Council of Ministers)
PSMP	*Postanovlenie Soveta Ministrov-Pravitel'stva* (Decree of the Council of Ministers-the Government)
PSND	*Postanovlenie S"ezda narodnykh deputatov* (Decree of the Congress of People's Deputies)
PVAS	*Plenum Vysshego Arbitrazhnogo Suda* (Plenum of the Supreme Arbitration Court)
PVS	*Postanovlenie Verkhovnogo Soveta* (Decree of the Supreme Soviet)
RAIS	*Rossiiskoe agentstvo intellektual'noi sobstvennosti* (Russian Agency for Intellectual Property)
RAO	*Rossiiskoe avtorskoe obshchestvo* (Russian Copyright Society)
RosAPO	*Rossiiskoe agentstvo po pravovoi okhrane programm dlia EVM, baz dannykh i topologii integral'nykh mikroskhem* (Russian Agency for the Legal Protection of Computer Programs, Databases and Topologies of Integrated Microcircuits)
Rospatent	*Gosudarstvennoe patentnoe vedomstvo Rossiiskoi Federatsii* (RF State Patent Office)

SM	*Sovet Ministrov* (Council of Ministers)
SNK	*Sovet Narodnykh Komissarov* (Council of People's Commissars)
TsIK	*Tsentral'nyi Ispolnitel'nyi Komitet* (Central Executive Committee)
TsK	*Tsentral'nyi Komitet* (Central Committee)
UPVS	*Ukaz Prezidiuma Verkhovnogo Soveta* (Edict of the Presidium of the Supreme Soviet)
VAAP	*Vsesoiuznoe agentstvo po avtorskim pravam* (All-Union Agency for Authors' Rights)
VKP(b)	*Vsesoiuznaia Kommunisticheskaia Partiia (bol'shevikov)* (All-Union Communist Party-Bolsheviks)
VNIISZ	*Vsesoiuznyi Nauchno-Issledovatel'skii Institut Sovetskogo Zakonodatel'stva* (All-Union Institute for Scientific Research in the Field of Soviet Legislation)
VTsIK	*Vserossiiskii Tsentral'nyi Ispolnitel'nyi Komitet* (All-Russian Central Executive Committee)

In English

CC	Central Committee
CPSU (or: CP)	Communist Party of the Soviet Union
Eur.Comm.H.R.	European Commission of Human Rights
Eur.Ct.H.R.	European Court of Human Rights
CIS	Commonwealth of Independent States
L.	Leningrad
M.	Moscow
PPO	Primary Party Organization
RF	Russian Federation
RSFSR	Russian Soviet Federative Socialist Republic
SPb.	Saint Petersburg
Sv.	Sverdlovsk
USSR	Union of Socialist Soviet Republics

Abbreviations of Journals and Official Publications

Russian-language

BMD	Biulleten' mezhdunarodnykh dogovorov
BNA SSSR	Biulleten' normativnykh aktov SSSR
BVS SSSR	Biulleten' Verkhovnogo Suda SSSR
BVS RF	Biulleten' Verkhovnogo Suda RF
GiP	Gosudarstvo i Pravo
IS	Intellektual'naia Sobstvennost'

MZhMP	Moskovskii Zhurnal Mezhdunarodnogo Prava
Ross.Iust.	Rossiiskaia Iustitsiia
SAPP RF	Sobranie Aktov Prezidenta i Pravitel'stva Rossiiskoi Federatsii
SGiP	Sovetskoe Gosudarstvo i Pravo
Sots.Zak.	Sotsialisticheskaia Zakonnost'
Sov.Iust.	Sovetskaia Iustitsiia
SP RSFSR/RF	Sobranie postanovlenii pravitel'stva RSFSR/RF
SP SSSR	Sobranie postanovlenii pravitel'stva SSSR
SU RSFSR	Sobranie Uzakonenii i Rasporiazhenii Rabochego i Krest'ianskogo Pravitel'stva RSFSR
SZ RF	Sobranie Zakonodatel'stva RF
SZ SSSR	Sobranie Zakonov i Rasporiazhenii SSSR
VI	Voprosy Izobretatel'stva
VLU	Vestnik Leningradskogo Universiteta. Seriia 6
VMU	Vestnik Moskovskogo Universiteta. Seriia 11: Pravo
VSND i VS RSFSR	Vedomosti S"ezda narodnykh deputatov RSFSR i Verkhovnogo Soveta SSSR
VSND i VS SSSR	Vedomosti S"ezda narodnykh deputatov SSSR i Verkhovnogo Soveta SSSR
VVS RSFSR	Vedomosti Verkhovnogo Soveta RSFSR
VVS SSSR	Vedomosti Verkhovnogo Soveta SSSR
Zak.	Zakonnost'

English, German, French and Dutch language

AA	Ars Aequi
Am.J.Comp.L.	American Journal of Comparative Law
B.C.Int'l & Comp.L.Rev.	Boston College International and Comparative Law Review
B.S.	Belgian Official Gazette
B.U.Int'l L.J.	Boston University International Law Journal
Bull.EU	Bulletin of the European Union
CDPSP	The Current Digest of the Post-Soviet Press
CDSP	The Current Digest of the Soviet Press
CMLR	Common Market Law Review
Col.Hum.Rts.L.Rev.	Columbia Human Rights Law Review
Col.J.Transnat'l L.	Columbia Journal of Transnational Law
Copyright L.Symp.	Copyright Law Symposium
Cornell Int'l L.J.	Cornell International Law Journal
DA	Le Droit d'Auteur
Dick.J.Int'l L.	Dickinson Journal of International Law

ECLR	European Competition Law Review
EIPR	European Intellectual Property Review
EJIL	European Journal of International Law
EuGRZ	Europäische Grundrechte Zeitschrift
Fordham L.Rev.	Fordham Law Review
Ga.J.Int'l & Comp.L.	Georgia Journal of International and Comparative Law
Geo.Wash.J.Int'l L.& Econ.	George Washington Journal of International Law and Economics
GRUR Int.	Gewerblicher Rechtsschutz und Urheberrecht. Internationaler Teil
HRLJ	Human Rights Law Journal
Harv.Int'l L.J.	Harvard International Law Journal
Harv.L.Rev.	Harvard Law Review
IIC	International Review of Industrial Property and Copyright
I.L.M.	International Legal Materials
Int'l Law.	The International Lawyer
J.Copyright Soc'y U.S.A.	Journal of the Copyright Society of the USA
J.Int'l L.& Econ.	The Journal of International Law and Economics
JWT	Journal of World Trade
Loy.L.A.Ent.L.J.	Loyola of Los Angeles Entertainment Law Journal
Md.J.Int'l L.& Trade	Maryland Journal of International Law and Trade
Mich.J.Int'l L.	Michigan Journal of International Law
NJ	Nederlands Juristenblad
Ohio N.U.L.Rev.	Ohio Northern University Law Review
OJ	Official Journal of the European Communities
Parker Sch.J.E.Eur.L.	Parker School Journal of East European Law
PS SEEL	Parker School Survey of East European Law
Pasin.	Pasinomie
RCEEL	Review of Central and Eastern European Law
Rev.Soc.L.	Review of Socialist Law
RIDA	Revue Internationale du Droit d'Auteur
ROW	Recht in Ost und West
RTD com.	Revue trimestrielle de droit commercial et de droit économique
R&R	Rechtsfilosofie en Rechtstheorie
RW	Rechtskundig Weekblad
SD	Statutes and Decisions. A Journal of Translations

Stud.Dipl.	Studia Diplomatica
SSD	Soviet Statutes and Decisions. A Journal of Translations
T.B.P.	Tijdschrift voor Bestuurswetenschappen en Publiek Recht
T.Rechtsgesch.	Tijdschrift voor rechtsgeschiedenis
UFITA	Archiv für Urheber-, Film-, Funk- und Theaterrecht
Utah L.Rev.	Utah Law Review
Vand.J.Transnat'l L.	Vanderbilt Journal of Transnational Law
Whittier L.Rev.	Whittier Law Review
WiRO	Wirtschaft und Recht in Osteuropa
ZaöRV	Zeitschrift für ausländisches öffentliches Recht und Völkerrecht
ZUM	Zeitschrift für Urheber- und Medienrecht

GENERAL INTRODUCTION

1. In a "plan for an article concerning the rights of a writer", dated to 1835,[1] Aleksandr Sergeevich Pushkin, the greatest poet and the father of the modern Russian language and literature, listed ten points with which he wished to deal. The first two ("on literary property" and "on the rights of the publisher, the writer, the anonymous, the heirs") and perhaps also the last one ("on the personality") concerned copyright, while the other seven dealt with censorship of the contents of publications.

Pushkin never wrote this article, but he did get a later chance to put his ideas about Russian copyright down on paper. On 11 December 1836, Baron Barante, French ambassador to St. Petersburg, wrote to Pushkin,[2] asking him for explanation and comments on the copyright legislation then current in Russia. In his answer of 16 December 1836,[3] barely a few weeks before his tragic death, Pushkin gave an overview of the provisions of the law of 22 April 1828 (*Ustav o tsenzure*), indicated as a deficiency the absence of any arrangement for posthumous or pseudonymous works, and concluded:

> La question de la propriété littéraire est très simplifiée en Russie où personne ne peut présenter son manuscrit à la censure sans en nommer l'auteur et sans le mettre par cela même sous la protection immédiate du gouvernement.[4]

Both in his plan for an article and in his letter to Barante, Pushkin makes a connection between copyright and censorship, and this was no coincidence: in Czarist Russia the application of subjective copyright was, until 1911, materially connected to the fulfillment of the requirements of the legislation on censorship. Throughout his brief life, Pushkin struggled almost ceaselessly against censorship a struggle which was also, albeit indirectly, for respect for the inviolability of an author's creation.

2. Pushkin's plan and letter fix our attention on the fact that the full meaning and function of copyright only become clear when they are situated within a particular political-constitutional context. The economic system within which the artist works can also have a direct impact on the content and form of the works of art, and on the way in which an author exercises his rights in

1. "Plan stat'i o pravakh pisatelia", first published by V.E. Iakushkin, "Rukopisi A.S. Pushkina, khraniashchiesia v Rumiantsevskom muzee v Moskve", *Russkaia starina*, December 1884, 569, reprinted in *Pushkin. Polnoe sobranie sochinenii*, XII, M., Izd. Akademii Nauk SSSR, 1949, 209-210.
2. "Mnenie M.E. Lobanova o dukhe slovesnosti, kak inostrannoi, tak i otechestvennoi", in *Pushkin. Polnoe sobranie sochinenii*, XVI, M., Izd. Akademii Nauk SSSR, 1949, 196-197.
3. *Ibid.*, 199-201.
4. *Ibid.*, 201.

those art works. The meaning and function of copyright differ significantly accordingly as artists either work under the protection of patrons, or depend on a monopolistic state enterprise with censorship powers for the marketing of their works, or have to defend their rights independently—individually or collectively—in a free market for cultural goods.

Copyright is thus intimately connected with both the political and economic systems within which it functions. It is, therefore, to be expected that any major change in the political-economic order of society will influence the legal nature, the content, and/or the function of copyright within this system.

3. The Soviet Union and Russia have provided an excellent laboratory in which to test this hypothesis. The transformation of the political and economic system of the Soviet Union and Russia offers a unique opportunity to put copyright—which existed both in the *ancien régime* and in modern Russia—in this changing context and to study the consequences of this development for copyright.

To test this hypothesis, we further restrict our perspective to the functioning of copyright in the cultural sector only. The term "culture" should not be taken here in its sociological "omnibus" signification as a complex unity of attitudes shared and transmitted within a group, or in the yet broader anthropological meaning which sees the material products created by a group as part of a "culture". The broad concepts of culture found in the social sciences do not lend themselves well to legal analysis, which requires a much more concrete concept of culture. In the present work, a multi-sectoral concept of culture will be used. This means that we limit our area of study to those social sectors specifically oriented towards the development, maintenance, and dissemination of products of art, leisure, and entertainment. The emphasis of our research will be much more on those sectors that actively create and disseminate culture, than on those working for the preservation of culture. Thus, we look particularly at book and periodical publishers, music and drama circuits, the film industry, the news media, the art trade, etc.—in other words, those social sectors towards which copyright law is traditionally oriented. Radio and television are only occasionally dealt with: to analyze a state's entire broadcasting policy would, indeed, require a separate study.

The aim of this book is to locate copyright within cultural law as a whole, that is to say, within the entirety of norms, which juridically frame creation and entrepreneurship in the cultural sector. We will investigate how changes in both the political aspects of cultural policy (*i.e.*, the human rights perspective, and especially the new concept of freedom of speech) and in the economic aspects thereof (*i.e.*, the introduction of market mechanisms) affect copyright. Copyright law itself must be understood as a combination of "political" (*i.e.*, personal-law) and economic (*i.e.*, property-law) components.

4. In taking this perspective, we have consciously left out another viewpoint, namely the way Russian copyright law responds to the technological revolution. The latter viewpoint is, however, in our opinion less interesting, as this challenge to permanently adapt its copyright legislation to technological evolutions is not typical for Russia. Therefore, the adaptations of copyright law to the needs of an information society will only be touched up incidentally in this book.

5. In *Part I* we will analyze the copyright provisions which applied in the Soviet Union during the era of real socialism, emphasizing the period which immediately preceded Gorbachev's policy of *perestroika* (1973–1985). Soviet copyright law is analyzed in the light of the political-constitutional and economic-administrative order created by Communist rule. The terminal date of this period, 1985, is not a year of change in copyright law but, rather, of the beginning of the political and economic revolution which has since played itself out in the Soviet Union and Russia.

This change to the framework, within which copyright has to function, is the object of study of *Part II*. The system transformation is studied in its ideological, constitutional, human-rights, economic, and cultural-policy dimensions. In *Part III*, we first give a chronological overview of the changes made to copyright law in this period, and then anatomize in detail the legal-technical aspects of the legislation in force. Finally, in *Part IV* we investigate how the system transformation influenced (and still influences) the legal nature, the contents and, especially, the societal and legal role of copyright law.

6. Studying Russian law in the late 1990s and early 2000s sometimes seems like "pumping with the bung out": barely has the last full period been put behind the last sentence of the final conclusion, but a (partial) revision of several chapters is necessitated by the great dynamism of the legal system. This book represents the state of affairs in Russian law on—approximately—1 December 2001.

The readers should be aware of the fact that since then a new Code on Administrative Infringements (December 2003) and a new Customs Code (2003) have been adopted, and that the Computer Law (2002) and the Criminal Code (2003) have been amended. The Copyright Law itself, however, has remained unchanged until—at least—early 2004.

PART I

SOVIET COPYRIGHT IN THE ERA OF REAL SOCIALISM

THE PERIOD FROM 1917 UNTIL 1985

TITLE I
CREATIVITY AND ENTREPRENEURSHIP IN THE SOVIET UNION'S CULTURAL SECTOR

Introduction

7. It is a commonplace to say that the communist system in the Soviet Union was totalitarian in striving for a monopoly of power in every sphere of life: not only politically, as in other dictatorial authoritarian regimes, but, also, economically and culturally.[1] In this title, we will examine how this totalitarianism manifested itself in the cultural sector. First, we will analyze Lenin's views concerning Communist cultural policy (Chapter I). Then, we will turn our attention to the double monopoly (political and economic) of the Communist Party of the Soviet Union (CPSU) as an instrument of cultural policy (Chapter II). Finally, we will offer conclusions with regard to Communist cultural policy (Chapter III). In the following title, we will then investigate how copyright law functioned within this Communist system.

Chapter I. Lenin's Opinions on Culture

Introduction

8. In his voluminous *oeuvre*, Lenin devoted scant attention to the arts, literature, and the media.[2] Moreover, the available texts contain very few precise directives although Lenin was not unforthcoming in his specific instructions in other fields. Nor did his great example, Marx, develop a detailed theory of culture or art.[3] Thus, Lenin could implement his own pragmatic, sometimes improvized, but always action-oriented cultural policy.

The limited arsenal of "Lenin quotations" on culture did not, in any case, prevent later Soviet leaders and historians from imputing detailed cultural and media theories to Lenin.[4] We will not examine the extent to which this

1. Feldbrugge 1993, 3-4.
2. His *Complete Works* (*Polnoe Sobranie Sochinenii*) come to no less than 55 volumes. Compendia such as *Lenin on Art and Literature* (M., Progress, 1976) or *Lenin on Culture and Cultural Revolution* (M., Progress, 1978) at the most contain respectively 450 and 206 pages, and mainly reproduce texts which only distantly relate to art or culture. Palmier 162 writes: "Il est bien évident que Lénine, comme Marx et Engels, n'a pas eu la possibilité de nous laisser une oeuvre spécialement consacrée aux problèmes de l'art ou de la littérature, envisagés d'un point de vue marxiste."
3. L. Dupré, *Marx's Social Critique of Culture*, New Haven, Yale University Press, 1983, 5; White 17.
4. This is how Lenin, in "Where to begin?" (*S chego nachat'?*) (May 1901), defined the role of the party press in a statement which has become famous: "A newspaper is not only a collective propagandist and a collective agitator, it is also a collective organizer" (*PSS*, V, 22-23). This statement became almost mythical (Kunze 27-28), as if a whole theory could be deducted from it on the role of the media *after* the revolution, or the contents of what

growth of theory did justice to Lenin's opinions. It is, however, important to understand that:

(i) the essential points of Lenin's cultural policy have to be deducted from his general opinions on social evolution and the CPSU's role therein, and from his concrete actions, and

(ii) Lenin's statements, possibly taken out of context, would become a political instrument for later Soviet leaders to legitimize particular political decisions.

9. If one still wishes to turn Lenin's fragmentary comments on cultural policy into a more or less coherent whole, one could distinguish five closely-entwined strands: (1) Lenin shared Marx's opinions on the class struggle, historical materialism, and the rejection of the formal character of bourgeois liberty; (2) in contrast to Marx, Lenin did not believe that class consciousness would spontaneously originate with the populace, thus necessitating an avant-garde of professional revolutionaries, after the revolution translated into the leading role of the Communist Party; (3) from this leading role, it also followed that the artist had an important social role to fulfill and that art was to be instrumental in the general proletarian cause; (4) this did not, however, imply that Lenin

should be written in the newspapers, the principles which the arts had to master (McNair 16-29). In reality, this article was written at the beginning of this century in the awareness of how important agitation, propaganda and organization were to prepare the proletariat to its historic task. Lenin only pointed out that the publication and distribution of an own central newspaper—especially at a moment when the revolutionaries were still working underground—demanded such a level of organization that it could serve as the basis of the development of revolutionary networks. This becomes clear from the sentences which follow the often quoted statement:

> "[...] With the help of the newspaper, and through the newspaper, a permanent organization will be shaped in a natural way, which will not only be involved in local activities, but, also, with general regular work, and it will train its members in carefully following political events, judging their importance and their effects on the different layers of the populace, and develop effective means for the revolutionary party to influence these events. The merely mechanical task to regularly provide the newspaper of a copy and to promote a regular distribution will necessitate a network of local agents [...] who will continuously be in contact with one another, who know the general state of affairs, who will get used to regularly fulfilling their detailed functions [...] and their strong tests in organizing different revolutionary actions [...] If we combine forces to make a common newspaper this work will put on the foreground not only the most able propagandists, but, also, train and bring to the foreground the most able organizers, and the most talented political leaders who at the right moment are able to express the slogans for the decisive struggles and to take the lead in these struggles."

(*PSS*, V, 23; see also McNair 17-18) Lenin's statement clearly related not to the role of the press in a socialist society but to the role which the revolutionary press can and should play in the overthrowing of bourgeois society.

After the October revolution comparable excessive importance was given to Lenin's article "Party organization and party literature" (in Lenin 1976, 76-78): see Palmier 106.

wanted to throw the old bourgeois culture overboard—on the contrary he argued for its assimilation; and (5) primary attention went to raising the general cultural level of the people rather than creating a new proletarian culture.

Section 1. A Marxist View of Art and Culture

10. As a Marxist, Lenin shared Marx's and Engels' ideas on historical materialism, labor ethics and the inextricable link between infrastructure and superstructure. He went further, in canonizing Marxism as the only officially-acceptable ideology, as "only the Marxist view of the world expresses the interests, opinions, and culture of the revolutionary proletariat correctly".[5]

11. From a Marxist perspective, ideas mirror material existence; they are not built on sand but are tied to a certain class and represent that class's interests. Those who control matter also control the intellectual.[6] In a capitalist system, a small group of capitalists own not only the means of production in private ownership but, also, dominate the opinions and views of society. Laborer (and artist) live in material and spiritual alienation because they have to sell their labor to the private owners of the means of production. Only through revolution can the laborer break through the vicious circle of material and socio-cultural alienation. This double alienation is nullified through the communalization of the means of production in socialist society.

12. One of the opinions which is enforced upon the whole of society by the possessing class in the capitalist system is the liberal understanding of freedom of speech and freedom of art and the press. Just like Marx, Lenin shows his disapproval of this *formal* freedom of the bourgeois artist, which is without content because of the material, economic dependency of author and artist with regard to the capitalist entrepreneur. Material alienation and socio-cultural estrangement go hand-in-hand. "The freedom of the bourgeois writer, artist, and actress is simply masked (or hypocritically camouflaged) dependence on the moneybag, on being bribed and maintained." The alternative is a truly "free literature, because not acquisitiveness and not career but the idea of socialism and sympathy with the working people will always recruit new hands for its ranks".[7]

5. Draft resolution "On proletarian culture", in Lenin 1976, 307-308.
6. K. Marx, "The German Ideology", in *The Marx-Engels Reader*, R.C. Tucker, (ed.), New York, Norton, 1972, 136-137.
7. "Party Organization and Party Literature", in Lenin 1976, 76-68. For a discussion of this article, see Palmier 96-105. Compare the draft resolution on freedom of the press, 4 November 1917, *PSS*, XXXVM 51-52; Theses and report on the bourgeois democracy and dictatorship of the proletariat, 4 March 1919 (First Congress of the Communist Internationale), *PSS,* XXXVII, 495-496; Speech on the First All-Russian Congress of workers of enlightenment and socialist culture, 31 July 1919, *PSS*, XXXIX, 133.

Section 2. The Leading Role of the Vanguard Party

13. On an important point, Lenin's opinions—as they were proclaimed in his now famous brochure *What is to Be Done?* (1902)[8]—deviated from Marx's. He was not convinced that the development of political consciousness would to a great extent be a spontaneous process, the combined result of advanced capitalism and political struggle. Left to itself, the working class develops a trade-unionist mentality of short-term thinking.

14. As a remedy, Lenin introduced a new element into the revolutionary process: the vanguard party of professional revolutionaries,[9] a grouping of the most politically-conscious laborers which would give shape and direction to the spontaneous wakening of the masses. It would become the Communist Party's task, as a vanguard, to guarantee the laborers' interests. Only the CPSU, armed with the scientific theory of Marxism-Leninism, had true insight into social processes and was thus the only legitimate source of interpretation of Marxism. The CPSU was, from a Leninist perspective, a guide—not a representative of a popular base.[10]

In this way, Lenin replaced the labor class with the CPSU as the driving force of the revolution.[11] For pragmatic reasons, Lenin adjusted his Marxist opinions to make the proletarian revolution (the Communist Party's coup) a success.[12] All power was hence concentrated in that party. Thus, one of the pillars of the idea of a constitutional state, the separation of powers, was cast aside as a bourgeois concept.[13]

8. "Chto delat'?", *PSS*, VI, 1-192.
9. Z.R. Dittrich, and A.P. Van Goudoever, *Sovjet Rusland 1917-1953*, Utrecht, HES publishers, 1985, 18.
10. G. Codevilla, "Marxism-Leninism and Fundamental Freedoms", *Rev. Soc. L.,* 1978, 216-217.
11. E.H. Carr, "A Historical Turning Point: Marx, Lenin, Stalin", in *Revolutionary Russia*, R. Pipes *et al.* (eds.), Cambridge, Mass., Harvard University Press, 1968, 287.
12. "[...T]here was no place in anything that Marx ever wrote for the nation of the party of the proletariat exercising political rule after a successfully accomplished revolution. Indeed such a conception was inconsistent with his entire philosophy of society and of revolution. Marx saw the revolution as the culminating point in the development of the struggle, and therefore of the consciousness, of the working class: the revolution puts an end to the division which exists between society and the state, and thereby brings about the transcendence (*Aufhebung*) of classes and of the state itself. Conversely, a seizure of power effected by a party in the name of an abstraction called socialism, before the social conditions for it existed, could only result in a change from one form of oppression to another—a charge repeatedly made by Marx against the Paris Jacobins. But the notion that a 'class' can seize and exercise power is utopian and unrealizable in any practical sense. Lenin provided the practical means—the élitist party acting in the name of a class, the proletariat—but in the process played havoc with Marx's utopia." (Schapiro 619).
13. Van Caenegem 260-261.

15. The CPSU also played the role of guide and leading power in the cultural sector. At the same time, it was maintained that the artist was now truly free, freed from his material and spiritual dependence upon the capitalist entrepreneur. This led to a double attitude: "Every artist and everybody who considers himself thus has the right to create freely, in accordance to his ideals and independent from everything. But we are of course communists. We should not watch, with our arms crossed, while chaos develops however it pleases. We have to lead this process according to careful plans and give form to the results."[14]

Section 3. An Instrumental View of Art

16. To Lenin, literature and art could not be private matters but, rather, were a means to educate the populace into new Soviet people. This was expressed in the principle of *partiinost'*, "partyness", the servitude of literature—and by extension all other arts[15]—to the CPSU's goals.[16] Art for art's sake was, for Lenin, unthinkable.[17]

If art is not a private matter, the artist will not create for his own interests or for self-development. He has a social, political-educational commitment to fulfill: through his creation he has to contribute to the construction of the communist party.[18]

Section 4. The Assimilation of Bourgeois Culture

17. Lenin lamented that, in the classic texts of Marxism, there was not a word about the fate of the bourgeois intelligentsia, or bourgeois culture and

14. As quoted by K. Tsetkin, "Mijn herinneringen aan Lenin", in Lenin 1976, 365.
15. The application of the principle of the *partiinost'* on other artistic expressions other than literature was the work of later interpreters, not of Lenin himself: Kemp-Welch 158-159.
16. "[... F]or the socialist proletariat, literary activity must not be a means of profit for individual persons or groups, it can on the whole not be an individual matter, which is independent from the general proletarian case. [...] Literary activity must become *part* of the general proletarian cause, a cog in the great social-democratic machine, which is set into motion by the whole politically conscious vanguard of the complete workers' class. Literary activity has to become a part of the organized, planned, collective social-democratic party work."
("Party Organization and Party Literature", in Lenin 1976, 73-74)
17. With this Lenin was on the same wavelength as Plekhanov who considered the idea of *L'art pour l'art* as a sign of decadence: "the tendency of art for art's sake arises where there is a disharmony between the artist and the social milieu which surrounds him" (G.V. Plekhanov, *Izbrannye filosofskie proizvedeniia*, V, M., 1956-1958, 686-748).
18. With these opinions, Lenin followed a long tradition of political and social involvement with the 19th century writers Belinskii and Chernyshevskii whom he admired (Lenin 1976, 344-345, 351-356), be it that these writers pleaded for a voluntary involvement in the intelligentsia, which is a different matter from involvement asked for by or in the name of society.

knowledge, after the working class had seized power:[19] did the past have to be assimilated or should it be cast aside?

Lenin, pragmatic as ever, made a clear choice in favor of assimilation of bourgeois culture, a choice which he justified by pointing out that Marxism itself was a product of bourgeois society.[20] The message thus ran: learn as much as possible from the bourgeois experts; they are the only stones with which socialism can be built, and their knowledge has to be spread among the people.[21] This implied a certain de-radicalization.

Control of party and state had, of course, to prevent such assimilation of bourgeois culture from becoming internal degeneration.[22] Ideology formed the basis for the evaluation of the past: Marxism was a prism through which bourgeois culture had first to be examined and then accepted.[23]

18. With this, Lenin at once rejected the replacement of bourgeois culture with a to-be-created proletarian culture.[24] So there was no question of iconoclasm.[25] In fact, there would be no question of the "creation" of a culture:

19. Speech on the First Congress of Economic Councils, 26 May 1918, *PSS, XXVII*, 412.
20. "Marxism got its world historical meaning as an ideology of the revolutionary proletariat because it rejected the most valuable attainments of the civil era, but controversially absorbed and incorporated everything which was valuable in the over two thousand year-old development of human thinking and human culture. Only the further work of this basis and in his direction [...] can be acknowledged as the construction of a truly proletarian culture."
(draft resolution "On proletarian culture", in Lenin 1976, 307-308)
21. "Successes and difficulties of Soviet power", March-April 1919, in Lenin 1976, 281-288.
22. Sochor 123.
23. Lenin supported "the development of the best examples, traditions and results of the existing cultures, seen from the world view of Marxism and the life and struggle circumstances of the proletariat under his own dictatorship" ("Draft resolution on proletarian culture", 8 October 1920, in Lenin 1976, 306).
24. With regard to this, Lenin reacted against the *Proletkul't* movement which his political opponent Bogdanov founded and which the CP reproached for not having a cultural program. Hence, this movement claimed this domain for itself. *Proletkul't* wanted to operate in full autonomy with regard to the Communist Party with the immediate creation of a proletarian culture in mind. For an extensive study of Bogdanov's ideas and *Proletkul't*, see Sochor. On Lenin's reaction against the "chimera of a new proletarian culture" ("Draft resolution on proletarian culture", 8 October 1920, in Lenin 1976, 306), see also Heller/Nekrich 158-159; Ropert 337.
25. Only monarchist statues without historical or artistic values had to disappear from the scene ("On the republic's monuments", 12 April 1918, in Lenin 1976, 329-330) and be replaced by statues of European revolutionaries, Russian radicals and cultural workers who were considered 'progressive' (Marx, Engels, Spartacus, Brutus, Tolstoi, Dostoevskii, Mussorgskii, Chopin, etc. (Lenin 1976, 333-334)). Stites, R., "Iconoclastic Currents in the Russian Revolution: Destroying and Preserving the Past", in Gleason *et al.* 18 points out that most of these early monuments were made with bad material (plaster) and hence soon needed to be removed.

socialist culture would be the natural consequence of previous cultures.[26] If anything was to be created, this was values, convictions, or attitudes in the political sphere, *i.e.*, a political culture which would motivate and mobilize the people for the primary tasks of socialist construction with economic development at the top of the list.[27]

19. If Lenin did not cast aside the fruits of bourgeois knowledge and art, he did disapprove of its monopolization by the bourgeoisie[28] and its inaccessibility for the proletariat.[29]

Section 5. The Priority of Raising the Cultural Level of the (Rural) Populace

20. Fear of shortsighted syndicalism and lack of spontaneity, and Marx's taciturnity on the intelligentsia's fate after the revolution were not the only problem for the implementation of Marxism in Russia. Lenin was confronted with a largely rural country with barely 2.6 million industrial workers. According to Marx, socialism would follow capitalism and not the feudalism, which, in fact, still ruled the Russian countryside.[30]

Primordial in Lenin's policy was thus to refine the people's cultural level (in its broadest sense). Lenin preferred, as it were, the slow road,[31] on which the backwardness of the countryside had to be overcome first, before a real proletarian culture could come into being. This required the gradual and nonmilitant raising of cultural standards, achieved without direct confrontation with the old intelligentsia and involving, above all, the expansion of mass education in politics and the spread of basic literacy.[32] The final goal was to found the prin-

26. "Proletarian culture did not appear out of the blue; neither is it an invention of people who present themselves as experts in proletarian culture. That is all nonsense. The proletarian culture has to be a lawful development of the whole of knowledge which humanity has won while under the yoke of capitalist, feudal, and bureaucratic society. All these roads and routes led, lead, and will lead further to proletarian culture [...]." (Speech at the Third All-Russian Congress of the Communist Youth League of Russia, 2 October 1920, in Lenin 1976, 304)

27. Sochor 173-174.

28. Sochor 106.

29. "In the old times the human genius, the human brain, created only to give to few the advantages of technique and culture, and to deny others the most important—education and development. From now onwards all miracles of science and the achievements of culture belong to the people as a whole and never again will the human brain and the human genius be used for suppression and extortion." (concluding words on 18 (31) January 1918 uttered at the Third All-Russian Congress of the Soviets, in Lenin 1976, 269)

30. "[...I]t may safely be stated that in November 1917 Russia really passed from imperial absolutism to proletarian dictatorship, missing out the intermediate stage of bourgeois capitalism." (van Caenegem 247).

31. "In the area of cultural issues there is nothing as disadvantageous as over haste and imprudence" ("Rather less, but better", in Lenin 1978, 155).

ciples for the origin of a socialist society. Art and the media were considered an instrument in this political education.[33]

In his political testament of the turn of the years 1922-1923, Lenin put this point at the top of his agenda by launching the so-called "cultural revolution". With this, he did not aim at a specific policy with regard to the cultural sectors but at the replacing of the pre-capitalist structure of the backward countryside.[34] For Lenin, cultural revolution meant not a revolution of culture but, more broadly, the political, economic, and cultural education of the Russian agricultural classes. The term "revolution" emphasized the volume of the work to be done. Lenin considered this to be the last, but not a simple, step on the way to the making of a completely socialist country.[35]

21. In fact, this reversed the Marxist pattern, for Lenin attempted to reach a change in the relations of production in the countryside with his cultural revolution,[36] in order *a posteriori* to legitimize and consolidate political hegemony and to rationalize the proletarian coup in a mainly rural country. Lenin interpreted the dictatorship of the proletariat as the use of political power to bring about a socio-economic transformation in rural Russia. An aid to this was directing and expediting the cultural change.[37] Lenin was not interested in general literary-revolutionary work but in the construction—in as short a time as possible—of an ideological basis and an organizational framework for the revolution.

It is, then, quite ironic and contradictory that, in Lenin's view, the socialist cultural revolution in Russia could only succeed with the introduction of a

32. See, *e.g.*, "From the report to the Second All-Russian Congress of Political Educators", 17 October 1921, in Lenin 1978, 126-127. See also S. Fitzpatrick, "Editor's Introduction", in S. Fitzpatrick, (ed.), *Cultural Revolution in Russia, 1928-1931*, Bloomington, Indiana University Press, 1978, 2.
33. "Draft resolution on proletarian culture", in Lenin 1976, 307-308.
34. "To begin with we should be pleased with a real civil culture, to begin with it should satisfy us that we would be able to do without the specific outspoken types of pre-civil culture, in other words without the culture of the functionary or the serf etc." (Lenin, from "Rather less, but better", in Lenin 1978, 155). It would, however, also precisely be the new economic policy introduced by Lenin which would hinder the course of the education campaign on the Russian countryside. The fact that subsidies were cut off and market principles were introduced meant a dramatic decrease in the amount of educational institutions because of which also the literacy campaign—in spite of the proclaimed cultural revolution—almost ceased.
35. "For us, this cultural revolution suffices to become a completely socialist country, but this cultural revolution brings us terrible difficulties, of a purely cultural nature (because we are illiterate) as well as of a material nature (because to be civilized a certain development of the material means of production, of a certain material base, is needed)" ("On cooperation", in Lenin 1978, 149).
36. Erler 1978b, 39.
37. Sochor 100-105.

civil revolution[38] which, of course, explains Lenin's lenient attitude with regard to the previous cultural bourgeoisie.

38. "The civil-democratic reforms [...] are a side-product of the proletarian, in other words of the socialist revolution [...] The first grows from the second. The second resolves the issues of the first in passing. The second anchors the work of the first." ("At the fourth remembrance of the October-revolution", in Lenin 1978, 120).

Chapter II. The Instruments of Communist Cultural Policy

Introduction

22. The Communist Party always interfered with the cultural sphere *through external guidance.* The general outlines of the CPSU's cultural policy were established in the Party Program[1] that was updated at the five-yearly Party conferences by means of long-term plans which could, among other things, relate to socio-cultural development.[2] The guidelines that the Party gave in this manner almost always related to the improvement of the material-technical basis of the cultural sector: the extension of the network of libraries, cinemas, theaters and cultural institutions, plant improvements in printing houses, the distribution of publications, etc.[3]

The Party's program and five-year plans could not, however, react to problems as they arose. This is why the party organs were constantly developing measures to refine the organization and activities of cultural institutions, the relevant ministries and state committees, and social organizations.[4] This resulted in a mass of party resolutions and decrees relating to the cultural sector and the media,[5] for example about work with creative youth,[6] the improvement of production and distribution of regional newspapers,[7] the encouragement of traditional[8] and independent artistic creativity,[9] and so forth. Important reor-

1. See, *e.g.*, the Party Program of 1919: *KPSS v Rezoliutsiiakh*, II, 77, 82–83; the Party Program of 1961: *KPSS v Rezoliutsiiakh*, X, 176–178, 180.
2. B. Meissner, in Fincke, I, 171, nr 43.
3. See, *e.g.*, the Party Directives for the third five-year plan for the development of the economy of the USSR (1938–1942), *KPSS v Rezoliutsiiakh*, VII, 76; for the fifth five-year plan (1951–1955), *KPSS v Rezoliutsiiakh*, VIII, 281–283; for the sixth five-year plan (1955–1960), *KPSS v Rezoliutsiiakh*, IX, 73–74; for the subsequent five-year plans (which the CPSU's documents no longer numbered): 1966–1970, *KPSS v Rezoliutsiiakh*, XI, 66; 1971–1975, *KPSS v Rezoliutsiiakh*, XII, 81; 1976–1980, *KPSS v Rezoliutsiiakh*, XIII, 71–72; 1981–1985 and the period to 1990, *KPSS v Rezoliutsiiakh*, XIV, 90–91.
4. Mel'nikov/Silvanchik 46–47.
5. To keep party workers up to date, a regular volume of party (and government) decisions was published, the so-called *Spravochnik partiinogo rabotnika*: see D.D. Barry, "The *Spravochnik partiinogo rabotnika* as a Source of Party Law", in Loeber 1986, 37–52.
6. Decree CC CPSU of 12 October 1976 "On work with creative youth", *KPSS v Rezoliutsiiakh*, XIII, 137–140.
7. Decree CC VKP(b) 20 August 1940 "On local newspapers", *KPSS v Rezoliutsiiakh*, VII, 175–177; Decree CC VKP (b) 24 January 1952 "On measures for the improvement of local newspapers", *KPSS v Rezoliutsiiakh*, VIII, 255; Decree CC CPSU 16 March 1984 "On the further improvement of the activity of local and city newspapers", *KPSS v Rezoliutsiiakh*, XIV, 501.
8. Decree CC CPSU 29 January 1975 "On folk-artistic companies", *KPSS v Rezoliutsiiakh*, XII, 498–502.
9. Decree CC CPSU 28 March 1978 "On measures concerning the further development of independent artistic creativity", *KPSS v Rezoliutsiiakh*, XIII, 253–256.

ganizations in the organs of state with competences affecting culture were also announced through party resolutions.[10] The CPSU also concerned itself with the setting up of the so-called creative unions (*e.g.*, the Writers' Union),[11] their internal organization,[12] and the role which they and their periodicals were to play in the propagation of socialist realism.[13]

23. This external guidance in effect, however, disguised the nature of the Communist system. It gave the impression that state, Party, and society were separate in the Soviet Union while the nature of the Communist system lay precisely in *the theory (or myth) of the harmonious reconciliation of interests*: state and individual sought the same goal, namely the construction of a Communist society. A whole series of identifications of will and interest led to the equation of the interests of the individual, as a member of a collective, with those of the Party and the state.[14] The truth-claim and the monopoly of power brought all spheres within the manipulative reach of the party state.[15]

10. *Concerning the film industry*: Decree CC VKP(b) 8 December 1931 "On Soviet cinematography", *KPSS v Rezoliutsiiakh*, V, 370–374; Decree CC CPSU 2 August 1972 "On measures concerning the further development of Soviet cinematography", *KPSS v Rezoliutsiiakh*, XII, 263–268.

    Concerning the publishing industry: Decree CC VKP(b) 5 October 1946 "On publishing", *KPSS v Rezoliutsiiakh*, V, 339–348; Decree CC VKP(b) 5 October 1946 "On the work of OGIZ RSFSR", *KPSS v Rezoliutsiiakh*, VIII, 71–74.

    Concerning radio: Decree CC VKP(b) 16 January 1933 "On the All-Union Radio Committee", *KPSS v Rezoliutsiiakh*, *KPSS v Rezoliutsiiakh*, VI, 34–35; Decree CC VKP(b) 25 January 1947 "On measures concerning the improvement of the central radio broadcasts", *KPSS v Rezoliutsiiakh*, VIII, 94–97.

11. Decree CC VKP(b) 23 April 1932 "On the *perestroika* of the literary-artistic organizations", *KPSS v Rezoliutsiiakh*, V, 407–408.

12. Decree CC VKP(b) 2 December 1940 "On literary criticism and bibliography", *KPSS v Rezoliutsiiakh*, VII, 181–84 (liquidates the 'literary critics' section within the Writers' Union).

13. Decree CC CPSU 23 July 1982 "On the creative bonds of the literary-artistic periodicals with the practice of communist construction", *KPSS v Rezoliutsiiakh*, XIV, 355–358.

14. Malfliet 1985, 179–180 clarifies this as follows:

    > "The individual is in the first instance seen as a member of the collectivity. Soviet society cannot be considered an organism with a thousand aspects, a conglomeration of individuals and groups. *Society itself is from the beginning onwards a purposeful unity*. According to Soviet theory the equation of society as a whole with the collectivity is only valid in a Socialist society. It is this collective, this target group, which is the bearer of objective interest. This objective interest can only be discovered through Marxist theory. Marxist theory can only be scientifically interpreted by Communists organized as a Party. The Party, as the vanguard, formulates the direction in which society should evolve. The Party gives expression to the true will and the true interests of Soviet society. However, given that the Party, according to Marxist teaching, in the current stage of the state of the whole people, has no interests independent of those of society, the will and interests of the Party happen to coincide with the will and the interests of the collective."

15. Casier 59.

24. For seven decades, this one-party state rested on two pillars: economic monopoly and political-cultural autocracy. Both artistic creativity and enterpreneurship in the cultural sector of the USSR were under the leadership of the CPSU so that the private sphere, in which the individual could move and find self-expression, was reduced to a minimum. Individual economic initiative was barely tolerated, and only system-affirming opinions could be expressed.

The legitimation of this total claim lay in the dialectical relationship between the public and private, which Marxism advanced. The individual could not be spiritually free when economically not truly free. Only the abolition of economic inequalities ("exploitation"), which came with the collectivization of the means of production, could free mankind from the urge to adopt the ideas of the bourgeoisie. In socialist society, the worker would—according to Marxism—be economically and spiritually free.

In this Chapter, we will examine the mechanisms, which, in the cultural sectors, gave form to the party state's double monopoly on power. Completely in accordance with Marxist ideas we will first examine the monopoly of power in the infrastructure and then the CPSU's control of superstructure.

Section 1. The Monopoly on Enterprise in the Cultural Sector

Introduction

25. The nationalization of the means of production and the introduction of an administrative command economy made possible the longevity of the Soviet regime. The abolition of the economic independence of the individual was the key to seven decades of totalitarian rule. Force was, thereafter, only necessary in a relatively limited number of cases when the individual, regardless of economic dependence, claimed a certain social autonomy. These cases aside, the economic monopoly was in itself sufficiently compelling and repressive to generate conformity to the system among the populace.[16]

In this section, we will first shed light on some basic elements of the administrative command economy in the cultural sector (§1). Then we will investigate the exceptional status of the quasi-public sector, *i.e.*, the cultural enterprises owned by social organizations and the Communist Party (§2). Finally, we will see to what extent the planned economy left room for private enterprise (§3).

§1. The Public Cultural Sector

1.1. State Ownership

26. Immediately after the October Revolution, the Communist government put an end to the cause of the exploitation of the proletariat by nationalizing the means of production even in the cultural sectors, such as bookshops, print-

16. Ioffe 1988a, 49.

ing and publishing houses,[17] the theaters,[18] the music industry,[19] film companies,[20] etc. The nationalization of civic and private art collections,[21] of private archives,[22] and the opening of museums[23] were further intended to give stature to the policy of free access for the proletariat to the cultural achievements of "capitalist culture".[24]

27. Even during the strategic retreat from the New Economic Policy necessitated by the terrible circumstances of wartime Communism,[25] the state sector retained dominance. Private enterprise was legalized in the publishing

17. *SU RSFSR*, 1918, No.86, item 891 (bookshops and libraries); *SU RSFSR*, 1919, No.20, item 244, English translation in *SSD*, 1977–1978, 19–21 (putting all publishing under the control of the State publishing house); *SU RSFSR*, 1920, No.42, item 187, English translation in *SSD*, 1977–1978, 13–14 (nationalization of stocks of books and other printed matter in private ownership or owned by cooperatives and other institutions and organizations except libraries).
18. *SU RSFSR*, 1919, No.44, items 433 and 440; English translation in *SSD*, 1977–1978, 21–25 (nationalization of theaters, centralization of theater productions).
19. *SU RSFSR*, 1918, No.99, item 1020 (nationalization of all shops and printing works in private ownership); *SU RSFSR*, 1919, No.42, item 415 (nationalization of all shops, workshops and suchlike which produce, hire, sell, stock musical instruments, record players, records, etc.).
20. *SU RSFSR*, 1919, No.44, item 433 and No.46, item 448; English translation in *SSD*, 1977–1978, 25–26, 26–28 (nationalization and centralization of the photographic and film industries). See also Babitsky/Rimberg 267–268; Leyda 142.
21. *SU RSFSR*, 1918, No.31, item 417 (Museum of the Academy of Arts in Petrograd); *SU RSFSR*, 1918, No.39, item 511 (Tret'iakov gallery); *SU RSFSR*, 1918, No.82, item 851 (Shchukins gallery of French impressionists); *SU RSFSR*, 1918, No.99, item 1011 (collection of icons and collection of western paintings in the possession of I.A. Morozov, I.S. Ostrukhov, and A.V. Morozov) See also Levitsky 1982, 55.
22. *SU RSFSR*, 1919, No.38, item 374; English translation in *SSD*, 1977–78, 12 (abolition of private ownership of archives of deceased Russian authors, whereby the People's Commissariat for Education obtained the right of first publication of all documents found in the expropriated archives of deceased authors). More on this in Skripilev *et al.*, "Arkhivnoe delo v SSSR: proshloe i nastoiashchee", *SGiP*, 1990, No.4, 39–40; Koretskii 31–32.
23. By the end of 1918, 87 musems were operational (as opposed to 30 before the Revolution); by the end of 1920 550 country houses and 1000 private art collections had been registered: R. Stites, "Iconoclastic Currents in the Russian Revolution: Destroying and Preserving the Past", in Gleason *et al*. 17. See also Palmier 446–447.
24. *Supra*, No.19.
25. During the period of wartime communism, the production of books and films dropped dramatically (J. Brooks, "The Breakdown in Production and Distribution of Printed Material, 1917–1927", in Gleason *et par.* 152; Babitsky/Rimberg 66–67). Many houses publishing Russian books settled abroad (DA, 1921, 60 and 143), while most film makers and actors fled to the studios in Odessa, and later to Paris, Berlin and Hollywood, and took everything portable away from the Moscow film studios (Leyda 111–120). Those, who hoped that the revolution would not last, buried their films and equipment in the ground (Taylor, R., *The Politics of the Soviet Cinema 1917–1929*, Cambridge, Cambridge University Press, 1979, 192). Writers such as Ivan Bunin, Aleksei Tolstoi and Il'ia Erenburg went abroad.

sector by a decree of 12 December 1921,[26] but the state publishing house (*Gosizdat*) received preferential treatment from the authorities through special government commissions,[27] tax exemptions,[28] and the option of buying up the production of private publishers at wholesale prices.[29] Furthermore, privately-owned publishing firms had to renew their licenses annually.

In the film industry too, the greater freedom for private enterprise and the resulting boom in feature films[30] was largely a smokescreen obscuring the growing hold of the state and the Communist Party on the film industry. Step-by-step this was brought about by obtaining political control, a monopoly on film rental, exclusive rights to foreign investment and loans to the Soviet film industry, and exclusive rights to the exportation and importation of films. In the end, a large share of all production was given to *Sovkino*, a company in which the state was the majority shareholder.

28. After the NEP, the dominance of the state-controlled sector became a real monopoly. The combination of socialist ownership of the means of production — the economic basis of the USSR[31]—and centrally-directed control on the basis of state plans,[32] which seemed a natural corollary, gave extensive power to those who controlled the state and was, thus, one of the main components of Soviet totalitarianism.[33]

29. The legal status of property went through many changes but was finally consolidated in USSR's Constitution of 1977. Private property was recognized[34] but could only have as its object a residence, household goods, or objects for personal use.[35] All means of production were socialist property, which was further divided into state property, co-operative property,[36] and the property of social organizations.[37] Of these three, state property was—in economic terms—by far the most important.

26. *SU RSFSR*, 1921, No.80, item 685; English translation in *SSD*, 1977–78, 16–17.
27. See, *e.g.*, the publication of the complete works of Lenin and the obtaining of a monopoly on the publication of textbooks: *SU RSFSR*, 1921, No.61, item 430; *SU RSFSR*, 1922, No.22, item 231, English translation in *SSD*, 1977–78, 28.
28. A.I. Podgornova, *Sovetskoe knigo-izdanie v 20 gody*, M., izd. Nauka, 1984, 51–52.
29. Mirkin-Gezewitsch 24.
30. The number of feature films rose from 11 in 1921 to 157 in 1924 (Leyda 169). Furthermore, from 1923 there was massive importation and distribution of American films. In the period 1923–33, 956 American films were exhibited (Golovskoy 132).
31. Art.10 Const.1977.
32. Art.16 Const.1977.
33. Feldbrugge 1993, 229.
34. Art.13 Const.1977.
35. See, also, art.25 Fundamentals 1961.
36. For example cooperative farms, kolkhozes. This form of socialist ownership is not relevant to the cultural sector, and will not be discussed further.
37. Arts.10–12 Const.1977; arts.19–27 Fundamentals 1961. On the differentiation of property law, so typical of Soviet jurisprudence, according to the subject matter and its economic role in the planned economy, see Malfliet 1985, 62–68.

State property formed one fund, with one owner, the Soviet Union (not the Union Republics). In order to build up an economy on the basis of this single ownership, the different state bodies responsible for managing the property decided whether or not to set up a (state) company within their sphere of jurisdiction.[38] If this was considered desirable, an economic body was set up and provided with statutes (*ustavy*) containing a precise description of the activities to be pursued.

1.2. State Enterprises

30. At its foundation, a state enterprise would be given machines, buildings and funds, by the state,[39] not in ownership but in "operative management" (*operativnoe upravlenie*), *i.e.*, the right to possession, use, and alienation "within the limits laid down by law",[40] and in accordance with (1) the purposes of their activity as laid down in the statute (for example, a film studio could not itself publish a filmscript as a book);[41] (2) the planned production (*e.g.*, only the use of printing presses for the amount, quality, and the sort of printing work indicated in the plan); and (3) the purpose of each individual state subsidy (money awarded for building a bookshop could not be used to buy machines).[42] None of these three elements were determined by the state enterprise on its own account but by the state, which was, and remained, the sole owner.[43]

31. Although the foundation of a state enterprise and the description of its field of activity was completely dependent on the state, such an enterprise could otherwise function as a distinct entity.[44] For this purpose, they were given

38. See art.27 CC 1964; PSM SSSR, "Polozhenie o poriadke sozdaniia, reorganizatsii i likvidatsii predpriiatii, ob"edinenii, organizatsii i uchrezhdenii", 2 September 1982, *SP SSSR*, 1982, No.25, item 130, amended under Gorbachev on 21 April 1987, *SP SSSR*, 1987, No.29, item 101; 14 May 1987, *SP SSSR*, 1987, No.31, item 109; and 21 December 1989, *SP SSSR*, 1990, No.2, item 16; PSM RSFSR, "Polozhenie o poriadke sozdaniia, reorganizatsii i likvidatsii predpriiatii, ob"edinenii, organizatsii i uchrezhdenii respublikanskogo i mestnogo podchineniia", 10 June 1983, *SP RSFSR*, 1983, No.15, item 88, amended under Gorbachev on 22 July 1987, *SP RSFSR*, 1987, No.13, item 97; 1 December 1987, *SP RSFSR*, 1988, No.1, item 2; and 10 June 1988, *SP RSFSR*, 1988, No.15, item 76. See also A.K.R. Kiralfy, "Public Property" in Feldbrugge 1985, 645; Malfliet 1993, 127–128.
39. Art.24 CC 1964.
40. Art.19 and art.21 para. 2 Fundamentals 1961.
41. All transactions in which the state enterprise engaged beyond the statutary speciality imposed by the owner (the state) were null (*ne ultra vires*): E.H. De Jong, "State Enterprises", in Feldbrugge 1985, 725.
42. Art.21 para. 2 Fundamentals 1961.
43. Ioffe 1985, 112.
44. The state enterprise could conclude transactions with other enterprises or citizens in its own name and on its own account (art.23 CC 1964), it (not the state) was itself liable for its duties and activities, and was, similarly, not liable for the state's obligations (art.13 para.2 Fundamentals 1961; art.33 CC 1964), it could file a claim itself, was given its own bookkeeping and accounts so that the enterprise was separated from the administration which had founded the enterprise (O.S. Ioffe, "Khozraschet", in Feldbrugge1985, 414–417; Malfliet 1993, 129).

the status of legal persons by the Fundamentals (*Osnovy*) of Civil Legislation of 1961.[45]

The state enterprise functioned on the basis of the principle of economic calculation (*khozraschet*, *khoziaistvennyi raschet*). This meant that the enterprise had to carry out its activities with respect for the following principles:

— the enterprise had to be self-sufficient (*samookupaemost'*), in other words all expenses had to be covered by the enterprise's income;
— it had, moreover, to generate a surplus, although with little incentive, since any profit which appeared in the balance submitted annually to the state treasury had to be transferred to the state budget;
— it had to pay for everything it was given and had to be paid for everything it produced.[46]

This autonomy, however, was of no great importance. The basic assets, which the state awarded to the enterprise in operative management could, at any time, be reclaimed from the enterprise by the owner (the state),[47] and

45. Art.11 para.2 Fundamentals 1961. See also the Decree of the USSR Council of Ministers of 4 October 1965 approving the Statute on the socialist state production enterprise: PSM SSSR, "Polozhenie o sotsialisticheskom gosudarstvennom proizvodstvennom predpriiatii", 4 October 1965, *SP SSSR*, 1965, No.19–20, item 155. This Decree was gradually also declared applicable to the various cultural sectors: PSM SSSR "O perevode gosudarstvennykh izdatel'stv na novuiu sistemu planirovaniia i ekonomicheskogo stimulirovaniia", 21 June 1968, *SP SSSR*, 1968, No.12, item 77 (publishers); PSM SSSR "O rasprostranenii na gosudarstvennye teatral'no-zrelishchnye predpriiatiia deistviia Polozheniia o sotsialisticheskom gosudarstvennom proizvodstvennom predpriiatii", 29 November 1968, *Svod Zakonov SSSR*, III, 682 (theaters); PSM SSSR "O rasprostranenii na parki kul'tury i otdykha, gorodskie sady i zooparki deistviia Polozheniia o sotsialisticheskom gosudarstvennom proizvodstvennom predpriiatii", 26 August 1971, *SP SSSR*, 1971, No.16, item 117 (cultural parks, inter alia); PSM SSSR "O rasprostranenii na gosudarstvennye kinostudii sistemy Goskino SSSR deistviia Polozheniia o sotsialisticheskom gosudarstvennom proizvodstvennom predpriiatii", 5 November 1976, *SP SSSR*, 1976, No.25, item 129 (film studios); PSM SSSR "O rasprostranenii na khozraschetnye fil'moproizvodiashchie organizatsii sistemy Gosudarstvennogo Komiteta SSSR po Televideniiu i Radioveshchaniiu deistviia Polozheniia o sotsialisticheskom gosudarstvennom proizvodstvennom predpriiatii", 23 June 1978, *SP SSSR*, 1978, No.14, item 95; 1981, No.2, item 3 (creative associations and studios for the production of television films); PSM SSSR "O rasprostranenii na gosudarstvennye kinozrelishchnye predpriiatiia i predpriiatiia po prokatu kinofil'mov sistemy Gosudarstvennogo Komiteta SSSR po Kinematografii deistviia Polozheniia o sotsialisticheskom gosudarstvennom proizvodstvennom predpriiatii", 29 mei 1979, *Svod Zakonov SSSR*, III, 737–738 (cinemas and film rental businesses).
46. O.S. Ioffe, "Khozraschet", in Feldbrugge 1985, 414–417.
47. Art.43 Decree of 4 October 1965 on the socialist state production enterprise, *supra*, note 45; Ioffe 1985, 126. Malfliet 1993, 130 also points out:
    > "The right of operative management illuminated two contradictory principles: the autonomous quality of the enterprise's right of operative management in contrast to its dependence on state property. This balance between autonomy and dependence was varied to ensure efficient execution of the state agency's task. The right of operative management was governed by the purpose of the state organization and the function given to the assets."

the enterprise itself could be suspended at any time.[48] Capital which became surplus through changes in the plan was claimed by the state with no compensation for the organization.[49] The principle of *khozraschet* was not applied consistently. For important industries (*e.g.*, metallurgy), losses were "planned" and covered by state subsidies, and thus not one of the principles of *khozraschet* was applied.[50]

But this was not all. The principle of *khozraschet*—the core of a decentralizing tendency in the Soviet economy, put into pratice on the basis of economic contracts—always remained subordinate to planning: the centralizing tendency which functioned on the basis of administrative orders. Because of the clear preponderance of the centralizing tendency, only planned contracts had real significance; unplanned contracts (for which freedom of contract existed) were of no economic importance.[51] Indeed, a complex planning procedure meant that "Moscow" appointed the trading partners of every state enterprise and the extent of their cooperation.[52] Through the plan the relevant state body laid down specific aims for the enterprise with regard to production, labor, finances, central investment, the importation of new technology, and the supply of raw materials and means of production. The division of profits was also dictated by the plan, with any surplusses going to the state treasury.[53] The execution of the plan was the first priority even if this meant that the principles of *khozraschet* had to be violated.

32. From an economic perspective, the commercial cultural sector enjoyed no special treatment:[54] the equivocal relationship between planned economy and

48. Soviet law made no provision for the bankruptcy of enterprises due to unprofitability, see D. Winter, "Commerce and Commercial Law", in Feldbrugge 1985, 140.
49. O.S. Ioffe, "Khozraschet", in Feldbrugge 1985, 414-417.
50. Moreover the application of *khozraschet* as an economic-organizational principle was again limited in 1973–1974, when many industrial enterprises (excepting the very largest) were integrated into production associations (*proizvodstvennye ob"edineniia*), either vertically, in *kombinaty* which grouped enterprises in one production chain, or horizontally, in a *trest* which brought together all similar enterprises in one particular branch of industry (De Jong, E.H., "State Enterprises", in Feldbrugge 1985, 725). Only these associations had legal personality and worked according to the principle of economic accountability, their constituent parts did not (O.S. Ioffe, "Khozraschet", in Feldbrugge 1985, 414-417).
51. Ioffe 1985, 125–126.
52. W.B. Simons, "Planning", in Feldbrugge 1985, 588–591; see also Stephan 36-41.
53. For more details, see E.H. De Jong, "State Enterprises", in Feldbrugge 1985, 725.
54. The Soviet government naturally took special care of books, films, television broadcasts, theatrical performances and such—like instruments of propaganda. At a legal-economic level, however, there was no differentiation between industrial and "cultural" enterprises, even though the current ideological discourse pretended this was the case. The publishing industry, for example, was always depicted as a cultural, or even ideological activity; excessive pursuit of profit was condemned; increase of the publishing houses' profits by increasing the print runs of those books which were in demand, was dismissed as "satisfying commercial interests on an unhealthy basis", and the book was considered a special product, which moreover had a completely different status in socialist society than under capitalism (Walker 6–8).

economic calculation, and between socialist ownership and operative management dominated so-called non-material (*nematerial'noe*) or mental production (*dukhovnoe proizvodstvo*) as much as it did 'material' production.

Nor was the principle of *khozraschet* applied consistently in the cultural sector.[55] Thus, publishing houses were set up for which the losses were planned, and here too the principle of economic calculation was subordinate to the planning. In the course of the planning procedure,[56] cultural enterprises could be made subject to duties which were completely contrary to the principle of economic calculation (including an order to cover expenses from an enterprise's income), and which took no account of the existing demand for cultural products. For publishing houses, for example, the two main planning indicators were the annual plan of titles which had to be brought out by a particular publisher (*tematicheskie plany*) and the total volume of output in printed pages. The prices of the books were also fixed by the state so that the publishers themselves could only take any account of demand when determining the print runs of their publications; this was done on the understanding, however, that increasing the print run of one publication was always at the cost of the print run of another.

33. Finally, we must point out another important limitation of the autonomy of state enterprises, including those in the cultural sector: the presence in every company of a primary party organization (PPO).[57] This was formed in any workplace (*e.g.*, in cultural institutions, organs of state, enterprises) where three or more party members worked.[58] These PPOs had broad powers in education, organization, and surveillance.[59] In enterprises, cultural institutions, etc., they had the right to check on administrative activities while in the ministries and state committees they exercised surveillance of the work of the administrative apparatus with regard to the execution of party and state directives, and adherence to Soviet laws.[60] The PPOs reported administrative failures to higher party instances.

In the publishing houses, party representatives sat on editorial boards; there was constant interaction between management and the PPO and, in particular, the party secretary who monitored work, adherence to the plan, the hiring of staff, etc.[61] The party secretary of a publishing house was not subject to the managing director but to the local party secretary. The most important posts in publishing houses were on the *nomenklatura* list and were, thus, reserved for party members.

55. On the publishing sector, see Walker 11–13.
56. On the planning-cycle in publishing industries, see Walker 41–44.
57. This term first appears in the Party statutes of 1934; before that there was mention of 'party cells': W.B. Simons, "Introduction", in Simons/White 401.
58. Art.53 Statute of the CPSU of 1961 (with later alterations in 1966 and 1971).
59. Arts.59–60 Statute of the CPSU 1961.
60. Art.60 Statute of the CPSU 1961.
61. Walker 22–24.

Things were no different in the film studios. The most important man was not the director (who was usually a party member appointed for his loyalty rather than his ability), but the secretary of the studio's PPO. He had a decisive voice in all artistic, ideological, and administrative matters; the director only put into practice what the party secretary decided.[62]

The PPO's influence, close to the source of cultural decision-making power (the cultural administrations) and the use of cultural products (theaters, film studios, publishing houses, newspapers) was great. They had the right of authoritarian involvement in the management of the cultural sector and could, at any time, intervene in the production process as censors even if this would lead to substantial losses for the state enterprise.[63]

1.3. State Institutions

34. While state enterprises concerned themselves with commercial activities, non-commercial enterprises (libraries, museums, schools, universities, hospitals, etc.) had the status of an "institution" (*uchrezhdenie)*.[64] Institutions were almost completely financed by direct state subsidies and were thus subject, if possible, to even greater state control than were the commercial enterprises. Institutions were legal persons.[65] Generally, they also had the right to the operative management of the assets, which were granted to them by the state, but they could not dispose of them without the permission of higher administrative authorities.[66]

1.4. Planned Management of the Cultural Sector

35. As almost all publishing houses, theaters, film studios, etc. were state owned, a very extensive and bureaucratic state apparatus was needed to carry out the administrative and economic management of the cultural enterprises and institutions.[67]

The Soviet leadership strongly believed that the efficiency of its cultural management could be increased by administrative reforms. Shortcomings in management were hence not attributed to the goal or to the means used to reach this goal, but to faulty organization. The history of cultural management in the USSR is, hence, largely a history of the constant reforms of the cultural apparatus, which were necessary to "perfect" this management.[68]

62. Babitsky/Rimberg 73–75.
63. Mel'nikov/Silvanchik 48.
64. Malfliet 1993, 127.
65. Art.11 para..2 Fundamentals 1961; art.24 CC 1964.
66. A.K.R Kiralfy, "Public Property", in Feldbrugge 1985, 644.
67. On "ideological" management, to wit the censorship organs, see *infra*, No.69. The separate treatment of ideological and economic control should not lead us to forget that *both* were aimed at the construction of communist society (officially) and the preservation of economic and political power (pragmatically).

36. Soon after the Revolution, all cultural sectors were brought under the competence of the People's Commissariat for Information although as early as the twenties separate directing agencies were established per branch of the arts which, in the following decades, were repeatedly reorganized and renamed.[69] In 1953 the management of all the branches of the arts was again concentrated under a single umbrella organ, the newly-formed Ministry of Culture of the USSR.[70] Yet only one year later, the splintering and specialization began anew until, in 1963, the basic structure of the cultural apparatus was systematized in the form that it was (more or less) to retain until the break-up of the USSR.[71]

37. The center of gravity of the management of the cultural sector lay in the following bodies: the Ministry of Culture of the USSR, competent for the visual arts (including applied decorative arts), stage arts (theater, dance and ballet, music, opera, variety, circus, etc.), cultural education (museums, libraries, clubs), and the conservation of monuments, memorials, and works of art (institutes for the restoration of works of art, monitoring of the import and export of works of art);[72] the State Committee of the Council of Ministers of the USSR for publishers, printers, and the book trade (*Goskomizdat*), which monitored the press and the book trade, the printing houses, and the distribution of books;[73] the State Committee of the USSR for cinematography (*Goskino*), monitoring the film industry in all its aspects;[74] and the State Committee of the USSR for television and radio broadcasting (*Gosteleradio*).[75]

38. The powers of these four administrations were, each in their area, very broad[76] and included long-term planning for the expansion of networks

68. Art.9 Const.1977: "The basic direction of the development of the political system of Soviet society is the further unfolding of socialist democracy: [...] the perfection of the state apparatus [...]". Critical remarks on the problematics of concentration and deconcentration of cultural-administrative management are in Mel'nikov/Silvanchik 114–118; V.I. Shabailov, in Dorokhova 103–106; Shaliagina 115–118.
69. Shaliagina 113–114; V.I. Shabailov, in Dorokhova 90–92.
70. Shaliagina 114.
71. V.I. Shabailov, in Dorokhova 103–104; T.I. Kozyreva, in Dorokhova 226–227.
72. *SP SSSR*, 1969, No.22, item 130; *SP SSSR*, 1981 No.2, item 3; *Svod Zakonov SSSR*, III, 665–670. An interesting analysis of the organization and (bureaucratic) working methods of the Ministry of Culture is given by D.P. Hammer, "Inside the Ministry of Culture: Cultural Policy in the Soviet Union", in *Public Policy and Administration in the Soviet Union*, G.B. Smith, (ed.), New York, Praeger, 1980, 53–78.
73. *SP SSSR*, 1973, No.23, item 130; *SP SSSR*, 1981, No.2, item 3; Voronkova *et al.* 310–315; *Svod Zakonov SSSR*, III, 748–756; English translation in *SSD*, 1977–78, 132–146.
74. *SP SSSR*, 1974, No.2, item 11; *SP SSSR*, 1981 No.2, item 3; *Svod Zakonov SSSR*, III, 730–737; English translation in *SSD*, 1977–78, 77–89. For a historical review of the numerous reorganizations in the administration of the film sector, see Chernysheva 1995, 113–115.
75. *SP SSSR*, 1971, No.5, item 36; *Svod Zakonov SSSR*, III, 740–745.

of cultural enterprises and institutions, the coordination and approval of the (annual and long-term) thematic plans[77] of theaters, film studios, record companies and publishing houses, as well as of their financial and production plans (which for films included budget and time schedule), the approval of the scripts and monitoring of the artistic and ideological levels of the pieces performed or produced, the distribution of raw materials (paper, film) provided to the enterprises by the State planning office *Gosplan*, the care for their technical and artistic equipment (musical instruments and costumes, new printing presses, projection facilities, machines in the film and television studios, and in the film duplication factories), the production and distribution of all printed matter, films, radio and television broadcasts, the assurance of the scientific-technical progress in their area, financing as a whole, the management of wages and personnel, foreign contacts.[78]

In the last instance, even the founding or activity profile of a cultural enterprise or institution depended on the decision of the relevant administration and, ultimately, on the CPSU itself.[79] In this, the greatest possible specialization of the state enterprises was to "avoid waste". The ideal was hence one publishing house for legal literature, one for publications in foreign languages, one for encyclopedias, one for art books, etc.

The cultural administrations also played an important role in matters of authors' rights, in particular with regard to the approval of model contracts and the levels of authors' remunerations.

§2. The Quasi-Public Cultural Sector

39. Alongside state enterprises and institutions, there were also economically-active social organizations such as the Communist youth organization *Komsomol*, the workers' unions, and the creative unions. In the first instance these had social, cultural, and scientific goals.[80] Most of their possessions (sanatoria, cultural palaces, holiday homes, libraries) could neither be classified as means

76. Apart from specific Statutes, the General Regulations on the Ministries of the USSR, 10 July 1967, ("Obshchee polozhenie o ministerstvakh SSSR", *SP SSSR*, 1967, No.17, item 116; 1982, No.25, item 130) were also applicable to the Ministry of Culture; for the state committees, such General Regulations were never drawn up (van den Berg 1988, 2), but the specific Statutes of Goskino, Gosteleradio, and Goskomizdat declared that the said State committees were guided in their activities by the General Regulations of the Ministries (art.7 of their respective Statutes).
77. This was the list of works which a publisher, theater etc.'had planned' to publish or produce in a certain year.
78. Art.6 of their respective Statute; Ageenkova 417–424; S.L. Levitsky, "Entertainment" in Feldbrugge 1985, 286–290; T.I. Kozyreva, in Dorokhova 236–239.
79. For publishing houses, see Walker 31.
80. Bregman/Lawrence 193; Ioffe 1985, 111; Malfliet 1985, 65.

of production nor as consumer goods and were, hence, given a separate status as a *tertium genus* in the codification of the early 1960s.[81]

40. In article 20 Fundamentals (1961) the ownership of social organizations was placed on the same level as the two other forms of socialist ownership (state ownership and cooperative ownership). In article 10 Constitution 1977, however, it became clear that this was an economically-inferior form of socialist ownership since it was not considered to be part of the basis of the economic system of the USSR, unlike the two other forms of socialist ownership.[82]

41. Of all social organizations, the creative unions such as the Union of Soviet Writers, the Union of Composers, etc. were the most active in the cultural sector.[83] To organize their activities they, and the bodies subordinate to them, could found institutions or enterprises which had to support their activities.[84]

The status of these enterprises and institutions in social ownership was largely equal to that of state enterprises and institutions. However, where the profits of state enterprises—after division according to set rules—disappeared into the state treasury, the profits of the enterprises of the creative unions provided an important source of income for that social organization.[85]

42. The Communist Party—the legal status of which was not completely clear: was it an organ of state or a social organization, or did it have a *sui generis* status?—also took an active part in cultural traffic. It owned the big central publishers *Pravda* and *Politizdat* (*Izdatel'stvo politicheskoi literatury*) and 78 local publishing houses. Most of their publications were newspapers, periodicals, and party literature, but *Politizdat* was also a major book publisher; from 1976 onwards, it enjoyed the exclusive right to publish all textbooks for higher and secondary education dealing with Party history, Marxism-Leninism, political economy, and scientific communism.[86] The profits from its publishing houses made up about one-third of the party's income.[87]

The party publishing houses were advantaged in many ways. For example, all libraries were obliged to buy the books by famous political figures, every party member was obliged to subscribe to *Pravda*, and party members at the

81. G. Ajani, "Some notes on the development of trade union and other social organization ownership in the Soviet Union", in Barry 63.
82. *Ibid.*, 66–67; Ioffe 1985, 111.
83. More on these creative unions, see *infra*, No.85. Nevertheless, the trade unions too owned numerous cultural institutions. The trade unions in Belarussia, for example, in 1986 managed 770 clubs and cultural palaces, 550 libraries, 1044 cinemas and 14,500 so–called "red corners": Mel'nikov/Silvanchik 136.
84. *Infra*, No.85.
85. O.S. Ioffe, "Associations", in Feldbrugge 1985, 66.
86. *Biulleten' Ministerstva vysshego i srednego spetsial'nogo obrazovaniia SSSR*, 1975, No.12, 33, quoted by Walker 25.
87. Walker 25.

universities, research institutions, and similar bodies also had to subscribe to the periodical *Kommunist*.[88] They also enjoyed tax advantages.[89] The presence of the PPOs in the paper mills, printing houses, and bookshops also ensured that the publications of the party publishing houses were printed faster and distributed earlier to the shops than were other publications.

§3. Room for Private Initiative in the Cultural Sector?

43. The administrative command economy on the basis of socialist ownership of the means of production was not opposed to limited individual work outside the state sector.[90] Such individual activities were tolerated by the Soviet regime for pragmatic considerations: it was hoped that by legalization of individual labor activities, part of the abundant "second, black economy" would come under the control of the authorities—not so that it could then be suppressed (the black economy filled important gaps in the production and distribution of food and in the service sector)[91] but in order to skim off financial benefits and to punish any undesired behavior. It was indeed not the right, but the duty, of the state to supervise this form of permitted private enterprise, so that this activity would not be exercised contrary to the interests of society.[92]

44. Individual labor activity was discussed sympathetically for the first time in the Constitution of 1977, article 17 of which allowed individual labor in the sphere of the home and traditional activities, farming, the provision of services to the people, as well as other forms of activity solely based on the personal labor of workers and members of their family.[93]

The limits within which this individual work was allowed were, however, very narrowly circumscribed: the individual activity had to be based on the personal labor of the worker or his family members,[94] the possibility of exploitation being excluded by means of a prohibition of the hiring of labor;[95] the activity carried out had to be in the interests of society;[96] and it had to stay within the strict framework of further implementation orders.

88. O.S. Ioffe, "The CPSU and the juridical person", in Loeber 1986, 127–148.
89. D.A. Loeber, "On the status of the CPSU and higher state agencies in Soviet financial law", in *Soviet Law after Stalin*, II, *Soviet Institutions and the Administration of Law*, D.D. Barry, (ed.), in *Law in Eastern Europe*, No.20, Alphen aan den Rijn, Sijthoff & Noordhoff, 1979, 108–109.
90. For a historical overview, see Malfliet 1986, 2259–2263.
91. Ioffe 1985, 95.
92. G.C. Reghizzi, "Private Enterprise", in Feldbrugge 1985, 613.
93. Malfliet 1985, 96 and 1986, 2258.
94. On the relationship between permitted individual labor activity and the prohibition of income not due to personal labor (art.13 Const.1977; arts.105 and 111 CC 1964), see Ioffe 1988a, 52–54.
95. Malfliet 1986, 2258.
96. Art.17 Const.1977 *in fine*.

45. In this regard, the Decree of the Council of Ministers of 3 May 1976—"On the activity of artisans and craftsmen"—was significant.[97] This decree allowed commercial craft activity and the provision of services in principle (art.1), but, also, included a catalogue of forbidden activities (art.3).[98] This was admittedly relatively small,[99] but none the less the principle of tolerating individual labor in the cultural sector lost a lot of its meaning. Among the forbidden activities were making duplicating machines, all sorts of seals, stamping machines, printing presses, the reproduction of all sorts of printed matter and photographic products, the reproduction of gramophone records, films and magnetic tapes, and arranging any sort of attraction or organization for putting on shows. This list could be even more extensive at the level of the Republics of the Union. The Decree confirmed the prohibition on taking on employees. Carrying out one of these prohibited activities led to an administrative sanction for a first conviction, and criminal penalties for subsequent offenses.[100]

For individual activities beyond those proscribed, citizens had to apply for an annual (and specific) license[101] which made it easy for the financial organs

97. PSM SSSR, "Polozhenie o kustarno-remeslennykh promyslakh grazhdan", 3 May 1976, *SP SSSR*, 1976, No.7, item 39; English translation in Hazard *et al.* 101–102 & 187–188. See, also, A. Bilinsky, "Das Handwerk in der Sowjetunion", *WGO-Monathefte für osteuropäisches Recht*, 1976, No.5–6, 311; Malfliet 1985, 96–98.

98. For the first time, the freedom of individual activity in the sphere of trades and handicrafts was treated on the basis of the principle that everything is allowed which is not prohibited: Malfliet 1985, 96–97.

99. Malfliet 1986, 2262.

100. Art.162 CrC 1960. The sanction was, however, immediately of a criminal-legal nature if the prohibited activity took place "on a meaningful scale" or "with hired labor". See S. Pomorski, "Economic offenses", in Feldbrugge 1985, 269–270. Note, however, that even for state organizations or social organizations the approval of the local police and local committees was required if they wanted to set up printing works, or enterprises for the production of typewriters and any sort of machines used by printers. Police approval was also required for the acquisition of duplicating machines and accessories, see Postanovlenie SNK, 26 June 1932, *SU RSFSR*, No.64, item 288, English translation in Hazard *et al.* 101; for administrative sanctions with regard to civil servants who breached this regulation, see UPVS SSSR "Ob administrativnoi otvetstvennosti za narushenie pravil otkrytiia poligraficheskikh i shtempel'no-gravernykh predpriiatii, priobreteniia, sbyta, ispol'zovaniia, ucheta i khraneniia mnozhitel'noi tekhniki", 7 September 1978, *BVS SSSR*, 1978, No.6, 38; art.171 Kodeks RSFSR ob administrativnykh pravonarusheniiakh, 20 June 1984, *VVS RSFSR*, 1984, No.27, item 909.

101. Art.4 Decree 3 May 1976. See also the circular of the USSR Ministry of Finances of 18 June 1976, quoted by G.C. Reghizzi, "Private Enterprise", in Feldbrugge 1985, 614. Compare also another Decree which imposed administrative fines and confiscation of such equipment on the persons who made or used radio broadcasting equipment without the required licenses: UPVS RSFSR, 7 april 1960, *Sots. Zak.*, 1960, No.6, 85, English translation in Hazard *et al.* 103 and UPVS SSSR, 10 August 1972, *VVS SSSR*, 1972, No.33, item 297, *Sots. Zak.*, 1973, No.1, 73, English translation in Hazard *et al.* 103. Because radio piracy was easy to detect and thus particularly dangerous, this phenomon only had a marginal existence, see Feldbrugge 1975, 16.

of the state and for the Ministry of Internal Affairs to monitor the activities of private craftsmen and service providers.[102]

46. Licensed individual work could never amount to private enterprise, *i.e.*, in Soviet terms the systematic or large-scale production of goods or provision of services with the aim of gaining income not directly remunerating one's own labor, hereby making use of "socialist forms" in order to enjoy the priviliges appertaining to socialist organizations (*e.g.*, the hiring of personnel).[103] Nor could it amount to professional commercial mediation for substantial gain[104] or to buying and selling of goods for purposes of profit ("speculation").[105] In brief, those activities—which appear natural and essential in a market economy—were punishable in a planned state economy.

For as far as there was any space left for private initiative within the narrow perimeters set out above, individual activity was in any case reduced to a barely remunerative alternative by the high taxes and the prohibition of selling products via the state's commercial network.[106] It should, therefore, be no surprise that such individual craft work was of marginal economic significance.[107]

47. This entire arrangement with regard to individual labor was given special significance in the cultural sector by the issue of the legality of *samizdat*, the non-commercial publication and distribution of literary works via the mechanism of the chain letter,[108] without making use of the state publishing house,[109] without making use of printing presses or any other means of multiplication the acquisition, the ownership, and the conveyance of which was prohibited for individual citizens. As such, *samizdat* was the means par excellence to circumvent censorship.[110]

An alternative to *samizdat* was smuggling the manuscript abroad and having it published there (so-called *tamizdat*, "published over there"), hereby avoiding the procedure for foreign publication provided by copyright law.[111]

102. G.C. Reghizzi, "Private Enterprise", in Feldbrugge 1985, 614.
103. Art.153 para.1 CrC 1960.
104. Art.153 para.2 CrC 1960. A contract of agency without these characteristics was legal, see arts.396–403 CC 1964; S. Pomorski, "Economic offenses", in Feldbrugge 1985, 269.
105. Art.154 CrC 1960. See F.J.M. Feldbrugge, "Speculation", in Feldbrugge 1985, 718–719; Malfliet 1985, 142–148. The sale of objects one had made oneself (*e.g.*, the craftsman who sells his wicker baskets) was not a form of speculation.
106. G.C. Reghizzi, "Private Enterprise", in Feldbrugge 1985, 614.
107. Stephan 42. This was certainly not the case in the agricultural sector, but that falls entirely outside our current field of enquiry.
108. Dewhirst 182; Feldbrugge 1975, 17–18; Waegemans 329–330.
109. A Soviet citizen did not have the option of using the services of a state publishing house to publish a work privately: Loeber 1974, 112.
110. Under Stalin, possession of a typewriter had to be registered, but this requirement was later dropped: Feldbrugge 1975, 3.
111. *Infra*, No.120.

The fame an author acquired in this fashion in the West, to some extent, protected him from too repressive a response by the Soviet authorities, the works obtained copyright protection under the Union of Berne,[112] and copies could be smuggled back into the Soviet Union to lead a second life.[113]

Finally, in music there was the phenomenon of *magnitizdat*, the recording, multiplication, and distribution of light music by amateur groups, but, also, of protest singers, on audiotapes.[114] *Magnitizdat* developed, unlike *samizdat*, into a truly large-scale black industry with national distribution networks.[115]

48. *Samizdat* and *tamizdat* (to a lesser extent also *magnitizdat*) were the favorite means for those opposed to the Communist regime to spread their opinions, for instance concerning human rights and the rule of law. The dissident movement originated in the mid sixties and obtained—in spite of its limited size[116]—a large response, especially in the mid seventies, in reply to the signing, also by the Soviet Union, of the Final Act of the Conference for Security and Cooperation in Europe (CSCE) in Helsinki. But there was also a large response abroad, through chain letters or via foreign broadcasting stations, which broadcast programs in different national languages of the USSR.[117] In the later seventies the authorities managed to "put away" almost the entire movement in prisons, psychiatric institutions or remote places of exile.[118]

49. Professor Andre Loeber concluded, after a detailed study in the early seventies, that *samizdat* activities were not illegal in the Soviet system.[119] In our opinion, this conclusion was unaffected by the approval of the Decree of 3 May 1976 "On the activity of artisans and craftsmen"[120] because this Decree prohibited only *commercial* publishing or printing activity but did not touch on *non-commercial* (re)production by means of typewriters and carbon paper. Also the above-mentioned penalization of private enterprise and commercial mediation, speculation and the brokering of illegal trade were not applicable to the *samizdat* phenomenon. Article 8 para. 4 Fundamentals (1961) and article 12 Civil Code (1964) stated that nobody should be restricted in his legal rights (which included, *inter alia*, the right to publication of private works)[121]

112. Art.3 (1) b BC.
113. Waegemans 330.
114. Feldbrugge 1975, 4 and 16.
115. Nijenhuis 42.
116. At the most a few hundred intellectuals, of whom the most famous were Sakharov, Solzhenitsyn, Amalrik, Grigorenko and Bukovski.
117. *Voice of America* and *Radio Free Europe/Radio Liberty*. Reception of these stations was regularly made impossible by jammers.
118. Casier 153.
119. Loeber 1974, 122. See also Feldbrugge 1975, 22; Levitsky 1985, 16.
120. *Supra*, note 97.
121. Arts.9 and 98 Fundamentals 1961 and arts.10 and 479 CC 1964.

except in the cases stipulated by law. There seems to have been no such a law in reference to *samizdat*.[122]

There were, however, Soviet legal theorists who held the view that the author himself did not have the authority to publish his works. Professor Gringol'ts, for example, claimed that activities involving publication, theater and suchlike were not included in a citizen's legal rights for the simple reason that such activities were explicitly reserved to the socialist organizations whose function it was to select and distribute those works found *useful* in a certain area.[123]

50. The fact that the *samizdat* phenomenon as non-commercial activity possibly remained within the limits of the acceptable did not, however, mean that the phenomenon was simply tolerated by the authorities. As an uncontrolled means of conveying often critical information to the populace, *samizdat* was an undesirable expression of individual autonomy. *Samizdat* was not fought because of the phenomenon itself but because of the dissemination of the ideas, which it incorporated.[124]

51. In contrast to the *samizdat* publications, the *magnitizdat* or *magnizdat* produced tapes were distributed on a large scale and on a commercial basis[125] and, hence, were prohibited by virtue of the Decree of 3 May 1976. The phenomenon was, however, even harder to control than the *samizdat*. It was part of a broader post-war phenomenon, namely the growth of western influence on young people's leisure habits and the individualization of the leisure activities of the populace. The Soviet authorities were forced into a reaction. The "culture palaces" attempted to attract youngsters again by pushing the ideological to the background and giving western cultural consumptive tendencies a chance: jazz and pop music, record libraries. This is characterizing for the gradual, unconscious slipping of government control over the activities of the Soviet citizen: the instrumental approach to art and culture which wanted to dictate "needs" became less and less efficient.[126] Because of the popularity of pop music and the important profits which came from record libraries, these new phenomena had to be tolerated, as a result of which a certain de-ideologization appeared in the sector of light music. The toleration of theoretically-prohibited *magnitizdat* was just another expression of this.

122. Gordon 79; Loeber 1974, 108.

123. I.A. Gringol'ts, in Fleishits/Ioffe 708. Compare Antimonov/Fleishits 164 (referring to the then applicable Postanovlenie TsIK and SNK SSSR, 20 May 1932, *SZ SSSR*, 1932, No.38, item 233); V.I. Serebrovskii, "Avtorskoe pravo" in *Grazhdanskoe pravo*, Ia. F. Mikolenko.and P.I. Orlovskii, (ed.), M., 1938, 264; and the critical remarks to this opinion by Loeber 1974, 107–108, note 123. See also V.A. Dozortsev, in Bratus'/Sadikov 565 and Dozortsev 1980, 130 (less explicit at this point).

124. *Infra*, No.72.

125. Nijenhuis 42; A. Troitsky, *Back in the USSR. The True Story of Rock in Russia*, London, Omnibus Press, 1987, 86.

126. White 155.

§4. Conclusion

52. Economically speaking, the identity of the socialist state was fully expressed in the nationalization of the means of production. Personal property was limited to consumer goods. The collectivization of the production and distribution of goods and services deprived the individual of the option of independent enterprise. The Soviet citizen could not develop economic autonomy. The exceptions to this rule were inspired by pragmatic considerations and were made "safe" by a series of restrictions.

Not only the citizen but, also, enterprises in socialist ownership only had a relative autonomy. They were not considered capable of owning the goods, which were placed at their disposal by the state or the social organizations. They obtained only the right of operative management, *i.e.*, management, which has to be aimed at the fulfilment of the imposed plan even if this went against the interests of the enterprise itself.

The fact that the planned economy was not the best choice from an economic perspective was of no great significance as political, not economic, efficiency was of central importance. A planned economy was a very effective way of ensuring the complete loyalty of Soviet citizens to the regime.

Section 2. The Communist View on Freedom of Speech and Art

Introduction

53. The second cornerstone of the CPSU's totalitarian power claim was of a political nature as the Communist Party was "the leading and guiding force of Soviet society and the nucleus of its political system".[127] By means of its insight into the scientific theory of Marxist-Leninism, it could guide every sphere of life towards the construction of the communist society, which the historic patterns supposedly made necessary and inevitable. This opinion had a determining influence on the relationship between state and individual, a relationship, which is clearest in the issue of human rights.

In this section, we will first give a rough sketch of the outlines of Marxist-Leninist theory and constitutional practice in relation to basic rights in the Soviet Union (subsection 1), after which we will discuss the freedoms, so important for the cultural sector, of speech, of the press, and of artistic expression, as well as other cultural rights (subsection 2). Finally, we will briefly touch on the freedom of association (subsection 3).

Subsection 1. Human Rights in Communist Theory and Practice

54. The point of departure of the Marxist-Leninist view of human rights and freedom is the criticism on the liberal-individualist image of man and the concept of freedom. In the capitalist model of society, man continuously strives for his self-interest detached from any consideration of the interests of others

127. Art.6 Const.1977.

or of society. Every person can do what he likes in total freedom, a principle with its highest legal expression in the law of private property.[128] This freedom is enjoyed by man, *every man*, by birth.

According to Marxism, this image lacks any sense of reality. Reality shows that in the capitalist system, the rights and freedoms of man are indeed *formally* granted to everybody but, *in reality*, can only be exercised by the ruling class.[129] The proletariat, which had to sell its labor, and thus itself, to the owners of the means of production, was the victim of the every-man-for-himself picture, which lies at the basis of the liberal view of human rights.

55. If the individual freedom of the laborer leads to servitude, then collective freedom as a class will lead to the economic, social, cultural, and finally also the political emancipation of the proletariat. The point of departure is then no longer the selfish man, who looks only to himself, but collective man who puts society's well-being before his own interests. The only means to reach this end is the abolition of private property by nationalizing the means of production. Only after the proletariat *as a class* has been freed from economic exploitation will the necessary economic and social conditions be created in which the rights and freedoms of the proletariat and eventually of everybody can be made real.[130]

56. The ideological premises that individual freedom comes from the proletarian class being freed from its economic dependency have many consequences in the sphere of human rights:

(1) Basic rights are not universal or innate but are bound to their context and historically determined.[131] Material circumstances determine the existence and the contents of the freedoms and rights according to the Marxist scheme of infrastructure and superstructure.[132] As the CPSU is the only body that has an insight into the stages of material development and the spiritual and social developments which result therefrom, it is the only body that can determine what level of human rights can be granted to the citizens at the current moment of material development. Human rights only exist to the extent that they are instituted by the state.[133] The

128. Van Genugten 1990, 46.
129. Feldbrugge 1993, 216.
130. Y. Rechetov, "Socialist concept of Human Rights", in *De rechten van de mens in de internationale betrekkingen*, M. Bossuyt. and Y. Vandenberghe, (eds.), Antwerpen, UIA, 1979, 36.
131. W.J.M. van Genugten, "Oost en West, van kemphaan naar partner", *AA*, 1992, 335-336. Compare Ginsburgs/Pomorski 41 ("Without establishing the intimate connection between the status of the individual and his political environment, one falls, according to Soviet scholars, into a metaphysical trap where the individual's rights and duties acquire a figurative and 'absolutist' connotation. The philosophical premise of the inalienable or transcendental nature of human rights, divorced from their concrete setting, leads to a false picture of historical reality and reduces these freedoms to empty verbiage").
132. Gorlé 1978, 126.
133. K. Westen, in Fincke, I, 485, No.9.

list of basic rights summed up in the 1977 USSR Constitution was thus exhaustive[134] and, hence, not exemplary for a pre-existing general freedom from which the listed freedoms were deduced.[135] Moreover, there was no direct appeal to these constitutionally established rights. The Soviet citizen could only appeal to the constitutional rights to the extent that they had been further elaborated and made concrete in legislation.[136]

(2) The emphasis on economic emancipation also resulted in Soviet theory's great interest in socio-economic rights[137] because the realization of civil and political rights was inextricably linked to that of socio-economic rights: to split up the different categories would contradict the mechanical influence of the infrastructure on the superstructure.[138] Moreover, granting socio-economic rights, parallel to society's socio-economic development, was the *conditio sine qua non* for the realization of civil and political rights; in that sense, the former category of rights had priority over the latter.[139]

(3) A further consequence is the emphasis, which was placed up on the creation of the necessary material guarantees for the establishment of human rights, much more so than the provision of legal guarantees.[140] Here an active role was reserved for the socialist state: it did not have to abstain from involvement in the sphere of the citizen's freedoms and did have to take care of the improvement of material living conditions and the equal distribution of material wealth, and thus also of the expansion and deepening of the rewarded rights and freedoms.[141] In the first resort, the socialist state was presumed able to turn the merely formal guarantee of basic rights into a material guarantee.[142] For the holder of rights this meant, however, that there was no institutionalized mechanism for defending these rights against the state and the community, which was, of course,

134. See art.39 para.1 Const.1977, which stated that citizens of the USSR enjoy the full range of the socio-economic, political, and personal rights and freedoms *proclaimed and guaranteed by the Constitution of the USSR and Soviet laws*.
135. Gorlé 1978, 126; K. Westen, in Fincke, I, 498, No.6-7.
136. Ginsburgs/Pomorski 56-57; Gorlé 1978, 130-131; Maurach 327.
137. The catalogue of basic rights of Const.1977 included: the right to work (art.40), to rest (art.41), to health care (art.42), to material security in old age, in case of illness, loss of the ability to work or loss of the breadwinner (art.43), to housing (art.44), to education (art.45) and to use the achievements of culture (art.46), as well as the freedom of scientific, technical, and artistic creation (art.47).
138. Van Genugten 1990, 48.
139. Timmermans 37. Const.1977 mentioned the social, economic and cultural rights *before* the civil and political rights and freedoms.
140. Ioffe 1985, 54.
141. Feldbrugge 1993, 216-217. See art.39 para.1, second sentence Const.1977: "The socialist system ensures the widening of rights and freedoms and the continuous improvement of the living conditions of citizens in accordance with the fulfillment of the programs of socio-economic and cultural development."
142. Maurach 327.

particularly damaging for the exercise of civil and political rights.[143] From a Soviet perspective, human rights could not be a way of countering the all-encompassing claims of the state; they were not a guaranteed private sphere to which the state was denied access.[144] Collectivization of the means of production meant that there could no longer be any antagonism between state and individual:[145] the final goal which was set by the CPSU on the basis of the laws of history that it had formulated held everything together.[146] This is perfectly comprehensible if one not only sees man as an unselfish, social creature whose freedoms are achieved through his participation in the community, thanks to which the community enjoys these rights,[147] but, also, identifies the community with the state of which the Communist Party is the directing force.

(4) The (mainly political) constitutional rights were only granted upon the condition that they would be applied in conformity with the system[148] so that their function was to protect the system without any possibility for criticism of that system.[149]

(5) If, in spite of all this, a conflict of interests were to arise between the individual and the community, then this would be blamed on the lack of insight of the individual in the historic processes. The interests of the community then, of course, had priority, which indicates the socio-centric approach of the socialist system.[150] As the state and party themselves determined the interests of the state and the community, the minimalization of the rights and liberties of the citizen on the basis of institutionalized arbitrariness and opportunism were made remarkably easier.[151]

(6) The purpose-related character of the rights granted to the citizen meant that "the exercise of these rights was inseparable from the citizen's performance of his duties towards the state and the community"[152] and, in the first instance, "the duty to respect the rules of socialist community

143. Feldbrugge 1993, 218.
144. K. Westen, in Fincke I, 485, No.9.
145. Van Hoecke 539.
146. Van Genugten 1990, 47.
147. Van Hoecke 535-536.
148. See, *e.g.*, arts.47 and 51 Const.1977 ("in accordance with the goals of communist construction") and art.50 Const.1977 ("in order to strengthen and develop the socialist system"). In the words of van Caenegem 266: "Freedom in the Soviet Union was a guided, teleological freedom, not to do what one liked, but to co-operate in the construction of socialism".
149. K. Westen, in Fincke, I, 486 No.15. According to Timmermans 35-36, in a sense the violation of political rights was justified in Const.1977 by the same article in which that specific right was granted, the one hand taking away what the other had given.
150. Bloed/van Hoof 34-37. Art.39 para.2 Const.1977 gave blanket priority to the interests of society and the state over the citizen's rights and freedoms.
151. Ginsburgs/Pomorski 46; Timmermans 52; K. Westen, in Fincke, I, 501, No.20.
152. Art.59 para.1 Const.1977. See also, *e.g.*, K. Westen, in Fincke, I, 487, No.19.

life, and to bear with dignity the high calling of citizen of the USSR".[153] This definition, in fact, gave ideology the status of law and forced the acceptance of Marxism-Leninism onto collectivity.[154]

57. A last important, and somewhat disturbing, aspect in the issue of the fundamental rights and freedoms was the accession of the USSR to a number of human rights conventions (both UN International Covenants on economic, social and cultural rights and on civil and political rights of 16 December 1966[155] and the Final Act of the Conference on Security and Cooperation in Europe, held in Helsinki[156]), in which a 'bourgeois' concept of human rights was used. These accessions in the mid-seventies were doubtless inspired by opportunist motives,[157] when the Soviet regime was under heavy international criticism because of its attitude towards the dissident movement.

The International Covenant on Civil and Political Rights, in particular, used a concept of human rights which was incompatible with the Soviet theory of basic rights, with such concepts as "inherent dignity of the human person" and "inalienable rights of all members of the human family"[158] or the "inherent right to life".[159]

58. The contrast between the internal constitutional principles and the liberal-individualist natural-law concept of human rights in the treaties ratified by the USSR was dismissed by Soviet specialists in international law by referring to the sovereignty of the Soviet Union and the principle of non-interference

153. Art.59 para.2 Const.1977.

154. G. Codevilla, "Marxism-Leninism and Fundamental Freedoms", *Rev. Soc. L.*, 1978, 219. Gorlé 1978, 130 is of the opinion that this stipulation demonstrates particularly clearly the Soviet authorities' aim with this part of the Constitution: the government's demand for unconditional loyalty to the established regime.

155. *VVS SSSR* 1973, No.40, item 564.

156. In contradiction to the UN Covenants, the Final Act of Helsinki was made public in the Soviet Union by its publication, barely one day after the signing, in *Pravda* and *Izvestiia*, 2 August 1975, see J. Jager, "De Helsinkigroepen in the Sovjetunie", *Internationale Spectator*, July 1982, 383.

157. Bloed/van Hoof 32-33; Feldbrugge 1993, 214-215 even goes so far as to wonder whether the entire 'socialist' theory of human rights was made up for opportunist reasons, as the theme of basic rights had continuously been on the international political agenda since the second world war.

158. Preamble and art.10 (1) ICCPR.

159. Art.6 (1) ICCPR. See also the Final Act of Helsinki, point VII of the Declaration on Principles guiding relations between participating States: "[the participating States] will promote and encourage the effective exercise of civil, political, economic, social, cultural and other rights and freedoms, all of which derive from the *inherent dignity of the human person* [...]". The italicized words tend towards a Western natural-law and universalist concept of human rights, but in the alliance, expressed in this stipulation, between civil and political rights on the one hand and social, economic and cultural rights on the other, the influence of the Marxist-Leninist view was clear: W.J.M. van Genugten, "Moskou en de mensenrechten", *NJ*, 1988, 261.

in internal affairs[160] as a consequence of the right to self determination.[161] The positivist theory of human rights was linked to a strictly dualist view which considered the national and the international legal orders to be individual, separate, and equal systems,[162] so that these treaties were eliminated as alternative sources of law.

Subsection 2. Freedom of Speech and Cultural Rights and Liberties

§1. Some Cultural-Historical Remarks

59. Cultural-historical developments in Russia after the October Revolution were often soaked in blood and tears. For the Soviet regime, the perfection reached by Soviet non-verbal performing artists—such as ballet dancers, circus artists, and concert musicians—was proof of the scope for the development of talent enjoyed by the artistic intelligentsia in Russia. This facade, however, hid a tragedy: the terrible loss of creative talent during the seven decades of communist rule.

We cannot here give a complete historical overview of the way in which the Soviet authorities used the term "freedom of art and the press" over the years. It will suffice to draw attention to some generalities by way of introduction.

60. It must first of all be clear that the limitations of the freedom of the press originated with Lenin himself. As already mentioned,[163] Lenin had no patience with the formal freedoms of the bourgeois world, since these only served to obscure the exploitation of the proletariat. Once in power, he immediately put this theory into practice. "Formal" freedom of the press was withdrawn by a Decree of the Council of People's Commissars (*Sovnarkom*) of 27 October 1917, "On the press".[164] *Sovnarkom* obtained the right to close newspapers, which called for open resistance or disobedience towards the new regime, created unrest by clearly libelous distortions of the facts, or called for acts of a criminal nature. The decree was a temporary measure ("in expectation of the broadest and most progressive law") and was to be repealed after the restoration of order.[165] Less than a month later, private publications were prohibited from placing adverts.[166] Revolutionary tribunals were also set up with competence for press affairs,[167] but they lasted barely four months.[168] It was primarily due to the confiscation of printing presses and paper that the

160. Brunner 1982, 21.
161. Bloed/van Hoof 38.
162. Brunner 1982, 14; van den Berg 1991, 49; O.S. Van Oppen, "Mensenrechten en nationale rechtsmacht. Is het standpunt van de Sovjetunie verdedigbaar?", *Internationale Spectator*, October 1981, 576-585.
163. *Supra*, No.10-12.
164. *SU RSFSR*, 1917, No.1, 4; M.D. Orakhelashvili and V.G. Sorina, (ed.), *Dekrety Oktiabr'skoi Revoliutsii*, I, *Ot oktiabr'skogo perevorota do rospuska uchreditel'nogo sobraniia*, M., Partiinoe izd., 1933, 16-18. See also Mirkin-Gezewitsch 11-12.
165. Kenez 137; Kunze 29-31; Mirkin-Gezewitsch 11-12. This 'progressive' law was not issued until 1990, see *infra*, No.272.

bourgeois press ran into difficulties.[169] During the NEP, more freedom was temporarily allowed for private initiative—in the arts and the media as elsewhere—but this greater scope precipitated the permanent introduction of preventive, political-ideological surveillance by the Soviet authorities.[170] The space for private initiative was destroyed by the first five-year plan in 1928; censorship remained.

61. Secondly, it must be noted that the repression of artists runs through the *entire* history of Soviet cultural policy. After Stalin, this persecution was less violent in character, but the repression continued until the eve of Gorbachev's accession.

According to Krushchev's testimony in 1956, more than 600 writers disappeared in camps under Stalin.[171] Many authors were executed (Isaak Babel', Pavel Florenskii, Vsevolod Meyerhold, Boris Pil'niak); others died of privation in the camps (Ossip Mandel'shtam); yet others narrowly escaped death but were silenced for years by publication bans (Anna Akhmatova, Mikhail Bulgakov).[172] Shostakovich and Prokof'ev, who came under fire from Andrei Zhdanov, the then party secretary of Leningrad, during the terror just before the war and the so-called *Zhdanovshchina*-period immediately thereafter, only saved themselves by toadying.[173]

166. *SU RSFSR*, 1917, No.2, item 21; M.D. Orakhelashvili and V.G. Sorina, (ed.), *o.c.*, 48-55. See also Mirkin-Gezewitsch 14-15. Lenin had hoped that this would undermine the financial basis of privately-owned newspapers, but the measure had hardly any impact: Kenez 141.
167. Kenez 142.
168. Mirkin-Gezewitsch 12-13.
169. Kenez 141.
170. "Ironically, NEP had paved the road to censorship" (Levitsky 1982, 56). Before the revolution Lenin had never expressed his opinion of censorship, because he himself was a victim of it (Kenez 134-135), but he had made it clear that he would have no truck with formal freedom of speech (*Supra*, No.12).
171. Waegemans 265.
172. On the tragic fate of these and other writers, see V. Chentalinski, *La parole ressuscitée. Dans les archives littéraires du K.G.B.*, Paris, Robert Laffont, 1993.
173. Dmitrii Shostakovich's opera "Lady Macbeth of Mtsensk" was described as "[...] unSoviet, unhealthy, cheap, eccentric, flat and leftist" ("Noise instead of music", *Pravda*, 28 January 1936). The opera was suddenly pulled after two overwhelmingly successful years in Leningrad. The premier of Shostakovich's Fourth symphony was cancelled. The composer wrote his Fifth symphony in 1937 under heavy pressure, with the subtitle: "The answer of a Soviet artist to justified criticism". The composer miraculously escaped death: G. Seaman, "Russian music", in Brown/Kaser/Smith 250-251. Through a Central Committee Decree of 10 February 1948 (quoted McCauley 145-146; Babitsky/Rimberg 188-189; Werth 358-359) Khachaturian, Shostakovich and Prokof'ev, among others, were accused of "formalism" and "anti-nationalism". Prokof'ev saved himself by writing a letter of retraction to the Plenum of the Composer's Union (Heller/Nekrich 408). Under Khrushchev, the articles in *Pravda* as well as the Zhdanov decrees were revoked by a Decree of the CC of 28 May 1958 "On the correction of the mistakes which were made in judging the activities of certain talented composers": Sidorov 34; Werth 423-424.

Under Krushchev, the relationship between the authorities and artists thawed somewhat,[174] but the layer of ice was by this time so thick that there were regular conflicts until as late as 1985.[175] Boris Pasternak became the object of a campaign of slander after his *Doctor Zhivago*, refused by Soviet publishing houses, was published in translation in Italy. The writer was expelled from the Writers' Union, had to refuse the Nobel Prize for Literature under the threat of exile, and was forced to publish a letter of contrition in *Pravda* of 6 November 1958.[176] Siniavskii and Daniel were sentenced to seven and five years of forced labor respectively (1966),[177] Iosif Brodskii (1972) and Solzhenitsyn (1974) were expelled from the Writers' Union and forced to emigrate,[178] other writers were forced publicly to declare their remorse for the publication of their work abroad,[179] an open-air exhibition by non-official artists in Moscow's Sokolniki Park was bulldozed (1974),[180] artists—such as Rostropovich and Liubimov—who fled abroad, were stripped of their Soviet citizenship,[181] etc.

62. Thirdly, one must emphasize the subjection of cultural goals to economic and political ones. Art became a factor of mobilization and organization, a militant tool to increase productivity, to enthuse the masses for new techniques, better work performance, higher production figures, but naturally also for guaranteeing political loyalty.[182] This is certainly true of the period of

174. Some of the victims of the terror were rehabilitated (Z.R. Dittrich and A.P. Van Goudoever, *De Sovjet-Unie na 1953*, Utrecht, HES uitgevers, 1986, 47-50), authors shut away in prison camps were freed, and a number of works suppressed under Stalin were published for the first time (Waegemans 326).
175. Instead of execution and confinement in prison camps, internal exile and sectioning in psychiatric institutions made their appearance: Heller/Nekrich 489-490; Schapiro 575.
176. Bezemer 343-344; Heller/Nekrich 480-481; McCauley 194; Sidorov 36; Waegemans 328 and 365-368; Werth 484-485.
177. This was the first public political trial after Stalin (Heller/Nekrich 509). A document discovered in the archives of the Central Committee in 1992 shows how self-assured the Central Committee was concerning the outcome of the show trial against both authors: the main newspapers were ordered to publish daily bulletins from courtroom reporters and TASS-messages, while the other newspapers could only publish the latter. According to this document, the press agency Novosti and the *KGB* had to prepare articles on the trial for abroad. See *Moscow News*, 1992, No.28, 7. The trial against both authors was unique for two reasons: the accused pleaded not guilty and defended themselves, and for the first time there was overt protest against a political trial within the Soviet Union itself: Bezemer 373-374; Y. Feofanov and D. Barry, "The Siniavskii-Daniel trial: a thirty year perspective", *RCEEL*, 1996, 603-320; Werth 482.
178. Bezemer 376-377; McCauley 228. Solzhenitsyn was given the Nobel Prize for literature in 1970. In 1973-1975, his famous *Gulag Archipelago* was published in Paris. Brodskii in 1987 also received the Nobel Prize for literature.
179. M. Dewhirst, "Soviet Russian Literature and Literary Policy", in *The Soviet Union Since the Fall of Khrushchev*, London, Macmillan Press, 1978, 184-185.
180. Heller/Nekrich 565.
181. Werth 483.
182. Erler 1978a, 22.

Stalin's rule[183] when "socialist realism" was launched as an artistic method. At the first congress of the Writers' Union in 1934, this term was given the following definition: "Socialist realism, the basic method of Soviet literature and literary criticism, demands of the artist a realistic, historically concrete expression of reality in its revolutionary development. Apart from this the artist also has the task of training the workers ideologically and educating them in the spirit of socialism."[184]

Things never went so far that the artistic theory of socialist realism prescribed specific elements of style. They concentrated more on abstract definitions like the kind of public awareness which art had to mirror and upon which its success or failure could be judged.[185] Writers and artists, "engineers of the human spirit", were, however, not free in their choice of subjects since they had to represent reality (*realism*) as it was being made according to a theoretical imperative (*socialist*),[186] in other words as it showed itself in the communist world-in-the-making. Heroism and self-denial were necessary virtues to fight the battle for the CPSU's ideals: women on tractors, factory workers, the image of the positive hero (*polozhitel'nyi geroi*), and all of this in a glow of optimism and triumph in which every negative or critical sound was taboo. Psychological conflicts, which concern universal human emotions, could not be dealt with unless they evoked current political problems. Attention given to great

183. See, *e.g.*, the Decree of the CC of the VKP(b) of 15 August 1931 "On publishing": "a book must take a firm line and be politically current, it must arm the broadest masses of builders of socialism with Marxist-Leninist theory and with technical knowledge of production. A book must be a mighty means for the education, mobilization and organization of the masses in the cause of economic and cultural development [...]" (*KPSS v rezoliutsiiakh*, V, 340) and fiction "must give expression to the heroism of socialist construction and the class struggle, the transformation of social relations and the growth of the new people—heroes of socialist construction." (*Ibid.*, 343). Compare, along the same lines, the Decree CC VKP(b), 8 December 1931, "On Soviet cinematography", which however also provides for cinema meeting the need of workers and *kolchozniki* ("as builders of socialism") for rest and relaxation (*Ibid.*, 371).

184. Cited by Waegemans 254. See also the triumphant speech of Andrei Zhdanov (secretary of the CPSU and Stalin's future son-in-law): "We must first and foremost know life in order to portray it truthfully, not academically, lifelessly or purely as 'objective reality': reality must, on the contrary, be portrayed in its revolutionary development", cited in Elliott 5; Bezemer 267-268.

185. Points of reference for testing the correctness of works of art, newspaper articles, radio programs and suchlike were: *narodnost'* (the comprehensibility of the work for the masses, the use of folk elements, possibly the ethnic origin of the people which is depicted or described), *partiinost'* (the central and leading role of the CPSU in all aspects of Soviet life, the education of the laborers and farmers to new Soviet people), *klassovost'* (the class consciousness of the artist), *ideinost'* (the import of new ways of thinking and habits after those had been approved by the CPSU as the central contents of the work) and *tipichnost'* (the portrayal of the situations or scenes 'typical' of a socialist society): Elliott 13.

186. Kemp-Welch 169.

historical figures such as Ivan the Terrible and Alexander Nevskii were scarcely veiled expressions of the personality cult around Stalin.[187]

Socialist realism had an extremely unstable nature: it was not one doctrine or one artistic practice but a method, which could legitimize a whole series of different artistic, critical, and scientific practices.[188] This opaqueness did not make it any easier for artists in the general atmosphere of terror to conform to "socialist realism". It was, in other words, not only an artistic method of creation but, also, a means of supporting political campaigns or of making unwilling artists conform, or of removing them from the community.[189]

Under the Krushchev regime, lip service was paid to socialist realism to maintain an illusion of the continuity in Soviet art since 1932,[190] but there was no longer anything like a workable, credible theory: without its leading engineer, socialist realism was doomed as a concept of art theory.[191] On the contrary, works of visual art which had grown from Stalin's cultural and arts policy were, at the founding congress of the Union of Soviet Artists in 1957, criticized for their *illiustrativnost'* or *fotografiinost'*, or for their glossy (*i.e.*, excessively harmonious) view of reality (*lakirovat' deistvitel'nost'*).[192] Government dirigisme was nonetheless still the rule. Thus a Joint Decree of the Central Committee and of the Council of Ministers of the USSR of 4 November 1955 "Concerning the removal of excesses in projects and constructions" put an end to the overblown and monumental Stalinist style in architecture (so-called 'sugar pies'), but at the same time the Decree declared that colonnades, porticoes, marble, and all useless frills in the construction of buildings were prohibited.[193] In future, all building was to be by system: the Institute for the Study of Domestic Construction devised thirty-odd plans for the whole Soviet Union, no creativity being demanded of the architect.

During the period of stagnation (*zastoi*) under Brezhnev and his successors, references to Socialist realism became increasingly rare.[194] As with so many other matters in the Russia of Brezhnev, Andropov, and Chernenko, the machines of the art industry wore down and ground to a halt. The stream of

187. Waegemans 254-255; Elliott 13-17.

188. J. Guldberg, "Socialist Realism as Institutional Practice: Observations on the Interpretation of the Works of Art of the Stalin Period", in *The Culture of the Stalin Period*, H. Günther, (ed.), London, Macmillan, 1990, 152.

189. *Ibid.*, 151. This political aspect probably accounts for the lack of attention given to 'socialist realism' by Western art historians. The first retrospective exhibition of socialist realism in the West was oganized in Oxford and Brussels as recently as 1992.

190. See, *e.g.*, the Party Program of 1961: "In the art of socialist realism, based on the principles of *narodnost'* and *partiinost'* daring innovation in the artistic expression of life is combined with the use and development of all progressive traditions of world culture", in *KPSS v rezoliutsiiakh*, X, 177.

191. Elliott 17.

192. Sidorov 34.

193. Quoted by H. Rousselot, "Moscou: problèmes d'une capitale", *Le Courrier des pays de l'Est*, October 1991, 46-47, 64.

literally dozens of resolutions on ideological and other questions in almost all branches of the cultural sector bore witness to the disquiet and growing inability of the gerontocracy in the Party and the creative unions to find a satisfactory response to the changing recreational habits of Soviet youth and the increasing implausibility of the communist regime.[195]

63. Fourthly, and lastly, the basis of the Soviet Union's artistic reign of terror was not only of an ideological and political in nature but, also, economic. The nationalization of cultural mediation deprived the artistic world of every form of economic independence and autonomy. Artists were, in other words, economically and intellectually completely dependent on state and Party.

§2. Freedom of Speech and of the Press

2.1. The Constitutional Principle

64. Article 50 para. 1 Constitution (1977) stated that, in accordance with the interests of the people and in order to strengthen and develop the socialist system, citizens of the USSR are guaranteed freedom of speech (*svoboda slova*) and freedom of the press (*svoboda pechati*).

Freedom of speech was narrower in its object than freedom of expression since it referred only to the spoken or written word, and not to other means of expression.[196] This restriction was, however, catered for by the freedom of artistic creation to be discussed below.[197]

194. "We are in favor of an understanding attitude towards the artistic quest, the fullest expression of the gifts and talents of the individual, the multiplicity and richness of forms and styles, which are developed on the basis of the method of socialist realism" (L.I. Breshnew, *Auf dem Wege Lenins*, III, 319). In 1984 Chernenko called for a return to socialist realism ("Utverzhdat' pravdu zhizni, vysokie idealy sotsializma", *Izvestiia*, 26 September 1984, 1-2; Pittman 667; R. Van den Boogaard, "Tsjernenko beveelt terugkeer naar cultuurbeleid van socialistisch realisme", *NRC Handelsblad*, 26 September 1989).

195. See, *e.g.*, Decree CC CPSU of 21 April 1972 "On literary-artistic criticism", *KPSS v rezoliutsiiakh*, XII, 170-173; Decree CC CPSU of 2 August 1972 "On measures for the further development of Soviet cinematography", *KPSS v rezoliutsiiakh*, XII, 263-268; Decree CC CPSU of 8 May 1974 "On the increase of the role of the libraries in the communist education of the workers and scientific-technical progress", *KPSS v rezoliutsiiakh*, XII, 418-423; Decree CC CPSU of 29 January 1975 "On artistic folk crafts", *KPSS v rezoliutsiiakh*, XII, 498-502; Decree CC CPSU of 12 October 1976 "On work with creative youth", *KPSS v rezoliutsiiakh*, XIII, 137-140; Joint Decree CC CPSU and Council of Ministers USSR of 10 November 1977 "On measures with regard to the further improvement of the cultural services for the population in rural areas", *KPSS v rezoliutsiiakh*, XIII, 218-214; Decree CC CPSU of 28 March 1978 "On measures for the further development of independent artistic creativity", *KPSS v rezoliutsiiakh*, XIII, 253-256; etc.

196. See, on the other hand, art. 19 (2) ICCPR: "Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, *in the form of art*, or through any other medium of his choice"; and art. 10 ECHR in the interpretation given to this by the European Court for the Human Rights in the Müller case of 24 May 1988, A.133 (1988) (See also Hempel 302-304; W. Kasack, in Fincke, I, 550, No. 3; Velaers I, 290-296; Vlemminx 421-443).

At first sight, freedom of the press seemed only to apply to the printed press (*pechat'*), but the reference to radio and television in the second paragraph of article 50 Constitution (1977) gives grounds for seeing the electronic media as also coming under this umbrella.

65. Freedom of speech and freedom of the press, as conceived of in the Soviet Constitution, conformed completely to the conception of basic rights outlined above[198] with subjection to the goal of communist construction and the absence of legal guarantees in exchange for material guarantees as its most important characteristics.

The ideological-political nature of freedom of speech meant that this could not (primarily) be used to express private opinions,[199] but only to confirm the correctness of the social orientations chosen by the CPSU.[200] The purpose of the freedom granted was, thus, clearly of an educative nature: the use of the word, whether or not through the mass media, must aim at the building of communism.[201]

As a material guarantee for the achievement of the freedom of speech and of the press, article 50 para. 2 of the 1977 USSR Constitution makes reference to "the wide dissemination of information" and "the opportunity to make use of press, television, and radio" which is far more cautious[202] (and more platitudinous) than "all technical and material means to publish journals, brochures and books and guaranteeing free dissemination throughout the whole country"

197. *Infra*, Nos.76 ff.
198. *Supra*, No.56.
199. Timmermans 46.
200. Although the right to criticism was explicitly acknowledged by art.49 Const.1977—an explicit acknowledgement which by its nature raised the possibility that the right of free speech did not itself suffice—such criticism could only refer to shortcomings of the system, not to the options on which the communist model of society was founded. Ioffe expresses this in his delineation of the unwritten rule of the "three nots": (1) *not to go too far*, *i.e.*, not to go beyond a low level of Soviet bureaucracy in the criticism of Soviet shortcomings; (2) *not to generalize*, *i.e.*, not to go from a negative truth in particular to a negative conclusion in general; (3) *not to deny perspectives*, *i.e.*, to appreciate any shortcoming of Soviet life as accidental (not regular!), temporary (not permanent!) and transient (not systematic!) (Ioffe 1985, 64-66).
201. For the mass media this educational function was expressed in a number of sloganesque neologisms which were guidelines for the target form and contents of the media: *partiinost'* ('partyness', *i.e.*, to protect the CPSU's point of view, neutrality being absolutely forbidden), *Ideenost'* ('ideadom', the ideological content of what is being written and said), *ob"ektivnost'* or *pravdivost'* (objectivity, sense of truth, can only be reconciled with 'partyness' if one assumes that only the CPSU fathoms the scientifically determined, and thus objective laws of the world), *narodnost'* or *massovost'* (bond with the masses, not only with experts) and *glasnost'* (openness, *i.e.*, putting the positive phenomena of Soviet life in the spotlight, and criticism on limited shortcomings of the system): McNair 19-29; van den Bercken 1-15.
202. Chalidze 76.

from article 14 of the 1918 RSFSR Constitution or "the making available to the workers of printing establishments and stocks of paper" in article 125 para. 2 of the 1936 "Stalin" Constitution.

In Soviet reality, almost all channels through which opinions could be disseminated on a large scale were directly or indirectly owned by the state. Given the political and economic constellation in the Soviet Union, freedom of the press did not include the freedom to set up press organs.[203] Only through the fiction of a harmony of interests based on a common goal could it be maintained that *state* ownership of the media was a material guarantee for the freedom of speech of the *individual*. The lack of any legal guarantee, and the vagueness of the material guarantees, in effect institutionalized state arbitrariness. No limit was placed on the government's ability to limit freedom of speech and the press.

2.2. Limitations to Freedom of Speech and the Freedom of the Press

2.2.1. Introduction

66. With regard to limitations to freedom of speech and the freedom of the press, it is usual to distinguish between preventive and repressive measures, and within the last category between a criminal and a civil (torts) system of limitation. We here concern ourselves solely with the preventive measures and repressive criminal law, not with limitations to such freedoms through torts since these affect primarily the mutual relationship between citizens without touching on our main concern, namely the relationship between government and the citizen.

2.2.2. Preventive Measures

67. The 1977 USSR Constitution set no limits to possible curtailments of the freedom of speech and the freedom of the press. These freedoms were only granted "in accordance with the interests of the people and to strengthen and develop the socialist system". On the contrary, this meant that these freedoms simply did not exist unless they were exercised in accordance with the goal for which they had been granted. Since only the CPSU itself could discern and determine the interests of the people, nothing stood in the way of the preventive censorship of expressed opinions.

68. This censorship was double in nature: factual (facts which were state or military secrets could not be spread) and ideological-political (that which was written and said had to be in accordance with the then current interpretation of Marxism-Leninism).[204] While this latter task was to a large extent a matter

203. Van den Berg 1991, 442-443.

204. J.W. Bezemer, "Censuur in the Sovjetunie", *Internationale Spectator*, januari 1977, 3; Hübner 1972, 2-3; J. Lowenhardt, "Het sovjetcolofon—een sleutelgat voor the Kremlinoloog?", *Internationale Spectator*, January 1977, 25-28.

of feeling[205] and contained a certain degree of unpredictability, the former task was much more straightforward. The reasons for this were, first of all, that the categories of information which were protected as state secrets were indicated by sequential Decrees by the Council of Ministers of 27 April 1926,[206] 8 June 1947,[207] and 28 April 1956.[208] The final touchstone to determine whether information could or could not be spread was, however, a long and constantly adjusted "List of data which cannot be published in the open press" (*Perechen' svedenii ne podlezhashchich opublikovaniiu v otkrytoi pechati*) (often referred to as the "Talmud").[209]

69. Preventive censorship was exercised by an extensive administrative apparatus. In 1922 the Main Administration for Literature and Publishing (*Glavnoe upravlenie po delam literatury i izdatel'stv*, *Glavlit* for short) was founded with the task of prepublication censorship of all printed matter;[210] in 1923 the Main Committee for Monitoring Audience and Repertoire (*Glavrepertkom*), to coordinate the censorship of the performing arts, film, music and recordings;[211] and in 1928 the Main Administration for Art (*Glaviskusstvo*), authorized for the visual arts.[212,213] Since the existence of censorship was itself declared a "secret of state", it is difficult to reconstruct the later history of the censor-

205. Lanting 6.
206. *SZ SSSR*, 1926, No.32, item 213; L.G. Fogelevich, (ed.), *Osnovnye direktivy i zakonodatel'stvo o pechati*, M., 1934, 96.
207. *Izvestiia*, 10 June 1947; English translation in Gsovski, II, 671-673.
208. Quoted by Ginsburgs/Rusis 46, note 71.
209. The existence of the "Talmud" was itself forbidden information. The West gained insight into the structure and contents of this list only because of a Polish censor defecting (van den Bercken 19) and through research into the "Smolensk" archive which fell into German hands in 1941 and after the Second World War found its way to the USA (M. Fainsod, "Censorship in the USSR—A Documented Record", *Problems of Communism*, 1956, No.2, 12-19).
210. *SU RSFSR* 1922, No.40, item 461. See, *e.g.*, also Heller/Nekrich 158.
211. L. Fogelevich, *Deistvuiushchee zakonodatel'stvo o pechati*, M., Iuridicheskoe Izd. NKIu RSFSR, 1927, 43-51. Statutes under Stalin in L. Fogelevich, *Osnovnye direktivy i zakonodatel'stvo o pechati*, M., OGIZ, 1935 (5 ed.), 121-126. See also Fox 1056.
212. Van den Berg 1991, 482.
213. The impact of censorship on cultural production was enormous from the beginning. In the third quarter of 1923, for example, a quarter of the publications of private publishers was altered or proscribed by *Glavlit* (Fox 1054), whereas *Glavrepertkom*, in the third quarter of 1924, banned one in every eight theater plays, one in every sixteen performances and one in every ten recordings (Fox 1057). But the cinema in particular suffered heavily: up to 22% of the output of some film studios was suppressed (Fox 1057), and foreign films, which as early as 1926 accounted for 80% of all screenings (Babitsky/Rimberg 67-68) were 'adapted' in the Soviet film studios: subtitles were altered (bandits were henceforth called "class enemies", "capitalists", or "bankers"), scenes were cut or moved to another place in the film so that the story became incomprehensible. Luckily programs were sold in which the meaning of the film was explained (Babitsky/Rimberg 68-69). In 1924 *Glavrepertkom* also banned public performances of the fox-trot (Fox 1058).

ship apparatus.[214] It is, however, certain that until the end of the eighties there was a section within each of three of the four main cultural administrations *Goskino*, *Gosteleradio*, and the Ministry of Culture, responsible for monitoring the contents of the repertoire of cinemas and film studios, radio and television broadcasts, theater groups, etc.[215] In 1963 *Glavlit* was incorporated into the fourth cultural administration, the State Committee for the Press (*Goskompechat'*), but then from 1966 onwards became an independent organ directly attached to the Council of Ministers of the USSR and, thus, became pre-eminent in the whole system of administrative censorship.[216]

Besides these general censorship organs, there were also three specialized organs, which censored all recorded expressions of opinion, irrespective of their form, with regard to the army, nuclear energy, and space travel.[217] The Committee of State Security (*KGB*) and the Ministry of Home Affairs (*MVD*) also monitored everything, which concerned state security or their services.[218]

70. This censorship apparatus, no matter how great, was only a small cog in the whole Soviet mechanism for monitoring and directing the sources of information.[219] The four cultural administrations[220] in the management of their respective sectors safeguarded the "thematic orientation" and the "further raising of the intellectual and political level" of the works produced within their sector,[221] which they made concrete through instructions to the enterprises

214. In 1931, for the last time in three decades, there was reference to censorship in official documents, namely in a new regulation on *Glavlit*: *SU RSFSR*, 1931, No.46, item 273.
215. Van den Berg 1991, 482
216. PSM SSSR "O Glavnom upravlenii po okhrane gosudarstvennykh tain v pechati pri Sovete Ministrov SSSR", 18 August 1966, *SP SSSR*, 1966, No.19, item 171; G.P van den Berg and F.J.M. Feldbrugge, "Press", in Feldbrugge 1985, 607. Hübner 1972, 5 and Kunze 34 wrongly made the assumption that *Glavlit* was still subordinate to *Goskompechat'*. The abbreviation *Glavlit* was maintained, even though in 1963 the name of this censorship organ was altered to Main administration for the protection of military and state secrets in the press of the Press Committee of the Council of Ministers of the USSR (*Glavnoe upravlenie po okhrane voennykh i gosudarstvennykh tain v pechati Komiteta po pechati pri Sovete Ministrov SSSR*), and in 1966 to Main administration for the Protection of State Secrets in the press of the Council of Ministers of the USSR (*Glavnoe upravlenie po okhrane gosudarstvennykh tain v pechati pri Sovete Ministrov SSSR*).
217. Hübner 1972, 10-11.
218. In contrast with the other (general and specialized) censorship organs, the *KGB* and *MVD* were never contacted directly by the publishers, film studios or theaters, but only by the censors of Glavlit itself. In this way a particular wall of secrecy was erected around this form of specialized censorship: Hübner 1972, 11.
219. A. Belinkov, in Dewhirst/Farrell 4. According to some, the conditioning of man to self-censor was more important: van den Bercken 16.
220. *Supra*, Nos.36 ff.
221. See, *e.g.*, art.1 Regulation of Goskomizdat (the State committee of the Coucil of Ministers of the USSR in affairs of publishing houses, printer's and the book trade), *SP SSSR*, 1973, No.23, item 130; *SP SSSR*, 1981, No.2, item 3.

subject to them.[222] The primary party organizations also played a significant role in the publishing houses, film studios, theaters and so forth: their monitoring made the exploitation of an ideologically unacceptable work a very unlikely achievement. Furthermore, the management of the creative unions kept an eye on things in so far as possible. Finally, the state enterprises and authors themselves learned the tricks of the trade and avoided serious conflict with the censorship apparatus by internal editorial censorship and self-censorship.[223]

71. This rough sketch of the censorship mechanism would be incomplete without some mention of the different measures which were used to check the incoming and outgoing currents of information[224] and the system of the so-called degrees of secrecy (*stepeni sekretnosti*) to which companies and institutions, which came into contact with state secrets, and their employees, were subject.[225] An administrative measure such as declaring certain areas and harbors closed to non-authorized persons was another means of keeping information secret.

2.2.3. Criminal Repressive Measures

72. Initially it was the crime of "anti-Soviet agitation and propaganda",[226] sanctioned through article 70 of the 1960 Criminal Code, which was the legal basis for the prosecution of dissidents and the authors of *samizdat* publications.[227] This was the transfer into criminal law of the constitutional principle

222. Van den Berg 1991, 441.

223. On editorial censorship and selfcensorship, see J.W. Bezemer, "Censuur in the Sovjetunie", *Internationale Spectator*, January 1977, 4-5; W.A. Timmermans, "Literatuur en censuur in the Sovjet-Unie", *AA*, 1984, 739; van den Berg 1991, 440-442; M.S. Voslensky, "Officially there is no censorship...", *Index on Censorship*, 1986, No.4, 28-30. On self-censorship, see moreover van den Bercken 16; Dewhirst/Farrell 26-49.

224. Havlicek 16 calls this "l'isolationnisme informationnel". These concern measures such as monitoring letters from abroad, customs checks on the import of foreign books (especially those with ideological or political themes) and the impossibility of subscribing to foreign periodicals (Ioffe/Maggs 237-239), control of the export of periodicals and books, esp. in scientific or technical fields (Hübner 1972, 12-13), the jamming of foreign broadcasting stations and measures strictly limiting foreign travel (van den Bercken 20-21).

225. Hübner 1972, 12-13.

226. Art.70 CrC 1960 ("circulation of slanderous fabrications which defame the Soviet state and social system for the purpose of subverting or weakening the Soviet regime, or the circulation or preparation or keeping, for the same purpose, of literature of such content"). In contrast to what could be read in art.39 Const.1977, no effective damage was supposed by art.70 CrC 1960, the intention to cause damage (*i.e.*, undermining or weakening of the Soviet authority) sufficed: Chalidze 72-73; Henke/Wirantaprawira 55.

227. G. Brunner, "Freedom of Speech", in Feldbrugge 1985, 343-344; Feldbrugge 1975, 21-22; F.J.M. Feldbrugge, "Propaganda, Anti-Soviet", in Feldbrugge 1985, 627. Prosecutions for anti-Soviet propaganda were brought on the basis of the opinions expressed in *samizdat*-publications, and were not concerned with *samizdat* itself as a private means of distributing publications on a non-commercial basis, see *supra*, Nos.49-50.

that freedom of speech and of the press cannot be exercised contrary to its ends (by, *e.g.*, questioning the legitimacy of the system, the leading role of the CPSU and its politics) or in a way which damaged the interests of the state and the community.[228]

During the show trial against Siniavskii and Daniel',[229] however, it transpired that evidence of an intent to cause harm, required by article 70 of the Criminal Code (1960), was not always easy to produce.[230] Immediately after this trial, therefore, this difficulty was eliminated by the introduction of a new article 190[1] in the Criminal Code.[231] This stated that "the systematic circulation in an oral form of fabrications known to be false which defame the Soviet state and social system and, likewise, the preparation or circulation in written, printed or any other form of works of such content" was a criminal offence, without indicating the intent to cause harm as a constitutive part of the crime.[232] From that moment on, this became the most important article in the prosecution of dissidents.[233]

73. The punishment for disseminating state secrets depended on the circumstances, as differentiated on the basis of article 64 of the Criminal Code (1960) (treason), article 65 Criminal Code (1960) (espionage), article 75 Criminal Code (1960) (divulgence of state secrets), article 76 Criminal Code (1960) (loss of documents containing state secrets) and article 259 Criminal Code (1960) (divulgence of military secrets, or loss of documents containing military secrets). Apart from these articles, curtailment of the freedom of speech and of the press was also inherent in article 71 Criminal Code (1960) (propagandizing of war), as well as in article 74 Criminal Code (1960) (propaganda or agitation for the purpose of arousing racial or national hostility or dissension),[234] article 76[1] Criminal Code (1960) (industrial and commercial espionage), article 130

228. Art.39 para.2 Const.1977.
229. *Supra*, No.61.
230. Both accused writers denied that they had the intention of damaging, undermining or weakening Soviet power, but were sentenced anyway on the basis of art.70 CrC 1960, because the court deduced the intention from their writings published abroad: Loeber 1974, 121.
231. *VVS RSFSR*, 1966, No.38, item 1038; English translation in Hazard *et al.* 97.
232. Ioffe/Maggs 241.
233. G. Brunner, "Freedom of Speech", in Feldbrugge 1985, 344. On the basis of arts.70 and 1901 CrC 1960, in total 7250 people were sentenced in the sixties and seventies: van den Berg 1991, 476-477 (on the basis of a statement of the then head of the *KGB*). According to another source, 2468 people were sentenced on the basis of art.70 of 1901 CrC 1960 RSFSR in the period 1966-1986 (excluding the year 1976). See S. Kovalyov, "The CPSU would have been inconceivable in a state governed by law", *Moscow News*, 1992, No.33, 13.
234. For a historical overview of the punishment of racial and national hatred and discrimination, see Yu. Luryi, "Soviet/Russian legislation against national or racial hatred and discrimination", *RCEEL*, 1994, 217-224.

Criminal Code (1960) (defamation), article 131 Criminal Code (1960) (insult), article 142 Criminal Code (1960) (circulation of documents violating the laws on separation of church and state, and of church and school) and article 228 Criminal Code (1960) (making or marketing of pornographic articles).[235]

74. Finally, we should point out that apart from these stipulations in the Criminal Code, there was also a complete arsenal of administrative or extrajudicial measures for punishing the authors of undesirable expressions of opinion ranging from expulsion from the Party, dismissal at work, discharge from the trade union or creative unions, the refusal of routine requests concerning housing and accommodation, referral to a psychiatric hospital[236] and ultimately, internal, or external exile with loss of Soviet citizenship.[237]

§3. Cultural Rights and Freedoms

3.1. Introduction

75. The 1977 Constitution for the first time granted "the right to use the achievements of culture" (art.46) and "the freedom of scientific, technical, and artistic creation" (art.47).[238] These cultural rights were not the object of thorough study by Soviet jurists,[239] and in the West it was assumed that both articles were included for propaganda purposes as they could, on the one hand, do no harm and, on the other, underlined the Soviet regime's great concern for human rights at a time of growing external and internal criticism.[240]

235. For a discussion of analogous articles from the Criminal Code of 1926 (as amended later), see S.L. Levitsky, "The Soviet Press and Copyright Legislation: Some Legal Concepts", *Fordham L. Rev.*, 1956, 470-477.
236. Feldbrugge 1975, 23.
237. See, *e.g.*, the TASS-communiqué, *Izvestiia*, 15 February 1974, 4; English translation in Hazard *et al.* 99 (Solzhenitsyn).
238. The source of inspriation was undoubtedly art.15 ICESCR (also ratified by the USSR : *VVS SSSR* 1973, No.40, item 564):
    "(1) The States Parties to the present Covenant recognize the right of everyone:
    a) To take part in cultural life;
    b) To enjoy the benefits of scientific progress and its applications;
    c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.
    (2) The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.
    (3) The States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity.
    (4) The States Parties to the present Covenant recognize the benefits to be derived from the encouragement and development of international contacts and co-operation in the scientific and cultural fields."
    Compare art.27 of the Universal Declaration of Human Rights which, however, does not include an equivalent for art.15 (3) ICESCR.
239. Rassudovskii 1986, 97.

3.2. Freedom of Artistic Creation

3.2.1. The Principle

76. Pursuant to article 47 (first sentence) of the 1977 Constitution, citizens of the USSR were guaranteed freedom of scientific, technical, and artistic creation in accordance with the goals of communist construction.

In Soviet legal theory, it was emphasized that the principle of freedom of creation gave the author the liberty to choose the theme, form, and genre of his work and the methods by which to solve the creative task, and to communicate the results of his creative labor to a wider audience.[241]

Freedom of artistic creation overlaps with freedom of speech and of the press, especially with regard to literature.[242] For the other art forms, the explicit recognition of freedom of artistic creation, therefore, seemed meaningful not so much because of the freedom itself but because of the official sanctioning of the extension of the subject matter of freedom of expression (*partiinost'*) and, thus, of the duty to behave in conformity with the system, to the other forms of art.[243]

77. The teleological solvent of the freedom of artistic creation ("in accordance with the goals of communist construction"), which gave it the character of a political more than a cultural right,[244] transformed it into an obligation for the artist to create system-confirming works.[245] The state and the CPSU

240. Feldbrugge 1993, 222, who calls art. 46 Const. 1977 'meaningless'. If the acknowledgement of the freedom of art was considered "of particular interest", this was related to the great influence of the State on art, see Henke/Wirantaprawira 53.
241. A.K. Golitsyn, "Voprosy k khudozhnikam", *SGiP*, 1983, No.3, 91-92 who talks about the principle of freedom of individual self-expression (*printsip svobody individual'nogo samovyrazheniia*); Maslov/Pushkin 408-409; Rassudovskii 1986, 104-105; Sverdlyk 16-18.
242. Art.50 Const.1977, *supra*, No.64. See also K. Westen, in Fincke, I, 555, No.4.
243. Gorlé 1978, 127.
244. The cultural rights (of education and of the use of the achievements of culture, arts. 45-46 Const.1977) were, in contradiction to the political rights, no longer limited by an ideological reservation. Const.1977 did not itself divide the basic rights by means of subtitles, and mentioned the freedom of creation (art.47 Const.1977) in the catalogue of basic rights either as the last of the cultural rights or as the first of the political rights. The copyright law, which is treated in art.47 para.2 Const.1977, is, however, clearly a cultural, and not a political basic right, so it seems likely that freedom of creation, guaranteed by the first paragraph of the same article, also has to be considered a cultural right. See, also, K. Westen, in Fincke, I, 488, No.25. Feldbrugge 1993 (222) places arts. 46-47 Const.1977 under the "social rights"; van Hoecke (544) calls them personal rights, whereas Rassudovskii 1986 (97) argues that the freedom of creation is, together with the right of education and of the enjoyment of the achievements of culture, the cultural (social-spiritual) legal status of the person (citing N.V. Vitruk, *Osnovy teorii pravovogo polozheniia lichnosti v sotsialisticheskom obshchestve*, M., 1979, 182).
245. The freedom of artists to honor governing rulers has never been threatened, see K. Westen, in Fincke, I, 556, No.8. Art.47 has, however, no other meaning, and that is why it "smacks of mockery in a country which deliberately killed, not so long ago, the cream of its writers, poets, artists, film-makers, theatrical directors, actors etc. and which continues the cruel and dull persecution of its brightest minds" (Ginsburgs/Pomorski 48).

determined, on the basis of their knowledge of objective human needs and interests, benchmarks for the creative activity of artists,[246] such as socialist realism as a method and style for artistic choice of theme and design,[247] and *partiinost'* as a guideline[248] and inalienable part of socialist art.[249]

78. The restraint which article 15 (3) ICESCR enforced on the states with regard to the observance of artistic freedom would be considered self-evident under the rule of law. But it contradicted the very essence of the socialist state, which actively involved itself in social development and directed it towards the goal which was not only set but, also, embodied by the CPSU: the construction of the communist community, in fact, meant the construction of the power of the Communist Party. For their part, artists who created in accordance with the laws of history had a great social responsibility:[250] here too, the right had a concomitant duty.

The act of creation itself admittedly remained a matter of an individual's pursuit of self-expression, and was not enforced by state legal pressure. Deviations were thus not excluded. But only such creative activity as was congruent with the internal necessity of objective reality was politically accepted[251] and could be commercially managed within the state economy.

79. Like the other human rights, the freedom of artistic creation was also safeguarded by material guarantees, albeit in this case exceptionally vague and meaningless guarantees. Artistic creation is, for instance, "ensured by the development of literature and the arts, for which the state creates the necessary material conditions. In this context, the state also provides support to voluntary societies and creative unions".[252]

In the Chapter on social development and culture, the 1977 Constitution confirms finally that the state had as its goal the expansion of the actual possibilities for citizens to apply their creative forces, abilities, and talents, and for the all-round development of the individual,[253] and was concerned with the protection, multiplication, and broad utilization of intellectual values for the purpose of the moral and aesthetic edification of the Soviet people and the raising of their cultural level. The development of professional art and popular artistic creativity received every encouragement.[254] This, too, can be considered a material guarantee for the freedom of artistic creation.

246. G.T. Chernobel', "Khudozhestvennoe tvorchestvo i pravo", *SGiP*, 1986, No.6, 57.
247. *Supra*, No.62.
248. O.A. Krasavchikov, "Avtorskoe pravo", in Krasavchikov, II, 444-445; this section was copied almost word-for-word in O.A. Krasavchikov, "Tvorchestvo i grazhdanskoe pravo (poniatie, predmet i sostav podotrasli)", *Pravovedenie*, 1984, No.4, 14-23.
249. Mel'nikov/Silivanchik 40.
250. Irresponsibility falsifies freedom, Rassudovskii 1986, 99.
251. Rassudovskii 1986, 99.
252. Art.47 para.1 Const.1977. On the right of association, see *infra*, Nos.83 ff.
253. Art.20 Const.1977. See also Rassudovskii 1986, 98.
254. Art.27 Const.1977.

3.2.2. The Relationship with Copyright

80. Article 47 para. 2 of the Constitution (1977) mentioned that "the rights of authors, inventors, and rationalizers are protected by the state", and this in the same article which in its first paragraph recognized the freedom of artistic creation.

Given the usual double structure of the constitutional articles in the chapter on basic rights, with in the first paragraph the description of the right and in the second paragraph the material guarantees, one could conclude that copyright is here considered a material guarantee for the freedom of artistic creation. However, it was precisely in article 47 that an exception was made in that the material guarantees were listed in the first paragraph. This gives the impression that copyright was considered an independent basic right,[255] as it is in the international agreements on which article 47 was based.[256] At the same time, the link between copyright and creative freedom was confirmed. Otherwise, this was a relatively empty stipulation with no more than a duty on the part of the legislator to lay down rules concerning copyright.[257]

Many Soviet copyright specialists recognized, moreover, that creative freedom as linked to the principle of *partiinost'* in Marxist-Leninist ideology formed the foundation for Soviet copyright.[258] Thus, copyright had the function of a *legal* guarantee for creative freedom to the extent that it protected the original result of creative activity.[259]

Protection of copyright is a job for the state and not, as still mentioned in the draft of the Constitution, the law. This suggests a wider commitment of means and organs, of which the law is only one. This legitimized, for example, the foundation of a *state* agency for the collective administration of copyright.[260]

81. It is, finally, not unimportant to indicate the significant *absence* of two elements.

255. *Contra*: Gavrilov 1984a, 15-16 who argues against the acknowledgement of copyright as an independent basic right, from the fact that unlike the rights to enjoy the achievements of culture and to freedom of artistic creation, the law of copyright does not apply to all Soviet citizens, but only to the creators of works.

256. In art.15 ICESCR, the law of copyright—as well as that of artistic freedom—are acknowledged, but independently of one another, whereas in art.27 Universal Declaration of Human Rights, only copyright law is mentioned.

257. A. Dietz, in Fincke, 563, No.46.

258. O.A. Krasavchikov, "Avtorskoe pravo", in Krasavchikov II, 444-445; Maslov/Pushkin 409; V.P. Mozolin, in *Grazhdanskoe pravo*, P.E. Orlovskii and S.M. Korneev, (ed.), II, M., Iuridicheskaia Literatura, 1970, 452-453; Savel'eva 1986, 10; Sverdlyk 16-18. Gavrilov 1988, 74 acknowledged moreover that the freedom of creation could also be of paramount importance for other legal branches, in the first place in the sphere of state and administrative law, as a regulating principle for the organization and activity of scientific and cultural institutions.

259. K. Westen, in Fincke, I, 555, No.5.

260. *Infra*, No.120.

First of all, copyright was not linked to any specific purpose ("the construction of communism") so that "unorthodox" works were also protected by Soviet copyright law. The copyright law's neutrality with regard to the content of the protected work was made harmless for the Soviet regime precisely through the link with the freedom of artistic creation.[261]

Secondly, the link of copyright law with freedom of artistic creation is not the only one possible, and it is not unthinkable that copyright could instead have been linked to the law of private property. That this did not happen is certainly an argument for rejecting the qualification of copyright law as a kind of property law.[262]

3.3. The Right to Cultural Consumption

82. Not only did citizens of the USSR enjoy freedom of creativity, they also had a right to the use of the achievements of culture, *i.e.*, the so-called right to "consumption" of cultural products.[263]

In contrast with the freedom of artistic creation, the achievement of this right, according to article 15 ICESCR, did depend on the active role of the state.[264]

Such an active role for the state was naturally hardly an obstacle for the Soviet state which had made the provision of material guarantees for the achievement of (classic and social) human rights the cornerstone of its constitutional theory. From the nature of the socialist state itself, it followed that the cultural-educational function (apart from and linked to the economic-organizational) was one of the fundamental duties of the state.[265] Thus, the right to use the achievements of culture was ensured by the general accessibility of the treasures of national and world culture in state and public collections; by the development and balanced distribution of cultural-educational institutions within the territory of the country; by the development of television and radio, of book publishing and the periodic press, and of the network of free libraries; and by expanding cultural exchanges with foreign states.[266]

This right to cultural consumption was, in itself, seen as a condition for exercising artistic freedom. The principle of the freedom of creation is never absolute, not only because this freedom is conditioned by a goal set by the authorities but, also, because every creation builds on an already existing national or global literature and art.[267] Access to this is, hence, of essential importance.

261. *Infra*, No.906.
262. *Infra*, Nos.925 ff.
263. Art.46 para.1 Const.1977.
264. Compare art.15 (2) ICESCR: "The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture."
265. I. Szabo, *Cultural Rights*, Leiden, A.W. Sijthoff, 1974, 87, 98, 100-101.
266. Art.46 para.2 Const.1977. Art.22 Const.1977 provided a program for the expansion of a network of cultural institutions in the countryside.

This access to the cultural treasures was guaranteed by a whole series of measures, of which the nationalizations of private collections and museums immediately after the Revolution were the most important ones.[268] Article 46 of the Constitution (1977) did not, however, inhibit the existence of the so-called *spetskhranilishcha* (or *spetskhrany*),[269] *i.e.*, the library and museum collections, to which books or works of art were relegated when changing ideological interpretations[270] suddenly made them undesirable[271] and they were removed to a separate room only accessible to well-defined categories of people.[272]

Subsection 3. The Freedom of Association

83. One of the material guarantees for the freedom of artistic creation was the support given by the state to voluntary societies and creative unions. In

267. Sverdlyk 17.
268. *Supra*, No.26.
269. Ioffe 1985, 55. *Contra*: Chalidze 77-78.
270. The interpretations of the governing ideology could change: "Der Marxismus-Leninismus ist kein festgefügtes Dogma, sondern eine Kampftaktik, die sich wechselnden Lagen anzupassen hat und die es daher auch nicht verschmäht, ihr Gesicht zu wandeln" (Maurach 361).
271. See, *e.g.*, Instruktsiia No.521 Ministerstva Kul'tury "O poriadke iskliucheniia ustarevshikh po soderzhaniiu i vetkhikh izdanii i materialov iz bibliotechnykh i spravochno-informatsionnykh fondov" ("On the procedure for excluding editions and materials with aged and old contents from library and information collections"), 18 July 1978, *BNA SSSR*, 1979, No.2, 43-48; German translation and commentary in O. Luchterhandt, "Neue sowjetische Bibliotheks-Instruktion", *Osteuropa*, 1979, No.12, A 755-765. As a result of this Instruction an annual cleaning-up is organized, in which "editions and materials, which have lost their political topicality or their scientific or their artistic value" were removed from the libraries (art.2.1.). Naturally, this also included the editions for which there was no longer demand (W.A. Timmermans, "Literatuur en censuur in the Sovjet-Unie", *AA*, 1984, 742; van den Berg 1991, 462). With regard to the purging of the libraries in the thirties, see J. Barber, "Working-Class Culture and Political Culture in the 1930s", in *The Culture of the Stalin Period*, H. Günther, (ed.), London, Macmillan, 1990, 7. In the collections which then remained political literature clearly dominated to the disadvantage of fiction. The librarians did not always have the necessary information or skills to determine which literature was in demand and which was not, and therefore used simple criteria such as year of publication, cover design and title. Ironically this meant that in some libraries all the works of Marx, Engels, Plekhanov and even Lenin and Krupskaia published before 1930, were removed together with books by Lev Tolstoi, Saltykov-Shchedrin, Poe, Maupassant and Shakespeare.
272. *Glavlit* ordered the "correction" of such unwanted books (by, for example, removing a number of pages out of them), while one or two copies of the "uncorrected edition" were removed to special rooms in the library (the so-called *spetsfondy*); other books (or works of art or films) were simply deposited in the *spetsfondy* entire. See A.I. Raitblat, "Kak nas otuchali dumat'. K istorii spetskhrana—v den' pechati", *Nezavisimaia gazeta*, 5 May 1991, 8, translated by P. Brang, "Wie man uns das Denken abzugewöhnen suchte... Zur Geschichte der sowjetischen Zensur", *Osteuropa*, 1992, No.5, A 262-268; See also M. Fainsod, "Censorship in the USSR—A Documented Record", *Problems of Communism*, 1956, No.2, 17-19.

other words, article 47 para. 1 of the Constitution (1977) gave the citizens the possibility of achieving their creative concerns through social organizations which were, therefore, supported by the state.[273]

This created a link between the freedom of artistic creation and the right of association. The latter was described in article 51 of the Constitution (1977) as "the right of citizens to unite in social organizations, which promote the development of political activity and initiative and the satisfaction of their diverse interests, in accordance with the goals of communist construction". This right's linkage to communist construction reduced it to a right to join existing organizations which were founded by, or with the approval of, the higher authorities (and ultimately the CPSU),[274] and this was a question not merely of legality, but, also, of opportunity.[275] There was, consequently, no right for citizens to found their own organizations themselves.[276]

84. The state and the CPSU gave the social organizations (trade unions, Communist Youth League *Komsomol*, etc.) a very important role.[277] They were "totalitarian instruments which contain the populace in various groups on the basis of particular characteristics so as to strengthen the political regime, promote the common good, integrate the populace into the political system and monitor the populace".[278]

85. In the artistic world, the creative unions (*tvorcheskie soiuzy*) fulfilled this political function. These were a typical product of the Stalin era. By a Decree of the Central Committee VKP(b) "On the reformation (*perestroika*) of literary-artistic organizations" of 23 April 1932, the decision was made that

273. Iampol'skaia 297.

274. Henke/Wirantaprawira 56.

275. Maurach 367, on the acknowledgement of freedom of association in art. 126, Constitution 1936:

> "[...] kann [...] eine Versagung der Genehmigung des Vereins bzw. die Auflösung eines bereits entstandenen Vereins nicht erst dann erfolgen, wenn dieser verbotene und insbesondere strafbare Ziele vervolgt, sondern schon dann, wenn die Verwaltungsbehörde der Ansicht ist, dass die Zielsetzung bzw. die praktische Tätigkeit des Vereins nicht *positiv* den Bedingungen gerecht wird, unter denen nach Art. 126 Vereinsfreiheit besteht."

The foundation of an association depended therefore on the presence of a social need for it and of the acceptance of the duty to contribute to the construction of communism: *Towards the Rule of Law: Soviet Legal Reform and Human Rights Under Perestroika*, A Helsinki Watch Report, December 1989, 63.

276. Lavigne/Lavigne 36; O. Luchterhandt, in Fincke, I, 590-591, No. 11-14; Y.I. Luryi, *loc.cit.*, 30.

277. "The trade unions, Komsomol, the cooperative and other social organizations, in accordance with their statutary tasks, take part in the management of state and social affairs, as well as in the solution of political, economic and social-cultural issues." (art. 7 Const. 1977).

278. Van den Berg 1991, 492. Stalin referred to the mass organizations as the "transmission belts" (*privodniki*, *privodnye remni*) which linked the masses to the CPSU: "Over the vragen van het Leninisme" (1926), quoted by van den Berg 1991, 491-492. See also Henke/Wirantaprawira 57.

"all writers who support the platform of Soviet power and strive to participate in socialist construction be united in one union of Soviet writers containing a Communist fraction".[279] In 1934 this Decree was implemented with the foundation of the Union of Soviet Writers.[280] Later, more and different Unions followed (of Artists, of Journalists, of Composers, etc.).

These creative unions were described in a legal dictionary as "social organizations which unite writers and artists on the basis of the idea-creating method of socialist realism, with the aim of creating great works of art, and developing the organizational independence and the political activity of their members, and of protecting their rights and interests".[281] This shows that the protection of interests was just one, and not even the primary, function of the creative unions. They were rather instruments in the CPSU's totalitarian cultural policy: their most important task was to keep writers and artists on the right track by rewarding (or punishing) them.[282]

86. The creative unions' internal organization and activities were governed by three main principles: democratic centralism, voluntariness, and the freedom to determine one's own functions.[283]

(1) The internal organization of all creative unions was based on the principle of democratic centralism. The highest organ was the All-Union Congress: it approved Statutes, chose union management, determined the union's tasks and activities, etc. The Congress, in fact, did not have a lot of power, which is sufficiently apparent from the fact that, according to the Statutes, it only met once every four years.[284] The creative union's management, chosen by the Congress, held a general assembly once or twice per year, while the daily running and the real power in the unions lay with the secretariat, which was chosen by the management's general assembly.[285] The principle of democratic centralism was, then, here applied just as it was elsewhere in Soviet society: more centralist than democratic.

(2) Membership of a creative union was not compulsory, was based on the candidate-member's profession, and was linked to certain conditions of admittance.[286] Given the political function of the social organiza-

279. *Pravda*, 24 April 1932; *KPSS v rezoliutsiiakh*, V, 407-408.
280. Fitzpatrick 35; Heller/Nekrich 225-226.
281. A.Ia. Sukharev, (ed.), *Iuridicheskii Entsiklopedicheskii Slovar'*, M., Sovetskaia Entsiklopediia, 1984, 368, entry "Tvorcheskie soiuzy".
282. See with regard to the Writers Union: Lanting 4.
283. Savel'eva 1989, 10-11.
284. Ageenkova 424. In reality the Congress of the Writers Union, for example, met only 7 times between 1934 and 1981, an average of once every seven years: Lanting 4.
285. Ageenkova 424; Lanting 4.
286. Candidate-members had to prove they had reached a sufficiently high expertise in their subject, had to be proposed by two existing members, and—with regard to the Union of writers—already had to have published two books: Iampol'skaia 301; Lanting 4; Savel'eva 1989, 10.

tions, including the creative unions, it was of essential importance that throughout the entire territory there should be only one organization which protected certain group interests, and that everybody who was eligible for it was called upon to become a member even if membership was formally voluntary.[287] Membership of the creative unions entailed so many material advantages that staying aloof meant social marginalization. First of all, membership of a creative union was for a writer—except for debutants—quasi-indispensable to get an opportunity to publish a work or to perform it or have it performed.

Moreover, most creative unions had a trust,[288] which disposed over considerable financial means to assist the creative union's members socially and financially.[289] For example, they granted their members short-term loans or bursaries, or they paid temporary invalidity benefits for those artists and writers who did not work under an employment contract, birth premiums, or a supplementary pension. These trusts also had a whole network of holiday homes, libraries, workshops, sanatoria, day-care centers and polyclinics that were only open to members of the respective creative union.[290] Moreover, they also possessed publishing establishments, housing estates, and industrial companies that produced requisites for the relevant forms of art.[291] These funds were partly fed by withholding a certain percentage (between 1% and 10%) of the fee paid to the author by the primary user organizations and/or a percentage of gross takings for performances and productions, whether or not the author whose fee was being creamed off was a member of the creative union, and whether or not he was in a position to enjoy the services of the respective funds which he was financing.[292] In other words, non-members had to pay for the services, which they did not themselves enjoy.

All of this means that only very few writers or artists remained aloof from the creative unions. Hence, these achieved a degree of unionization of almost 100%.[293] Given the enormous material advantages, exclusion

287. Van den Berg 1991, 492; O. Luchterhandt, in Fincke, I, 591, No.15.
288. The USSR Literary Fund (*SZ SSSR* 1934, No.39, item 311; Azov/Shatsillo 98-99), the USSR Architectural Fund (*SZ SSSR*, No.53, item 413; the Statutes of both funds (trusts) were approved by the government in 1935: *SZ SSSR*, No.4, items 26 and 27), the USSR Music Fund (*SP SSSR*, 1939, No.53, item 460) and the USSR Artistic Fund (*SP SSSR*, 1940, No.3, item 98; 1944, No.7, item 116.
289. Antimonov/Fleishits 37-38.
290. Savel'eva 1989, 13-14.
291. The Artistic Fund, for example, had a factory which produced the tools of painters (paint, brushes etc.), Savel'eva 1989, 12.
292. For more details, see Savel'eva 1989, 12.
293. In 1986, the Union of journalists had 83,000 members, the Union of visual artists 19,618, the Union of architects 19,067, the Union of writers 9,560, the Union of cinematographers 6,643 and the Union of composers 2,483 (van den Berg 1991, 493).

from a creative union, often inflicted for political reasons, was tantamount to taking the bread from someone's mouth. Creative unions could, therefore, perfectly fulfill their ideological function, namely monitoring the sincerity of their members by testing their works against the "method of socialist realism".

(3) The creative unions disposed over a great freedom to determine their functions and activities themselves. Apart from the abovementioned "control" function regarding the creation of socialist realist works, most union activities were aimed at perfecting the members' professional expertise and promoting the different art forms to a broader audience. To this purpose, numerous measures were taken ranging from the financing of travel grants to the organization of exhibitions, book sales, theater and film festivals, competitions and the awarding of prizes, the setting up of workshops, seminars and lectures, the publishing of private literary and art-critical periodicals, etc.[294] To organize these activities the creative unions—which were legal persons[295]—could found institutions or enterprises which had to support their activities, just like the funds (trusts) subordinate to them.[296]

This third principle needs to be put into perspective. The Statutes of the unions, which were founded in the thirties had to be approved of by the government.[297] The creative unions' management usually consisted of members of the CPSU, and the chairman was represented in the Presidium of the Supreme Soviet. Moreover the link with the CPSU was strongly maintained through the presence of primary party organizations in the unions and in their enterprises. On top of this, most creative unions were under the supervision of the Ministry of Culture.[298] There was, thus, no question of any real autonomy for the creative unions, and an alternative organizational life outside the creative unions was out of the question for the creative intelligentsia.

Subsection 4. Conclusion

87. According to Marxist-Leninism, freedom is man's domination of himself, a domination which is based on the knowledge of the necessary historical, legal development of society. As only the most conscious members of society, gathered in the Communist Party, have this insight, the complete freedom of the individual citizen is only achieved by acknowledging and accepting these laws as they are formulated by the CPSU, and by acting in accordance with them. The freedoms and rights recognized by the Constitution are thus functional

294. Iampol'skaia 277-279 and 285-293; Savel'eva 1989, 10-11.
295. Savel'eva 1989, 10.
296. On the legal status of these enterprises and institutions, see *supra*, Nos.39 ff.
297. See, *e.g.*, the Statutes of the Writers Union of 17 February 1934, *SZ SSSR*, 1935, No.4, item 26; Azov/Shatsillo 99-100.
298. Maurach 241.

and instrumental: they only become a value if they are party-aimed. Freedom of speech, freedom of the press, and the freedom of artistic expression are not granted to the citizen to allow him to express his personality through art and literature but to give the citizen the opportunity, the duty even, to express the consciousness obtained through the CPSU. This is also the case for the right of artists to organize themselves in already existing creative unions under the auspices of the CPSU.

The freedom of artistic creation granted to authors and artists places a heavy social responsibility on their shoulders, as they are brought into the great educational project of creating communist society and—in the materialist, real, and thus not formal sense—the emancipated *homo sovieticus*.

From a liberal-individualistic perspective the materialist, Marxist vision removes all substance from human rights and liberties. If the freedom of the individual is only the freedom to express the consciousness of a party-elite, and not to develop oneself, the freedom becomes an "unfreedom", and the right becomes a privilege. This is illustrated by the absence of legal guarantees to enforce the rights and freedoms granted against the will of the state: purely material guarantees for the existence and the exercise of political rights make these rights completely dependent on the arbitrariness of the state, and ultimately of the core of the political establishment, the Communist Party.

Section 3. Conclusion Concerning Communist Cultural Policy

88. Marx did not make things easy for Lenin: he failed to a systematic theory of culture, relied on the spontaneous awakening of the masses to emancipate themselves in a revolution, expected the revolution to take place in a highly-industrialized country, and said nothing about the fate of bourgeois culture after the revolution. Lenin sought, and found, a pragmatic solution: he replaced the working class with a vanguard party of the most conscious proletarians, legitimized the proletarian coup in a non-proletarian country by starting a cultural revolution in the Russian countryside after the revolution, and made an alliance of necessity with the old bourgeois intelligentsia.

The invention of the concept of a vanguard party, linked to the prohibition of factionalism within the party, formed the key to more than seven decades of totalitarian rule in the Soviet Union. The proletarian vanguard's grip on the community controlled the relations of economic production as well as the superstructure, which was built on it. Mixed together, the nationalization of the economy and the monopolization of politics were a magic formula, and the Communist Party was the sorcerer.

The autonomy of artistic life was in no way acknowledged: everything was political in the USSR—culture and art included. The CPSU issued detailed guidelines for the cultural sector, was omnipresent in the cultural administrations and cultural producers, engaged with cultural life from a privileged

position, and through a system of terror, the enforcement of socialist realism as arbitrarily interpreted by the authorities, and the creation of creative unions, made the social security of authors and artists completely dependent on their loyalty to the regime.

It is very much the question whether subjective rights which come to the author through the mere creation of a literary work or a piece of art, without any government involvement, can prosper in such a climate.

TITLE II
THE HISTORY AND SPECIFICITY OF SOCIALIST COPYRIGHT LAW

Chapter I. The History of Russian Copyright to 1985

Section 1. Czarist Russia

§ 1. The Period to 1887

89. As in other countries, copyright in Russia is historically closely related to the right to print which, in turn, was linked to the invention of movable type. The geographic, religious, and cultural distance from Western Europe meant that printing was introduced to Czarist Russia after a long delay. Only after Ivan IV, "The Terrible", (1533–1584) had defeated the Tartars in Kazan' (1552) and Astrakhan (1556), was the first printing press set up in Moscow with the support of the Czar in order to satisfy the urgent need for liturgical books for the churches in the newly-conquered areas.[1] There, the first dated book was published in 1564.[2] From then on, printing developed very slowly[3] until Peter the Great opened the windows to the West in the eighteenth century. Peter founded the first newspaper, opened the first private and public libraries, and promoted translations to make Western knowledge and culture accessible to Russians.[4]

Throughout much of the eighteenth century, the production of books increased and the number of printing shops rose. It is, though, remarkable that these presses, with few exceptions (namely, those linked to the Orthodox Church), were state owned.[5]

90. Only in 1771 was the first privilege issued to a private printer but, even then, only for publication of works in languages other than Russian. At the same time, an Edict of Catherine the Great introduced censorship of foreign literature.[6] This meant that, from the beginning, a link was made between publishing rights (later copyright) and censorship. The private presses only

1. This was Ivan the Terrible's second attempt to introduce the printing press to Moscow. He had earlier sent an envoy to recruit Western specialists, but the papermaker, bookbinder and printer were intercepted by the Hanseatic league on their way to Muscovy: Clair 249-250.
2. Kantorovich 68.
3. By 1700, only 507 books (of which seven were secular) with a total print-run of 800,000 copies had been printed in Moscow, see Porshnev 27.
4. Amburger 201-202; Clair 353-354.
5. Ischreyt 256.
6. Kantorovich 68-69. The first private press with the right to print in Russian was founded in 1776; in 1783, the free opening of private presses was allowed but, at the same time, preventive censorship was also introduced: Baturin 135-136.

became economically successful in the first quarter of the 19th century. The developing competition, however, almost immediately gave rise to the negative side-effect of *kontrafaktsiia*, pirating.[7] Furthermore, the Czars felt a need to institutionalize censorship as a tool of state cultural policy.[8]

91. It is in this context in which the censorship law (*Ustav o tsenzure*) of 22 April 1828 must be placed.[9] This law, besides a whole series of censorship regulations,[10] contained five articles on the rights of authors. These were further worked out in an appendix. According to §1 of the Appendix to the Censorship Law, the author or translator of a book had "the exclusive right [...] to enjoy his publication throughout his life and to sell it as he sees fit as a rightfully obtained property". The term of copyright expired 25 years after the author's death, after which the work became "public property". Failure to meet the censorship regulations entailed the lapsing of all copyright.

92. Barely two years later, on 4 February 1830, these provisions were superseded by the Decree of the Council of State "On the rights of authors, translators and publishers".[11] The most important innovations in this Law were the possibility of extension of the term to 35 years after death if the work were republished in the last five years of the original 25-year term, and the introduction of the term "literary property".[12] The Decree granted the author and translator exclusive rights over the reproduction, publication, and distribution of their work. The author of the original work, however, had no rights to its translation.

93. In the 1840's, the sphere of application of copyright law was expanded to include musical works and works in the visual arts.[13] On 15 April 1857 the term of protection was extended, at the request of Pushkin's widow,[14] to 50 years after death.[15]

94. Also during this period, negotiations with various countries in the West were opened with an eye to the conclusion of bilateral treaties concerning the mutual acknowledgement of copyrights. On 25 March/6 April 1861, for example, the "Convention on literary and artistic property" was concluded

7. Kantorovich 69.
8. Ischreyt 253-255.
9. *Polnoe sobranie zakonov rossiiskoi imperii* (Sob.II), SPb., 1830, vol.III, No.1979-1980, 459-480.
10. For a discussion of these, see Baturin 138-139.
11. Polozhenie "O pravakh sochinitelei, perevodchikov i izdatelei", in *Polnoe sobranie zakonov rossiiskoi imperii* (Sob.II), SPb., 1831, vol.V, No.3411, 17-21.
12. Sergeev 10-11. It was not until the last quarter of the 19th century that the expression 'copyright' was to enter the law alongside this term, see V.V. Bazhenov, "U istokov avtorskogo prava v Rossii", in *Pravoye idei i gosudarstvennye uchrezhdeniia*, Sv., UrGU, 1980, 149.
13. Stoyanovitch 179.
14. Newcity 1978, 7; Prins 1991B, 238.
15. Polozhenie, "O prodolzhenii sroka literaturnoi i khudozhestvennoi sobstvennosti", in *Polnoe sobranie zakonov rossiiskoi imperii* (Sob.II), SPb., 1858, vol.XXXII, No.31732, 310-311.

between France and Russia,[16] and on 18/30 July 1862 a treaty with the same name and of a similar nature was concluded with Belgium.[17] With both these treaties, the principle of material reciprocity (art.1) with a protected period of 20 years after death (art.4)[18] was applied. The extent of these treaties was limited, in as much as dramatic and musical works fell outside their scope, and as freedom of translations was maintained with reference to literary works.[19] It is also remarkable that these treaties expressly kept open the question of possible censorship by the signatory states (art.9).

About twenty-five years later, both treaties were abrogated by the Russian government at the request of the General Convention of Russian Book Dealers.[20] According to the Russian authorities, these were "unequal" treaties, which were forced upon Russia after her shameful defeat in the Crimean war.[21] The real burdens were indeed uneven, as at that time the import of French literature far exceeded the export of Russian books.[22] Moreover, there was dissatisfaction about the dishonest trade practices of French literary agents in Russia.[23]

95. In 1887, with a thorough re-codification of Russian law, the provisions regarding copyright law were taken from the section on the police laws and were transmitted unchanged—with the exception of a few purely editorial corrections—to the section on civil law.[24] Consequently, the link between copyright law and censorship was *formally* broken for the first time, but from

16. "Konventsiia mezhdu Rossiiu i Frantsiiu o literaturnoi i khudozhestvennoi sobstvennosti", in Tabashnikov 559-563.
17. "Konventsiia mezhdu Rossiiu i Bel'giiu o literaturnoi i khudozhestvennoi sobstvennosti", in Tabashnikov 563-568; "Convention pour la garantie réciproque de la propriété des oeuvres artistiques et littéraires", approved by Law 12 January 1863, *B.S.*, 15 January 1863 and *Pasin.*, 1863, No.13, 27. Attempts to reach agreements with Italy and Prussia failed: Newcity 1978, 12.
18. This was an odd choice, as neither Russia, France, nor Belgium had this term of protection in their domestic law.
19. Boguslavskii 1979, 81-82.
20. The treaty with France was abrogated on 14 July 1887, whereas the treaty with Belgium was cancelled on 9/21 December 1885 and lost its legal force from 14 January 1887 onwards, *B.S.*, 22 July 1886 and *Pasin.*, 1886, No.448, 612.
21. M.M. Boguslavskii, *Voprosy avtorskogo prava v mezhdunarodnykh otnosheniiakh*, M., 1973, 93.
22. Boguslavskii 1979, 80.
23. "[... L]es agents français, dans le but apparemment de capter la confiance aveugle de leurs mandants, n'hésitent point [...] à dénaturer les faits, à représenter la Russie comme rebelle à tout accommodement, comme endurcie au vol de la propriété intellectuelle des peuples étrangers. En agissant ainsi ils recueillent de leur tactique le double avantage de se voir conférer des pouvoirs illimités et sans contrôle et de dissimuler au besoin les chiffres réels des sommes perçues en Russie",
quoted in *DA*, 1894, 87. See, also, "Les droits des auteurs étrangers en Russie", *DA*, 1894, 24.
24. For more details on this recodification, see "La propriété intellectuelle en Russie", *DA*, 1897, 101.

article 21 of the provisions on copyright law it appeared that even after this re-codification, non-observance of the formalities under censorship law continued to result directly in the loss of copyright.[25]

§ 2. 1887–1917

96. In the two following decades, a dispute raged over reforms to domestic legislation, with a central issue being the possible accession of Russia to the Berne Convention (1886) and the recognition of translation rights.

Proponents of the recognition of a right of translation and of bilateral or multilateral copyright conventions argued that Russian authors suffered under the law as it stood: in their own country because many literary journals primarily devoted themselves to publishing foreign (and thus unprotected) works rather than native, new works; and abroad because Russian works could be translated freely which meant not only serious financial loss but, also, given the atrocious quality of most translations, a violation of the authors' moral rights.[26] Their preference was for the Berne Convention because the conclusion of a bilateral treaty with, for instance, France, would only lead to the decrease of translations into French but, at the same time, to an increase of translations of Russian works into English and German translations being published in England, Germany, etc. The literary stream would, as it were, simply find a new channel.[27]

The opponents of translation rights and of the protection of foreign works pointed particularly to the expected negative impact on Russia's trade balance,[28] the economic loss to Russian publishers and translators, possible rises in price, the probable formation of monopolies by a few big publishing houses, and the retardation of backward Russia's intellectual development.[29] For all these reasons, subscribing to a copyright agreement with France would amount to "signer un traité de commerce dans lequel la Russie et la France stipuleraient réciproquement la liberté d'importer des vins, des soieries et du velours".[30]

25. A. Pilenco, "Lettre de Russie", *DA*, 1894, 170.
26. The famous writer Tolstoy, for example, (although he had generously declared all his works free for reproduction and translation) had to protest repeatedly in French periodicals against the bad quality of the translations of his work: "La propriété intellectuelle en Russie", *DA*, 1897, 101-102. Cf. A. Pilenco, "Lettre de Russie", *DA*, 1894, 8-9; Boguslavskii 1979, 82-83.
27. "L'Union des écrivains russes et le traité littéraire avec la France", *DA*, 1897, 144; S.N. Uiakov, quoted in "Lettre de la Russie", *DA*, 1900, 120-121.
28. Critical about this: Stoyanovitch 180-181.
29. "L'Union des écrivains russes et la protection internationale des droits des auteurs", *DA*, 1898, 76; "L'Union des écrivains russes et la protection internationale des droits des auteurs—Traduction libre et contrefaçon", *DA*, 1899, 43-44. In literary circles a treaty with France was feared, whereas a treaty with Germany providing for the abolition of the freedom of translation met with resistance, especially in the scientific milieu, because "La Russie s'amuse en France, mais s'instruit en Allemagne", *DA*, 1894, 22.

97. In 1897 the committee working on the re-codification of the civil law was asked to come up with a new copyright law (independent of the code of civil law) by the end of 1898.[31] This was the beginning of a procedure, which was to take fourteen years,[32] after which a new Russian copyright law was passed by parliament on 20 March 1911.[33]

98. The copyright law of 1911 was presented as a law unsurpassed by Western contemporaries.[34] Many of the standards were indeed of a very progressive nature.[35] For the first time, provision was made for limited translation rights:[36] all Russian authors and all authors of works published in Russia enjoyed the translation rights to their works for ten years from publication of the original, upon condition that this right was expressly reserved on the title page or in the preface to the literary work and that the author himself had a translation published within five years of the original date of publication. The legislator also abandoned the expression "literary and artistic property" in favor of "exclusive rights". The copyright law of 1911 also partially recognized the moral rights of paternity[37] and integrity.[38] Copyright protection lasted for fifty years after the death of the author.[39]

A final section included an extensive author-friendly regulation for publishing contracts, based on German law:[40] the publisher had the duty to publish the work in which it had obtained publishing rights,[41] limitations regarding

30. Recommendation of the General Management of the Press, quoted in "Lettre de Russie", *DA*, 1900, 120. Compare Ianiul, who argued that in 1890 Russia exported 3,024 kg (*sic*) of books to France, while on the contrary importing 54,064 kg. Quoted in "Les droits des auteurs étrangers en Russie", *DA*, 1894, 22.
31. "La propriété intellectuelle en Russie", *DA*, 1897, 112-116, which also presents the contents of the commission's draft and compares them with the Bern Convention.
32. On this process, and the various points of contention, see Kantorovich 71-104.
33. Polozhenie "Ob avtorskom prave", 20 March 1911, *Polnoe sobranie zakonov rossiiskoi imperii* (Sob.III), SPb., 1914, vol. XXXI, No.34935, 194-202; Kantorovich 374-415.
34. Gsovski, I, 607. Sergeev (11) points out that the Russian copyright law of 1911 was modelled on the example of the best Western European copyright laws, with, however, the lower level of protection of copyright traditional for the Russian copyright law.
35. Sergeev 11-12.
36. Arts.33-36 CL 1911.
37. Arts.17 and 19 CL 1911.
38. Art.20 CL 1911.
39. Art.11 CL 1911. When the draft was debated at its first reading in the State *Duma* (20 April 1909) the existing term of 50 years *p.m.a.* was reduced to 30 years *p.m.a.* with the argument that most masterpieces of Russian literature were written by those writers in their youth, and that this would make the protection 'excessively' long (up to approximately 100 years). At the third reading the term of 50 years was restored (*DA*, 1909, 88; "Le XXXIIe Congrès de l'Association litéraire et artistique internationale (Luxembourg 2-5 septembre 1910)", *DA*, 124). The protection of photographic works became subject to formalities (art.60 CL 1911) and limited to 10 years after publication (art.61 CL 1911).
40. Kantorovich 76, who refers to the "Gesetz über das Verlagsrecht" of 19 June 1901.
41. Arts.65 and 68 CL 1911.

print-runs were imposed,[42] the moral rights of the author were guaranteed,[43] and copyright agreements on future works were limited to five years.[44]

In this law, for the first time, no link was made between censorship regulations and the vesting or exercise of copyright.[45]

99. In the meantime, international pressure on Russia to sign the international copyright conventions was continually increasing—if not the multilateral Bern Convention, then at least bilateral agreements.[46] The western powers wanted the mutual protection of copyright in exchange for trade agreements with Russia. Thus on 15 July 1904, an existing navigation and trade treaty with Germany was amended with a Russian undertaking to begin negotiations concerning mutual recognition of copyright within three years of the treaty coming into effect.[47] Similar trade treaties were to follow with France (1905)[48] and Austria-Hungary (1906).[49] After the passing of the copyright law of 1911, Russia concluded treaties for the mutual recognition of copyright with France,[50] Germany,[51] Belgium,[52] and Denmark,[53] all very similar in content.[54] The most

42. Art.69 CL 1911.
43. Art.70 CL 1911.
44. Art.9 CL 1911.
45. On the development of the censorship regulations and the freedom of press at the beginning of the twentieth century, see K.A. Markov, "Problemy svobody pechati v Rossii nachala XX v.", *GiP*, 1993, No.11, 132-139.
46. The constant reproduction and public performance of works of Western-European authors in Russia without permission of the copyright holder led to retaliatory measures against Russia and its writers. Mussorgskii's heirs were counting on between 15 and 16 thousand FF for the performance of "Boris Godunov" in the Paris Opera in June 1908, but the *Société des auteurs dramatiques* decided not to give any more rights to the nations which did not acknowledge the French authors. The collected sums for the performance of the Russian works were allocated to the aid and pension funds of the French authors in anticipation of Russia's accession to the Bern Convention: *DA*, 1908, 93.
47. "Allemagne. Convention additionnelle au Traité de Navigation et de Commerce avec la Russie (Du 15 juillet 1904)", *DA*, 1905, 54-55.
48. "France. Convention de Commerce avec la Russie (Du 19/29 septembre 1905)", *DA*, 1906, 43; Stoyanovitch 185.
49. "Autriche. Le traité de commerce avec la Russie et ses conséquences présumés au point de vue du droit d'auteur", *DA*, 1906, 52.
50. "France—Russie. Convention pour la protection des oeuvres littéraires et artistiques (Du 29 novembre 1911)", *DA*, 1912, 119-121; Stoyanovitch 185-187.
51. "Allemagne—Russie. Convention pour la protection des oeuvres littéraires et artistiques (Du 28 février 1911)", *DA*, 1913, 121-123.
52. "Convention conclue à Saint-Petersbourg, le 31/18 décembre 1913, entre la Belgique et la Russie, pour la protection des oeuvres littéraires et artistiques", approved in Belgium by Law on 15 June 1914, *B.S.*, 19 August 1914 and *Pasin.*, 1914, No.252, 399 (with Memorandum of Clarification and report by M. Wauwermans on behalf of the parliamentary committee).
53. "Danemark—Russie. Convention pour la protection des oeuvres littéraires et artistiques (Du 18 février 1915)", *DA*, 1915, 97-99.

important commitment in these treaties was undoubtedly that with regard to translation rights which was clearly based on Russia's domestic law: the author held translation rights for ten years as long as this right was expressly reserved and the author's translation was published within five years of the original. The five-year term was, for scientific and technical works and works with an educational purpose, reduced to three years. This recognition of the translation rights of foreign authors was Russia's most important concession[55] and for the Western signatories undoubtedly the main purpose of the treaties.[56]

All four treaties were agreed for a short period (three to five years). The treaty with Germany was inoperative during the First World War, but was renewed by the Treaty of Brest-Litovsk,[57] and ultimately declared definitively invalid by article 292 of the Treaty of Versailles.[58] The agreement with France expired in 1915, those with Belgium and Denmark in the course of 1918—to the extent that the new regime honored them at all. In any case, Russia had no international commitments by the middle of 1918.[59]

Despite frequent rumors of Russia's imminent accession to the Berne Convention[60] until the very end Czarist Russia stood aloof from what was to become the most important multilateral copyright convention.[61]

Section 2. The Soviet Period

§ 1. 1917–1922

100. In the first years after the Revolution, there was a strong feeling in the West that literary property in the context of the general campaign of compulsory nationalization of private ownership under wartime communism had become a *res nullius* in Russia.[62] Nevertheless, the new government did not

54. For a detrailed discussion of these four treaties, see M.-C. Humbert-Dayen, *L'URSS et les conventions internationales sur le droit d'auteur et les droits voisins*, I, Thèse doctorat d'état, Paris II, 1984, 57-77; F. Majoros, "Hundertzehn Jahre staatsvertraglich geregelten Urheberrechts des Zarenreiches und der Sowjetunion (1861-1971)", *Osteuropa Recht*, 1971, 61-97.
55. Newcity 1978, 14.
56. Note, by the way, that in the original version of the BC (1886) exclusive translation rights were only acknowledged for a term of 10 years following the publication of the original work in a country of the Berne Union (art.V). Only since the Berlin Conference of 1908 has the Berne Convention recognized translation rights for the complete term of protection as a minimum right (art.8).
57. "La solution des questions concernant la propriété intellectuelle dans les accords intervenus entre les belligérants au commencement de 1918", *DA*, 1918, 113-117.
58. "Une victime de la guerre: le traité littéraire germano-russe de 1913", *DA*, 1922, 11.
59. Levitsky 1964, 30-31; Newcity 1978, 15.
60. *DA*, 1906, 39 and 52; *DA*, 1913, 32.
61. According to Stoyanovitch (187), the outbreak of the First World War prevented Russia's accession to the Bern Convention.
62. "Une victime de la guerre: le traité littéraire germano-russe de 1913", *DA*, 1922, 11.

immediately break with the past, and copyrights acquired under the Czars implicitly retained their validity.[63]

101. In a first decree of the Central Executive Committee of the RSFSR of 29 December 1917,[64] the People's Commissariat for Education was given the task of making the classics of Russian literature available in a cheap edition. These were mainly works whose term of protection under the copyright law had expired. Moreover, the People's Commissariat could bring the works of "any Russian author from the sphere of private ownership to the sphere of the community" (*i.e.,* nationalization for an unlimited period), and proclaim for a period of 5 years a government monopoly on the publication of these works. Later clarifications issued by the People's Commissariat indicated that the (pre-revolutionary) rights of authors, who were still alive, fell outside the ambit of this measure.[65]

On the basis of the abovementioned Decree, the People's Commissariat of Education subjected the works of fifty-eight great Russian authors to the government's publication monopoly for five years,[66] a term which was later extended by a further five years.[67] In this were included works of, among others, Anton Chekhov, Nikolai Chernyshevskii, Fedor Dostoevskii, Aleksandr Gerzen, Nikolai Gogol', Mikhail Lermontov, Aleksandr Pushkin, Lev Tolstoi, and Ivan Turgenev.[68]

63. Antimonov/Fleishits 23; Koretskii 35-36; Levitsky 1964, 28.
64. Dekret TsIK "O gosudarstvennom izdatel'stve", 29 December 1917, *SU RSFSR*, 1918, No.14, item 201; Dinershtein/Iavorskaia 14-16; English translation in *SSD*, 1977-78, 17-19.
65. Gordon 22.
66. Postanovlenie Narkompros "Ob izdanii sochinenii russkikh pisatelei", 14 February 1918, see Koretskii 24; Antimonov/Fleishits 23 note 4. In the period 1918-1923 the works of these authors were a substantial part of the total of published works. The relative share of these "classics" in fiction publishing as a whole was later to decline, see J. Brooks, "The Breakdown in Production and Distribution of Printed Material, 1917-1927", in *Bolshevik Culture*, A. Gleason, P. Kenez, & R. Stites, (ed.), Bloomington, Indiana University Press, 1985, 159; Porshnev 58-61.
67. Postanovlenie Narkompros "O prodlenii Gosudarstvennomu izdatel'stvu prava na monopoliiu po izdaniiu russkikh klassikov", 13 November 1922, *SU RSFSR*, 1922, No.77, item 969; Dinershtein/Iavorskaia 135.
68. Remarkably enough, a Decree of 18 January 1923 was to declare the right to publish the works of 47 Russian authors (including all those listed above) a monopoly of the People's Commissariat for Education in perpetuity: Postanovlenie Narkompros RSFSR "Ob ob"iavlenii gosudarstvennoi monopolii na izdanie proizvedenii nekotorykh pisatelei", *SU RSFSR*, 1923, No.16, item 213; Azov/Shatsillo 44; English translation in *SSD*, 1977-78, 14-15. For a complete overview of the "monopolized" and "nationalized" works, see Levitsky 1982, 53. This author also points out later cases of nationalization and monopolization, such as those of Russian translations of the works of Upton Sinclair, the works of Georgii Plekhanov, of Marx and Engels (in favor of the Marx-Engels Institute) and Vladimir Maiakovskii: Levitsky 1982, 52, 54, and note 21.

102. A second important Decree of the Central Executive Committee "On the acknowledgement of scientific, literary, musical, and artistic works as state patrimony" of 26 November 1918[69] gave the same People's Commissariat for Education the right to nationalize all works on science and literature, music, or art. In this regard, no importance was attached to whether the works had already been published, in whose possession they were, or whether the author was still alive. Such nationalized works could only be published, distributed, or publicly performed with the express permission of, and according to the conditions stated by, the People's Commissariat. On the basis of this Decree, a number of nationalization decrees were issued, among others with regard to the works of seventeen deceased Russian composers, among whom Petr Chaikovskii, Modest Musorgskii, Nikolai Rimskii-Korsakov, and Aleksandr Skriabin.[70]

However, for the authors of works, which had not been declared part of the state patrimony, the pre-Revolutionary copyright law retained its relevance.[71] By virtue of the abovementioned Decree of 26 November 1918, and in the context of the general abolition of legal and testimonial rights of succession,[72] the duration of copyright protection was limited to six months after the death of the author. Only heirs suffering from poverty or inability to work could apply for compensation in the case of publication of the work of the deceased.

103. The continued existence of the czarist law of copyright was again—implicitly—affirmed by a Decree of the Council of People's Commissariats of 10 October 1919[73] which declared invalid all agreements by which the authors transferred literary, musical, or artistic works to their publishers in full ownership. Until that moment, then, the pre-Revolutionary agreements on publishing had remained valid.[74]

69. Dekret SNK RSFSR "O priznanii nauchnykh, literaturnykh, muzykal'nykh i khudozhestvennykh proizvedenii gosudarstvennym dostoianiem", 26 November 1918, *SU RSFSR*, 1918, No.86, item 900; Dinershtein/Iavorskaia 30-32; English translation in *SSD*, 1977-78, 9-12. For a discussion, see Antimonov/Fleishits 24-26; Koretskii 28-33.
70. Postanovlenie Narkompros RSFSR "O natsionalizatsii muzykal'nykh proizvedenii nekotorykh avtorov", 16 Augusts 1919, *SU RSFSR*, 1919, No.42, item 414; Azov/Shatsillo 43-44; English translation in *SSD*, 1977-78, 12-13.
71. Sergeev 13.
72. Dekret "Ob otmene nasledovaniia", 27 April 1918, *SU RSFSR*, 1918, No.34, item 456 and No.46, item 549.
73. Dekret SNK RSFSR "O prekrashchenii sily dogovorov na priobretenie v polnuiu sobstvennost' proizvedenii literatury i isskustva", 10 October 1919, *SU RSFSR*, 1919, No.51, item 492; Dinershtein/Iavorskaia 61-62; English translation in *SSD*, 1977-78, 157.
74. Gordon 24; Levitsky 1964, 28; Newcity 1978, 18, who dates this decree (at 20) mistakenly as 29 July 1919.

104. Finally, one should mention that in 1921 a state monopoly on the publication of textbooks was proclaimed.[75]

§2. 1922–1928

105. The introduction of the New Economic Policy (NEP) brought—solely for strategic reasons—a certain banking of the revolutionary fires, in the sphere of copyright law as elsewhere. A Decree of 22 May 1922 of the All-Russian Central Executive Committee "On the fundamental private property rights acknowledged by the RSFSR, protected by the laws, and defended by the courts of law of the RSFSR"[76] referred to copyright (together with the rights to inventions, trademarks, industrial models, and drawings) as a *right to a thing* the modalities of which were to be regulated by a separate law.

106. On 30 January 1925, the first full copyright law in the Soviet Union was approved, the so-called Fundamentals of Copyright Law (hereinafter: Fundamentals 1925),[77] a sort of basic law at the level of the Soviet Union which had to be further put into execution by separate Copyright Laws in the Union Republics. For the RSFSR, this occurred with the approval of the Copyright Law of 11 October 1926 (hereinafter: CL 1926).[78]

The Fundamentals 1925 and the CL 1926 were in a number of ways a return to the pre-revolutionary Copyright Law of 1911[79] although they already had the characteristics specific to "socialist" copyright law.[80] The author enjoyed the exclusive right to publish, reproduce, and distribute his work in all ways

75. Postanovlenie SNK RSFSR "O poriadke izdaniia uchebnikov", 16 August 1921, *SU RSFSR*, 1921, No.61, item 430; Dinershtein/Iavorskaia 102-104. This Decree was replaced on 2 March 1922 by the Dekret SNK RSFSR "O poriadke izdaniia uchebnykh posobii", *SU RSFSR*, 1922, No.22, item 231; Dinershtein/Iavorskaia 117-118; English translation in *SSD*, 1977-78, 28.

76. Dekret VTsIK "Ob osnovnykh chastnykh imushchestvennykh pravakh, priznavaemykh RSFSR, okhraniaemykh zakonami i zashchishchaemykh sudami RSFSR", 22 May 1922, *SU RSFSR*, 1922, No.36, item 423; English translation in *SSD*, 1977-78, 157 (where this Decree, however, mistakenly bears the date 13 November 1922).

77. Postanovlenie TsIK i SNK "Ob osnovakh avtorskogo prava", 30 January 1925, *SZ SSSR*, 1925, No.7, item 66-67.

78. Dekret VTsIK i SNK RSFSR "Ob avtorskom prave", 11 October 1926, *SU RSFSR*, 1926, No.72, item 567; English translation in *SSD*, 1977-78, 158-162.

79. Levitsky 1980a, 426-430.

80. "As products of the NEP era, the Copyright Acts of 1925 and 1926 were marked, in concepts as well as in terminology, by that curious accommodation between the rights of individual creators and the prerogatives of 'socialist' institutions, by an amalgam of the traditional and the new, which was not only a hallmark of NEP but, to a large extent, is characteristic of copyright in a 'socialist' society in general." (Levitsky 1982, 61) Or in the words of Stoyanovitch 193: "A côté de ces traits du droit d'auteur soviétique qui, à l'exception du délai de protection après la mort de l'auteur, toujours très court, font ressembler étrangement ce droit à celui des pays non socialistes, il en est d'autres cependant qui le font s'en éloigner."

allowed by the law,[81] as well as exclusive rights to public performance if the work had not previously been published.[82]

The term of protection was 25 years after the publication of the work.[83] In this way, the link between the term of protection and the death of the author was broken for the first time.[84] If the author died before the expiry of protection, the term was renewed but only for a maximum of 15 years after the death of the author. Freedom of translation was completely restored.[85] The rights of the author were, moreover, strictly limited by an impressive list of free uses.[86] Finally, the law of 1925-1926 granted the Governments of the Soviet Union and the Union Republics the option of compulsory purchase of rights.[87]

In the Fundamentals 1925, films were for the first time mentioned as subject matter of copyright.[88] Almost 29 years before, on 14 May 1896, the most energetic cinematic pioneers of France, England, and the United States had filmed the coronation of Czar Nikolai II, and three days later the *Lumière Cinématographe* had given the first screening on Russian soil.[89]

The Fundamentals 1925, but especially the CL 1926, included a modern-looking regulation with regard to publishing contracts. Copyright could be partially or fully alienated by a publishing contract.[90] The contract had to be in writing,[91] the nature of the exploitation had to be stated precisely, as well as the number of copies printed in the first and possible subsequent editions.[92] The alienation of copyright to a state publishing house, the CPSU, or a social or cooperative organization could be limited in duration,[93] while the transfer of copyright to a private publishing house could last for up to five years.[94] The publisher was obliged to publish,[95] etc.

81. Art.3 Fundamentals 1925.
82. Art.5 para.1 Fundamentals 1925. The public performance of previously published works could take place without the author's permission, but only on the payment to the author of a compensation, fixed by the state (art.5 para.2 Fundamentals 1925). The public performance or exhibition of a work in clubs of the "red guard", in workers' clubs or in other places to which entrance was free, was, however, completely free (art.4, h Fundamentals 1925).
83. Art.6 Fundamentals 1925.
84. For certain works (including choreographic, photographic and cinematographic), a shorter term was provided; see arts.7-9 Fundamentals 1925.
85. Art.4, a Fundamentals 1925.
86. Art.4 Fundamentals 1925.
87. Art.15 Fundamentals 1925; art.11 CL 1926.
88. Art.2 Fundamentals 1925.
89. Leyda 17-19.
90. Art.12 Fundamentals 1925.
91. Art.12 para.2 Fundamentals 1925; art.16 CL 1926.
92. Art.17 CL 1926.
93. Art.14 CL 1926.
94. Art.15 CL 1926. This time limitation did not apply to publishing agreements with regard to musical and musical-dramatical works.
95. Art.19 CL 1926.

107. The mid-twenties saw an important new technological development. From 1924 onwards, regular radio broadcasts started in the Soviet Union, after Lenin, two years previously, had formulated the basic points of a program for the complete "radiofication" of the country. Although the first radio stations were set up around the turn of the century, they had previously only been used for the distribution of official information.[96] This technological development, however, did not benefit the author: a Decree of 16 March 1927[97] granted the radio stations the right to broadcast the performance of works from theaters and other organizations without paying compensation.

108. As early as 16 May 1928, the Fundamentals 1925 were replaced by new "Fundamentals of copyright" (hereinafter: Fundamentals 1928).[98] Again, the various Union Republics issued their own copyright law on the basis of these Fundamentals. A new Copyright Law was passed in the RSFSR on 8 October 1928 (hereinafter: CL 1928).[99]

The Fundamentals 1928 largely adopted the provisions of the Fundamentals 1925.[100] Freedom of translation was retained[101] as well as the possibility of nationalization.[102] The most important change was that of the duration of protection. This was increased to 15 years *p.m.a.*[103] It is, moreover, remarkable that this term, by point 2 of the executive decree,[104] was applied retrospectively to works which, under the old terms, were already in the public domain but which, according to the new terms, were again protected from the application of the Fundamentals 1928 onwards.

For the first time in the Soviet period, protection was extended to the non-property interests of authors breached by third parties.[105] The law, however, did not yet use the term "personal" rights.[106]

96. V.D. Stelmakh, *Books and the Mass Media: Modes of Interaction in the USSR*, Paris, UNESCO, 1982, 7-8.
97. Postanovlenie TsIK i SNK SSSR, 16 March 1927, *SZ SSSR*, 1927, No.16, item 171; English translation in *SSD*, 1977-78, 30-31.
98. "Osnovy avtorskogo prava", 16 May 1928, *SZ SSSR*, 1928, No.27, item 245-246; Azov/Shatsillo 7-15; English translation in Gsovski, II, 398-409.
99. Postanovlenie VTsIK i SNK RSFSR "Ob avtorskom prave", 8 October 1928, *SU RSFSR*, 1928, No.132, item 861; Azov/Shatsillo 15-24; English translation in Gsovski II, 410-426.
100. For an extensive discussion, see J.I. Heifetz, "Le droit d'auteur dans l'U.R.S.S.", *DA*, 1929, 86-92; Stoyanovitch 191-197. For a comparison between the Fundamentals 1925 and the Fundamentals 1928, see Levitsky 1980a, 431-433.
101. Art.9 a Fundamentals 1928.
102. Art.20 Fundamentals 1928.
103. For a number of works (dances, scripts, films and photographic works, periodicals), a shorter term was provided. Arts.10-15 Fundamentals 1928.
104. Postanovlenie VTsIK i SNK SSSR "O vvedenie v deistvie 'Osnov avtorskogo prava'", 16 May 1928, *SZ SSSR*, 1928, No.27, item 245; Azov/Shatsillo 7-8.
105. Art.11 CL 1928.
106. Levitsky 1980a, 433.

Furthermore, the Union Republics were given wider legislative powers in certain parts of the copyright law.[107] The CL 1928 contained a complete series of rules with regard to the publishing contract (print run, remuneration, limited duration, obligation to publish, prohibition of further transfer, prohibition of altering the work), the performance contract (stage run, period within which the first performance had to take place, remuneration, limited duration of the contract), and the film script contract.[108]

From a technical-legal point of view, the quality of the Fundamentals 1928 and the CL 1928 was fairly high. It is, therefore, no coincidence that in later copyright legislation many of the legal standards were copied from these laws without any change.[109]

109. Finally, in this period there were new attempts to reach bilateral agreements with a number of Western European countries (namely England,[110] Germany,[111] and Italy[112]) on the mutual recognition of copyright albeit without success.

§ 3. 1928–1960

110. The Fundamentals 1928 were in force without alteration for three decades. But in this period countless decrees were issued for its execution or supplementation. Many of these concerned the ratification of so-called model agreements in execution of article 26 CL 1928 which prescribed that such model agreements contain provisions which could not be altered to the disadvantage of an author in a publishing contract.[113] A substantial number of other decrees concerned the approval of tables of tariffs for the remuneration of authors for the various sorts of work and modes of publication or performance.[114]

107. Art. 17 Fundamentals 1928.
108. Arts. 17-44 CL 1928.
109. Sergeev 14.
110. "Retour possible à la protection internationale des auteurs en vertu d'un traité conclu avec la Grande-Bretagne", *DA*, 1921, 60.
111. "Travaux préparatoires pour un traité littéraire avec la Russie", *DA*, 1923, 104-105; "Allemagne—Union des Républiques Soviétiques Socialistes Russes. Protocole économique Germano-Russe (Du 21 décembre 1928)", *DA*, 1929, 61; "Allemagne-Russie. Les négociations germano-russes en vue de la conclusion d'un traité littéraire", *DA*, 1931, 107-108.
112. "Italie—Union des Républiques Soviétiques Socialistes Russes. Traité de Commerce et de Navigation (Du 7 février 1924)", *DA*, 1926, 7-8.
113. See, *e.g.*, the model publishing contract for literary works (19 April 1929: Azov/Shatsillo 48-56; English translation in Gsovski, II, 427-437; 13 May 1955: quoted Loeber 1966, 83, No. 74); the model contracts for the creation of scripts for different film genres (30 August 1950: documentary; 3 July 1952, amended 31 August 1953: popular science; 22 February 1956, amended 19 March 1957: quoted by Loeber 1966, 81, No. 63); the model composer's contract for composing original film music (22 June 1948, quoted Loeber 1966, 80, No. 53) and the model performance contract for non-published works of dramatic art (24 March 1956: quoted by Koretskii 110-112).

111.In the full flow of de-Stalinization, the Council of Ministers of the USSR on 27 May 1957 approved a Decree with the sole stipulation that for the heirs of posthumously rehabilitated authors the term of copyright provided by article 15 Fundamentals 1928 (*i.e.*, 15 years *p.m.a.*) was calculated not from the day of the death of the author, but from the day on which the heirs were informed of his rehabilitation.[115] This meant that in the sphere of copyright, too, economic losses suffered by the author and his heirs as a result of the repression under Stalin were compensated. It is typical of the period that the Decree was never published[116] and, thus, also went unmentioned in Soviet legal doctrine.[117]

112.From 1959 onwards, attempts were made to adapt the basic law itself to thirty years of change. The first effort was the amendments to the CL 1928 by the Edict of the Presidium of the Supreme Soviet of the RSFSR of 31 March 1959.[118] The amendments related mainly to the decrees concerning film production contracts and the compulsory purchase of works,[119] but truly fundamental changes were not made.

In 1960 the RSFSR issued a new Criminal Code in which article 141 toughened the existing sentences for certain violations of the copyright law and enlarged the number of criminal acts.[120]

§4. 1961–1973

113. A thorough restructuring of the copyright law came about when, on 8 December 1961, the Supreme Soviet of the USSR approved the Fundamen-

114. See, *inter alia*, the Government decrees or Decrees of the relevant Ministries and Committees which approved the levels of authors' remuneration for the publication of literary and scientific works (12 July 1944: *SP RSFSR*, 1944, No.8, item 43, Azov/Shatsillo 82-85; 15 July 1947: *SP RSFSR*, 1947, No.9, item 31 and 1949, No.1, item 2, Azov/Shatsillo 85-88; 5 June 1952, quoted Loeber 1966, 100, item 244; 7 April 1960: *SP RSFSR*, 1960, No.16, item 64), for the public performance of musical works and works of (musical-) dramatic art (20 April 1957 and accompanying Instruction of 5 November 1957: quoted in the epilogue of Antimonov/Fleishits 274-276; Koretskii 117-122; Levitsky 1964, 44-46; Loeber 1966, 103, No.256), for the creation of musical works commissioned by the Committe for the Arts (7 September 1944: quoted Koretskii 92-93), for the industrial use of works of visual art (15 January 1929: quoted Koretskii 65-66; 2 June 1960: *SP RSFSR*, 1960, No.23, item 104), for the reproduction and publication of works of visual art in albums, on postcards, etc. (30 March 1930: *SZ SSSR*, 1930, No.21, item 237; 26 August 1930: *SU RSFSR*, 1930, No.42, item 506; 20 August 1955: quoted Koretskii 107) etc.
115. PSM SSSR "O poriadke ischisleniia sroka deistviia avtorskogo prava dlia naslednikov reabilitirovannykh avtorov", 27 May 1957, unpublished.
116. This Decree is in the author's files.
117. Gavrilov later, in 1990, referring to a newspaper article, drew attention to the existence of such a rule for the heirs of the victims of the Stalin era, but described it as 'new' (Gavrilov 1990b, 372).
118. *VVS RSFSR*, 1959, No.13, item 234; English translation in Levitsky 1964, 349-271.
119. Levitsky 1964, 47-48.
120. "Ugolovnyi Kodeks RSFSR", 27 October 1960, *VVS RSFSR*, 1960, No.40, item 591.

tals of Civil Law of the Soviet Union and the Union Republics (hereinafter: Fundamentals 1961).[121] Section IV Fundamentals 1961 treated copyright law in eleven articles. These norms were repeated and elaborated on by the fifteen Union Republics, each in their own Civil Code.[122] For the RSFSR this happened on 11 June 1964 with the approval of the RSFSR Civil Code (hereinafter: CC 1964)[123] which dealt with copyright, again in Section IV, under 42 articles.

114. The contents of this new legislation in 1961-1964 were dictated by the legislator's concern to settle long-standing doctrinal disputes, to adapt the law to practical necessities, and to formulate a number of existing regulations in a more exact fashion.[124]

An important change in comparison with the legislation of the twenties was the dropping of the possibility of the "alienation" of copyright or of specific author's rights, and the replacement of this term with the "transfer" of a work to a specific user organization for a specific use on the basis of a contract of which the contents were largely determined by an administrative model.[125]

121. "Osnovy Grazhdanskogo Zakonodatel'stva Soiuza SSR i Soiuznykh Respublik", *VVS SSSR*, 1961, No.50, item 525.
122. In the USSR, in contrast to usual practice in most federal states (M. Elst, "De wetgevende bevoegdheid inzake auteursrecht in België en in andere federale staten", *RW*, 1990-91, 1219-1231), the federal legislator was not granted exclusive powers with regard to copyright. With the exception of a few differences in the area of the term of protection of photographic works and works of applied arts (Gavrilov 1976, 113), the copyright of employees (with Kazakhstan the only Union republic which laid down a procedure for the use by the employer of an employee-made work, see Gavrilov 1976, 103 note 19) and the protection of diaries and letters in Kazakhstan and Uzbekistan (S.L. Levitsky, "Personal Letters and Soviet Law: Intellectual Origins of Sections 491 Kazakh CC and 540-1 Uzbek CC", *Rev. Soc. Law*, 1979, 73-77) there was great convergence in the regulations of copyright laws of the 15 Union Republics. This can be explained partly by the fact that the Fundamentals 1961 considered a number of issues (determining the procedure for the transfer of authors' rights abroad and importing a legal license for translations in accordance with the UCC) as belonging to the exclusive power of the Union, partly because the Union republics did not make use of their concurring powers in certain subareas (all model agreements, for example, were approved on Union level, even though the Union Republics had the competence to regulate them: Dozortsev 1979, 199; Gavrilov 1984a, 52) or mainly followed the lead of their big brother, the RSFSR, in the composition of their Civil Codes. This convergence was explained in the legal doctrine by the uniformity of the economic basis and social relationships concerning the creation and the use of author's works in the different Union Republics, but, also, by the fear that differences in regulations would considerably hamper the working of the copyright laws (Gavrilov 1979b, 13). See, also, I.P. Leikauskas, "Iskliuchitel'naia kompetentsiia Soiuza SSR v oblasti avtorskogo prava", *Problemy sovershenstvovaniia sovetskogo zakonodatel'stva*, 1977, No.9, 190-192.
123. "Grazhdanskii Kodeks RSFSR", *VVS RSFSR*, 1964, No.24, item 406.
124. Levitsky 1980a, 443-450.
125. Art.101 Fundamentals 1961; arts.488 and 506 CC 1964.

In accordance with this, the term "legal successor" was deleted with regard to national as well as foreign authors.[126]

Original and perpetual copyright could be vested in certain legal persons, namely film studios, broadcasting stations and the publishers of encyclopedias and periodicals.[127] For the first time, a regulation was provided with regard to employee-made works: the employee was in such a case considered the author, but the conditions of use and the cases of payment of an author's fee would be stipulated by specific rules.[128]

Another innovation was the introduction of the term "personal, non-property rights"[129] and of a right of the portrayed.[130]

The term of protection after the death of the author was no longer regulated at the level of the Soviet Union but by the different Union Republics. The CC 1964 retained the term of 15 years *p.m.a.*[131] with the proviso that the author's heirs could only receive 50% of the royalties, which the author would have received during his lifetime.[132] Freedom of translation was retained albeit with a number of new conditions: the author of the original work had to be informed of the fact that his work was being translated, and the meaning and integrity of the work had to be conserved.[133] Furthermore, the remuneration of the original author might be required in certain cases to be determined by the Union Republics.

115.As before, foreign authors only enjoyed protection for works not published in the Soviet Union if there was an international treaty to that effect between the Soviet Union and the country of first publication.[134] On 17 November 1967, for the first time since the October Revolution, an agreement on the mutual recognition of copyright was concluded with the People's Republic of Hungary[135] followed on 8 October 1971 by a similar agreement with Bulgaria.[136] Both agreements assumed the principle of assimilation but

126. See also *infra*, No.379.
127. Arts.483-486 and 498 CC 1964.
128. Art.483 CC 1964.
129. Art.499 CC 1964.
130. Art.514 CC 1964.
131. Art.496 CC 1964.The special method of calculation for the term of protection of works of posthumously rehabilitated authors was not incorporated in the CC 1964, so that it is doubtful whether this rule was still operative after 1964.
132. Art.105 Fundamentals 1961.
133. Art.102 Fundamentals 1961.
134. Attempts to conclude a payments agreement between the USA and the USSR outside the copyright law (D.P. Griff, "Royalties Without Copyright: Proposals for a Payments Agreement Between the United States and the Soviet Union", *Copyright L. Symp.*, 1969, No.17, 51-101) or to validate the rights of foreign authors in the Soviet Union through the application of the theory of enrichment without cause (*Re* Sir Arthur Conan Doyle, Supreme Court of Justice RSFSR 1959: *Ibid.*, 53-54) failed.

with important exceptions so that Hungary and Bulgaria which had higher levels of protection, would not have to give more rights to Soviet authors than their own authors enjoyed in the USSR. Both agreements fixed the term of protection at 15 years *p.m.a.* and provided material reciprocity for free uses.[137] This last meant, among other things, that freedom of translation as provided for in the Soviet legislation also applied to the translation of Soviet works in Hungary and Bulgaria as a result of these agreements.[138] Neither treaty required any alteration to domestic Soviet legislation.[139]

Finally, it should be mentioned that on 19 September 1968 the Presidium of the Supreme Soviet of the USSR ratified the Convention establishing the World Intellectual Property Organization.[140]

§ 5. 1973–1985

116. An important, even crucial event in the history of copyright in the Soviet Union and in Russia was the accession of this state to the Universal Copyright Convention (1952 version) on 27 February 1973.[141] Not only was this the first time in history that Russia or the Soviet Union entered into multilateral copyright undertakings with other (Western) countries, but from that time onwards accession to the UCC and the concomitant adaptation of national legislation was to carry the germ of the fall of socialist copyright.[142]

135. "Convention sur la protection réciproque du droit d'auteur conclue entre la République populaire hongroise et l'Union des Républiques socialistes soviétiques", *DA*, 1968, 64-65. This agreement was originally signed for three years (art.10), but was prolonged in 1971 for a further 7 years, "Hongrie—U.R.S.S.. Echange de notes relatif à la prolongation de la validité de la Convention sur la protection réciproque du droit d'auteur", *DA*, 1971, 123; *RIDA*, vol.70, 1971, 164. On this prolongation, see Timar, I., "Lettre de Hongrie", *DA*, 1974, 78-79. For a commentary, see E. Ulmer, "Urheberrechtsfragen in den Beziehungen zwischen Westen und Osten", *Grur Int.*, 1968, 410-412.
136. "Accord sur la protection réciproque du droit d'auteur conclu entre la République populaire de Bulgarie et l'Union des Républiques socialistes soviétiques", *DA*, 1972, 163.
137. G. Boytha, "Das Urheberrechtsabkommen zwischen der Sowjetunion und Ungarn im Spiegel der jüngsten Entwicklung der Urheberrechte beider Staaten", *Grur Int.*, 1969, 440.
138. I.Timar, "La convention hongaro-soviétique en matière de droit d'auteur", *DA*, 1968, 70. See also Simons 1974, 797.
139. Levitsky 1980a, 450-452.
140. UPVS SSSR "O ratifikatsii Stokgol'mskogo Akta Parizhskoi Konventsii po okhrane promyshlennoi sobstvennosti i Konventsii, uchrezhdaiushchei Vsemirnuiu organizatsiiu intellektual'noi sobstvennosti", 19 September 1968, *VVS SSSR*, 1968, No.40, item 363. The Paris treaty for the protection of industrial property was also ratified by the same Ukase.
141. "Vsemirnaia konventsiia ob avtorskom prave, podpisannaia v Zheneve 6 sentiabria 1952 goda", *SP SSSR*, 1973, No.24, item 139. For the USSR, the UCC became operative by virtue of art.IX (2) UCC three months from the depositing of the instrument of ratification, *i.e.,* on 27 May 1973.
142. More on this *infra*, Part I, Title III, Chapter III, Sections 3 and 4.

By this accession, the USSR sought to maximize political impact at an international level with a minimum of economic or legal effort at the national level.[143] Accession to the UCC as a means to "stimulate international cultural exchanges"[144] was part of the USSR's global strategy to improve its international image—tarnished by, among other things, the persecution of dissidents—on the eve of the Conference for Security and Cooperation in Europe (CSCE) in Helsinki[145] although the economic pressure of the USA probably also played a decisive role.[146]

117. The USSR joined the original version of the UCC and, thus, opted for the lesser evil:[147] it merely had to amend its national legislation in order to recognize the author's translation right,[148] and to prolong the term of protection

143. "L'U.R.S.S. a voulu adhérer à la Convention universelle (1952) pour exprimer sa volonté de participer de façon ouverte et plus complète aux échanges intellectuels et culturels internationaux, mais elle est restée fidèle à la philosophie marxiste-léniniste de son économie et, afin d'assurer deux des "tâches essentielles de l'Etat socialiste du peuple entier": la formation de "l'homme de la société communiste" et l'élévation du niveau culturel des travailleurs (cf. Préambule de la Constitution soviétique du 7 octobre 1977), elle a maintenu de nombreuses hypothèses d'utilisations libres, gratuites ou payantes d'oeuvres."
(M.-C. Humbert-Dayen, "L'U.R.S.S. et la Convention universelle: oeuvres protégées et droits accordés à leurs auteurs", *RIDA*, 1985, vol.125, 57)

144. Boguslavskii 1979, 12; B. Pankine, "Le droit d'auteur, partie intégrante de la politique culturelle", *Bulletin du droit d'auteur*, 1982, No.4, 33-39.

145. Corbet 1973, 291-292; Rudakov/Gringol'ts 3 ("La décision arrêtée par le Gouvernement soviétique d'adhérer à la Convention Universelle représente avant tout l'une des mesures qui s'inscrit dans la politique active de l'Etat soviétique ayant pour objectif la détente internationale et la consolidation de la paix [...]"). Other expressions of this willingness to improve the image of the USSR on the international forum were the ratification by the USSR of both UN Covenants concerning human rights on 18 September 1973 (*VVS SSSR*, 1973, No.40, item 564. *Supra*, No.57) and finally the signing of the Final Act of the CSCE in Helsinki in 1975.

146. C.G. Benjamin, "Some observations on certain consequences of the Soviet Union's accession to UCC", *Bulletin. Copyright Society of the U.S.A.*, 1973, 394; M.B. Levin, "Soviet international copyright: dream or nightmare ?", *J. Copyright Soc'y U.S.A.*, 1983, 129-140; N. Roit, "Soviet and Chinese Copyright: Ideology Gives Way to Economic Necessity", *Loy. L.A. Ent. L. J.*, 1986, 58-59; Vermeer 151-152.

147. The version of the UCC altered in Paris in 1971 was at the time of the entry of the USSR into the UCC not yet operative, as the quorum of ratifications (12) had not yet been reached. Once this quorum had been reached, the entry into the version of Geneva became legally impossible (art.IX UCC, 1971). See also E. Schulze, "Wirkung des Beitritts der Union der Sozialistischen Sowjetrepubliken zum Welturheberrechtsabkommen", *UFITA*, 1974, Band 70, 91-92. The USSR clearly wanted to anticipate this event, as the minimum level of protection contained in the Paris version of he UCC was higher. Thus, Contracting States to the Paris Version had to acknowledge that the reproduction right included the right to public performance and exhibition (art.IVbis UCC, 1971). See, *e.g.*, P.E. Braveman, "A New Dawn in International Copyright: The Soviet Adherence to the Uniform Copyright Convention", *Utah L. Rev.*, 1975, 461.

to 25 years *p.m.a.*,[149] apart from the obvious acknowledgement in the Soviet Union of the copyright of foreign authors.[150] This step into the international system of copyright law was taken, moreover, very gradually, given the fact that the UCC—as opposed to the Berne Convention[151]—does not require the acceding state (USSR) to protect works which were published in another treaty state or which were published by a national of another treaty state (irrespective of the place of publication, but not in the territory of the acceding state), and had permanently entered the public domain in the acceding state (USSR).[152,153] By opting for the original version of the UCC, the USSR attempted to limit as much as possible the negative consequences for its trade balance which—in the event quite rightly—were feared from entry into the international copyright law arena.[154]

148. Art.V UCC.
149. Art.IV (2) UCC.
150. The following categories of works were for the first time protected in the USSR:
(1) the works of nationals of a Contracting State to the UCC which were published for the first time after 27 May 1973, irrespective the place of publication, as long as that place was located outside the USSR;
(2) the works of nationals of a non-Contracting Party to the UCC, if these works were published for the first time in a Contracting State (except the USSR) after 27 May 1973.

On the protection of non-published works, located outside the USSR, of nationals of a UCC-Contracting State (excepting Soviet nationals) see *infra*, note 153). Unpublished works located outside the USSR, made by Soviet nationals, and works of non-Soviet authors published first in the USSR, or located in the USSR in an unpublished form, were, also before 1973, directly protected by the Soviet legislation (Art.97 para.1 and 2 Fundamentals 1961; arts.477 and 478 para.1 CC 1964).
151. Art.18 BC. It will later become apparent that this determination would not hinder the Russian Federation to join the BC without recognizing its retroactivity: *infra*, No.830.
152. Art.VII UCC *juncto*, art.97 para.3 Fundamentals 1961 and art.478 para.2 CC 1964. See also Nordemann *et al.* 307-309; Ulmer, E., "Der Beitritt der Sowjetunion zum Welturheberrechtsabkommen", *Grur Int.*, 1973, 94-95. On the concrete application of this rule on the protection of Soviet works in France, see A. Françon, "La protection par le droit d'auteur des oeuvres soviétiques en France", *RIDA*, 1974, vol.82, 109-123.
153. There is the issue of whether works which were created before entry into the UCC, but which were only published afterwards, enjoy UCC protection in a UCC member state (Dietz 1973, 56-60). One can argue that such unpublished works did not permanently enter the public domain of the acceding state (Soviet Union) (art.VII UCC), as they could still be published in a Union country after the coming into force of the UCC in the acceding state (27 May 1973) and could thus be kept out of the public domain of the acceding state (the USSR). This interpretation was not accepted by the USSR. This can be deduced *a contrario* from a stipulation in the bilateral agreement which was later signed between the USSR and Austria (*infra*, No. 121), which *did* provide for this (limited) form of retroactivity, and this was precisely the aim of the agreement: Art.2 Abkommen zwischen der Republik Österreich und der Union der Sozialistischen Sowjetrepubliken über den gegenseitigen Urheberschutz, 16 December 1981, *UFITA*, 1982, Band 94, 243-247.

118. When the USSR signed up to the UCC, it was thought in the West that a hidden agenda could be discerned on the part of the Soviet authorities: the exportation of censorship. Copyright on works written by Soviet dissidents, which might be published abroad (*tamizdat*), would be nationalized. When the foreign publisher brought out the work, the Soviet authorities would sue to stop publication in the foreign courts, and for damages for breach of the copyright, which they owned and for the breach of the state monopoly on the export of copyright.[155]

There are several reasons why this scenario was both improbable *and* impracticable. *Improbable,* because such an action would badly damage the USSR's prestige. The nationalization of copyright had in the past only been used to prevent private persons from impeding the distribution of works,[156] the mass-consumption of which was considered highly desirable.[157] Besides which, the Soviet government disposed over an extensive arsenal of repressive measures to silence dissident authors, quite apart from copyright law, within its national law. *Impracticable* because such a "nationalization measure" ran counter to the public order and/or could not have an automatic extra-territorial effect,[158] and because such *tamizdat* work, under the principle of assimilation, is protected by the national law of the country in which protection is sought, and this (western) national copyright law does not contain provisions which would limit the freedom of copyright traffic because of a monopoly of state

154. M.B. Levin, "Soviet international copyright: dream or nightmare?", *J. Copyright Soc'y U.S.A.*, 1983, 132 ff. and 157. In the Soviet legal doctrine the USSR's preference for the original version of 1952 was explained completely differently, namely with reference to the fact that the USSR did not have any experience of multilateral copyright treaties and therefore wanted to join a convention which had already been applied in international practice for two decades: Boguslavskii 1973, 58; Dietz 1973, 55; Gringol'ts 1973, 17; Rudakov/Gringol'ts 7.

155. See, *e.g.,* Newcity 1974, 298; Simons 1974, 809.

156. "Tactically also, it would be unwise for the Soviet authorities to launch such a trial, for they might find themselves thrown onto the defense of their own laws concerning publication and literature." (H. Bloom, "The end of samizdat? The Soviet Union signs the Universal Copyright Convention", *Index on Censorship*, 1973, 15). See also, *e.g.,* L.A. Radhauer, "The USSR Joins the Universal Copyright Convention", *Copyright L. Symp.*, 1977, No. 23, 27-30. But Ross warns that if there is a means of repression (the UCC), it can also be used: "Credulity would be stretched to the limit to assume that the Soviet hand dangling the sword over Damocles' head would never allow the sword to drop. That hand is already subject to few international restraints, and if, sometime in the future, the gains seemed to outweigh the losses, then that sword would surely drop!" (L.F. Ross, "Soviet accession to the universal copyright convention: possible implications for future foreign publication of dissidents' works", *Ga. J. Int'l & Comp. L.*, 1974, 421).

157. It is indeed hard to imagine that the Soviet authorities would pay a dissident author (as a nationalization order was—albeit compulsory—"purchase", art. 106 Fundamentals 1961 and art. 501 CC 1964) to *prevent* him from smuggling and publishing abroad a work containing anti-Soviet propaganda.

mediation.[159] The Soviet government could possibly be more successful in the Eastern European brother states. The bilateral agreements of the first generation (that is, from before the entry to the UCC) and a number of the bilateral agreements of the second generation[160] contain a so-called censorship clause with regard to unpublished works.[161] The states of the Eastern Block, however, themselves disposed over an extensive censorship apparatus, which made these censorship clauses rather superfluous.

Thus, not a single nationalization decree is known with regard to the works of dissident authors,[162] nor is any example known of censorship to the West or the socialist brother countries.

158. Corbet refers to a decision of the Paris Court of 8 May 1963 (*RIDA*, vol.39-40, 241) which denies any effect in France to the nationalization order of the People's Commissariat of Public Education of 16 August 1919 concerning the works of 17 Russian composers (Corbet 1973, 294-296). See, also, H. Cohen Jehoram, "Hoe werkt straks de Russische auteursrechtelijke censuur in het Westen?", *NJ*, 1973, 674; R.J. Jinnett, "Adherence of the U.S.S.R. to the Universal Copyright Convention: Defenses under U.S. Law to Possible Soviet Attempts at Achieving International Censorship", *Cornell Int'l L. J.*, 1974, 77-83; P.B. Maggs, "New Directions in US-USSR Copyright Relations", *Am. J. Int'l L.*, 1974, 403; Simons 1974, 812-813. *Contra*: Newcity 1974, 301-309.

159. Dietz 1973, 69-71. Older judgments affirmed these principles: Bundesgerichtshof (BGH), 16 April 1975, *Grur Int.*, 1975, 361, *UFITA*, 1975, Band 74, 303, *ICC*, 1976, 134, commentary by A. Dietz, "Zum Schutz sowjetischer Urheber im internationalen Urheberrecht", *Grur Int.*, 1975, 341-344; High Court of Justice, Chancery Division, 25 November 1971, *The Bodley Head Ltd.* v. *Flegon*, *Weekly Law Reports*, 1972, 680; *Grur Int.*, 1973, 117 (both with regard to Solzhenitsyn's work *August the Fourteenth* and on the basis of facts dating from before 27 May 1973). See also Nordemann *et al.* 43 and 50. The facts of this case and the verdict of the German and English judges are summarized by R.E. Bennett, "The Solzhenitsyn Cases: The Russian Author and Western Copyright Law", *Ohio N. U. L. Rev.*, 1975, 87-94. On the copyright fate of Solzhenitsyn's *Cancer Ward*, see E.F. Tervooren, "Solsjenitzin en zijn auteursrechten", *AA*, 1971, 41-46.

160. *Infra*, No.121.

161. This is how it was put in art.2 para. 2 of the agreement with the former GDR:

> "The publication of unpublished works in both countries simultaneously, their publication for the first time on the territory of the other Treaty Party, as well as the distribution in third countries of works by authors of one Party by organizations of another can only be carried out in case of agreement between the respective authorized organizations of both Parties in each specific case."

("Soglashenie mezhdu SSSR i GDR o vzaimnoi okhrane avtorskikh prav", 21 November 1973, *SP SSSR*, 1975, No.1, item 7) Compare art.2 para.2 Bilateral agreement with Bulgaria, 8 October 1971, *DA*, 1972, 163 and *RIDA* 1972, vol.74, 170; art.2 para.2 Bilateral agreement with Poland, 4 October 1974, *SP SSSR*, 1975, No.4, item 28; art.2 para.2 Bilateral agreement with Hungary, 17 November 1967, *SP SSSR*, 1975, No.18, item 123. This clause did not appear in the other bilateral treaties of the USSR with Czechoslovakia, Austria and Sweden. See also H. Cohen Jehoram, "De Sowjet-Unie aangesloten bij de Universele Auteursrechtconventie", *NJ*, 1973, 321 and "Auteursrecht contra vrijheid van meningsuiting ?", *NJ*, 1974, 1396.

162. Levitsky 1980b, 147.

119.In relation to accession to the UCC, adjustments were made to the contents of the copyright legislation in 1973-1974 although not all these changes were a necessary consequence of the decision to abandon international copyright isolation.[163] Apart from increasing the term of protection to 25 years *p.m.a.* and acknowledging translation rights,[164] the right of the heirs of authors to full remuneration for the use of their works was restored.[165]

The extent of these adjustments was limited to the simultaneous introduction of two new free uses,[166] namely the reproduction in newspapers of publicly delivered speeches and of published works in the original version or in translation,[167] and the non-profit reprographic reproduction of printed works for scientific, educational, and instructive purposes.[168]

120.For cross-border transfers of property rights in a work, a new procedure was introduced[169] which involved compulsory mediation by the All-Union Agency for Authors' Rights (*Vsesoiuznoe Agentstvo po avtorskim pravam*, *VAAP* for short).This agency was founded by an unpublished Decree of the Council of Ministers of the USSR of 16 August 1973.[170] Besides the usual tasks of a collecting society,[171] it was charged with exercising the state monopoly on foreign trade in copyrights.[172,173] This gave also *VAAP* a specific role in the whole

163. UPVS SSSR "O vnesenii izmenenii i dopolnenii v Osnovy grazhdanskogo zakonodatel'stva Soiuza SSR i soiuznykh respublik", 21 February 1973, *VVS SSSR*, 1973, No.9, item 138; UPVS RSFSR "O vnesenii izmenenii i dopolnenii v Grazhdanskii Kodeks RSFSR", 1 March 1974, *VVS RSFSR*, 1974, No.10, item 286. See also, *e.g.,* Boguslavskii 1973, 56-62; Boguslavskii/Gavrilov 22-29; Gavrilov 1974, 67-74; Levitsky 1980a, 452-456. For a comparative overview of the alterations which were made to the 15 Civil Law Codes of the 15 Union republics, see Majoros 127-139.

164. Boguslavskii 1973 (58-60) emphasized that the abolition of the freedom to translate was not only connected with UCC entry, but, also, with the changed reality of the post-war, multinational USSR in which the publication of literary works had increased enormously in all languages, including translations from one national language into the other.

165. Because of an alteration to the levels of personal taxes (with a rate of up to 75% on remunerations for rights received by the heirs of an author), this advantage was, however, again neutralized by developments outside the copyright law itself: UPVS SSSR "O podokhodnom naloge s summ, vyplachivaemykh za izdanie, ispolnenie ili inoe ispol'zovanie proizvedenii nauki, literatury i iskusstva", 4 September 1973, *VVS SSSR*, 1973, No.37, item 497. See also Boguslavskii/Gavrilov 26; Ioffe 1988a, 341; E. Schulze, "Vertragsabschlüsse nach Wirksamwerden des Beitritts der Union der Sozialistischen Sowjetrepubliken zum Welturheberrechtsabkommen", *UFITA*, 1975, Band 73, 8-9; Simons 1974, 805-806.

166. Levitsky 1987, 165.

167. Art.103 (5) Fundamentals 1961; art.492 (5) CC 1964.

168. Art.103 (7) Fundamentals 1961; art.492 (7) CC 1964.

169. Non-observance of this procedure implied the nullity of the transfer: Arts.97 para.4 and 98 para.2 Fundamentals 1961 (amend. 1973); arts.478 para.3 and 479 para.4 CC 1964 (amend. 1974); point 21 PPVS SSSR No.9, "O praktike rassmotreniia sudami sporov, vytekaiushchikh iz avtorskogo prava", *BVS SSSR*, 1968, No.1, 13, as amended by PPVS SSSR No.3, *BVS SSSR*, 1975, No.2, 21. See also point 2 of *VAAP*'s charter; Matveev 1980, 47-49. For a detailed discussion of the procedure for export and import of copyrights in the USSR, see Loeber 1979, 419-429 and Loeber 1980, Sowjetunion/I, 14-18.

censorship apparatus.[174] Moreover, *VAAP* was also responsible on the one hand for withholding the pre-payment fiscal levy on the authors' remuneration paid by it[175] and on the other hand the contributions for the social aid funds linked

170. PSM SSSR "OVsesoiuznom Agentstve po Avtorskim Pravam", 16 August 1973 (hereafter: Decree *VAAP*). This Decree was not published (but can be found in the author's files), although its contents were summarized in *Izvestiia*, 27 December 1973 (translation in *CDSP*, 1973, No.52, 3), which led Newcity 1978, 130 mistakenly to date the promulgation of the Decree of the Council of Minsiters on *VAAP* to December 1973. In legalistic terms *VAAP* was founded by the collective initiative of seven social organizations (six creative unions and the press agency APN) and seven state organs, which approved *VAAP*'s Charter (Voronkova *et al.* 305-310) (hereinafter: *VAAP* Charter) during a founding conference on 20 September 1973. This Charter was the almost literal reproduction of the content of the aforementioned Decree *VAAP*. This already showed the ambiguity of the status of *VAAP*, which had on the one hand the status of social organization (but without members!), and on the other hand was founded on the government's (hidden) initiative.
171. As an author's association, *VAAP* was the legal successor to the All-Union Committee for the Protection of the Copyrights of the Writers' Union of the USSR (*Vsesoiuznoe Upravlenie po okhrane avtorskikh prav Soiuza pisatelei SSSR* or *VUOAP* for short) and the Committee for the Protection of Copyrights of the Artists' Union of the USSR (*Upravlenie po okhrane avtorskikh prav Soiuza khudozhnikov SSSR* or UOAP for short): point 8, Decree of 16 August 1973 on *VAAP* (see previous note). On the situation before 1973 with regard to copyright agencies, see Antimonov/Fleishits 38-39; Rudakov/Gringol'ts 11-13. The so-called creative unions (*infra*, No.41 and Nos.85-86) continued to give their members legal advice concerning copyright problems after the foundation of *VAAP*. Usually in this situation the authors were simply referred to *VAAP*: Iampol'skaia 293.
172. Point 2, Decree *VAAP*. *Goskino*, *Gosteleradio* and the press agency *Novosti* were exempt from the mediation of *VAAP* in international legal matters; they did, however, have to register with *VAAP* any contracts signed with foreign partners. Even conference papers given abroad (or given by foreign authors in the USSR), although they could be directly published in the conference proceedings, could otherwise only be published via *VAAP*: see point 3, Decree *VAAP*.
173. *VAAP*'s power in this regard was part of the complete state monopoly on foreign trade, as mentioned in art.73 (10) Const.1977. See also Dietz 1973, 65-66.
174. Point 1 a) para.2 Decree *VAAP* named as one of *VAAP*'s functions "the promotion of works of Soviet authors abroad and the use of works of foreign authors in the USSR *taking into account the country's political, economic and cultural interests*", a stipulation beside which, in the margin of the official but unpublished text of this Decree, is written "ne dlia pechati", *i.e.,* not for the press. The paragraph is therefore not reproduced in the (public) Charter of *VAAP* dated 20 September 1973. This secretiveness increases the suspicion that the euphemistic tone of this paragraph hides a censorship measure (see, also, V. Smirnov, "Ne podelili ... rabotu?", *I.S.*, 1992, Nos.1-2, 59-60). Through this secret determination *VAAP* was granted the right to exclude foreign "anti-Soviet works", but especially to impede the foreign publication of works by Soviet authors which could not possibly be published within the USSR because of the censorship regulations, and would thus harm the Soviet Union's image abroad ("Le contexte philosophique et politique de l'U.R.S.S. permet à l'agence de l'U.R.S.S. pour les droits d'auteur de sélectionner les oeuvres importées et exportées en ne retenant que des créations conformes "aux intérêts de l'Etat socialiste" et à "l'édification du communisme" ou compatibles avec ces impératifs", M.-C. Humbert-Dayen, "L'U.R.S.S. et la Convention universelle: oeuvres protégées et droits accordés à leurs auteurs", *RIDA*, 1985, vol.125, 59. See, also, Loeber 1979, 432-435; Vermeer 154).

to the creative unions (such as the Music Fund, the Literary Fund, the Journalists' Fund).[176] Furthermore, *VAAP* had a policy-determining and normative role, in that the agency could submit legal proposals on copyright law to the Supreme Soviet.[177] In order to do so, it had to study the practical application of copyright law in the USSR and abroad, it was also involved in the drafting of model authors' contracts and the tariffs for authors' remuneration, and it could issue instructions and clarifications concerning copyright which were binding on all ministries, departments, and organizations. On the international scene, *VAAP* represented the USSR in all governmental *and* non-governmental organizations active in the field of copyright. Finally, *VAAP* also had a purely cultural-political function as it kept Soviet theaters informed of new dramatic works and promoted Soviet works abroad.[178] From all this, the dual status of *VAAP* comes through clearly: it was a *social* organization which, at least in part, was expected to exercise *state* functions.

121. After the entry of the USSR to the UCC, the law of copyright continued to change, both nationally and internationally. The Fundamentals 1961 and the CC 1964 were amended in a few points of detail in the period preceding the *perestroika* era.[179] Furthermore, several Governmental Decrees with tariffs for specific forms of exploitation,[180] and Ministerial Decrees with different model contracts,[181] were approved. The copyright law was also given a constitutional base.[182]

175. Point 19 UPVS SSSR "O podokhodnom naloge s naseleniia", 30 April 1943, amend. 20 October 1983, *VVS SSSR*, 1983, No.43, item 653. Foreign author's compensations were taxed in the Soviet Union against tariffs ranging from 30 to 75%: UPVS SSSR "O podokhodnom naloge s summ, vyplachivaemykh za izdanie, ispolnenie ili inoe ispol'zovanie proizvedenii nauki, literatury i iskusstva", 4 September 1973, *VVS SSSR*, 1973, No.37, item 497. See also Dietz 1973, 62-65; E. Schulze, "Vertragsabschlüsse nach Wirksamwerden des Beitritts der Union der Sozialistischen Sowjetrepubliken zum Welturheberrechtsabkommen", *UFITA*, 1975, Band 73, 8-9.
176. Point 1 h) *VAAP* Charter. See also Savel'eva 1989, 9-16.
177. Art.113 para.2 Const.1977.
178. Point 1 i), o), p) and q) *VAAP* Charter, and Point 1 p) Decree *VAAP*..
179. UPVS SSSR "O dopolnenii stat'i 103 Osnov grazhdanskogo zakonodatel'stva Soiuza SSR i soiuznykh respublik", 13 October 1976, *VVS SSSR*, 1976, No.42, item 585, and the corresponding amendment to CC 1964 on 18 October 1976, *VVS RSFSR*, 1976, No.42, item 1270 (free use for publication in braille); UPVS SSSR "O vnesenii izmenenii i dopolnenii v Osnovy grazhdanskogo zakonodatel'stva Soiuza SSR i soiuznykh respublik", 30 oktober 1981, *VVS SSSR*, 1981, No.44, item 1184, and the corresponding amendment to CC 1964 on 24 February 1987, *VVS RSFSR*, 1987, No.9, item 250.
180. See, *e.g.,* PSM RSFSR "O stavkakh avtorskogo voznagrazhdeniia za publichnoe ispolnenie proizvedenii literatury i iskusstva", 22 April 1975, *SP RSFSR*, 1975, No.8, item 49; PSM RSFSR "O stavkakh avtorskogo voznagrazhdeniia za izdanie proizvedenii nauki, literatury i iskusstva", 22 April 1975, *SP RSFSR*, 1975, No.9, item 54; PSM RSFSR "O stavkakh avtorskogo voznagrazhdeniia dlia perevodchikov izdatel'stva 'Progress' za perevody proizvedenii klassikov marksizma-leninizma na inostrannye iazyki", 6 November 1981, *SP RSFSR*, 1981, No.30, item 196.

From an international point of view, the USSR continued—to general surprise[183]—to conclude bilateral agreements with most of the Eastern Block countries even after accession to the UCC.[184] This happened in accordance with the guidelines set out in a Decree of the Council of Ministers of the USSR on 19 October 1972.[185] The existing agreements with Hungary and Bulgaria, for example, were renewed on 16 November 1977[186] and 16 January 1975[187] respectively, while new agreements were concluded with Czechoslovakia,[188] Poland,[189] and the GDR.[190] Finally, in 1981, the first bilateral agreement was concluded with a country, which did not belong to the Eastern Block, namely

181. See, *e.g.,* the various model publishing contracts which were approved on 24 February 1975 by the USSR's State committee for publishers, printers and the book trade: Voronkova *et al.* 184-200.
182. "The rights of authors [...] are protected by the state" (art.47 para.2 Const.1977). This stipulation was copied in the respective Constitutions of the different Union republics. See, *e.g.*, art.44 para.2 Const.1978. *Supra*, Nos.80-81.
183. Majoros 111, calls this "die dritte Überraschung" after the signing of the first bilateral treaty with Hungary (1967) and the entry to the UCC (1973).
184. For a general discussion, see J. Bleszynski, "Les accords bilatéraux sur la protection d'auteur entre l'URSS et les pays de démocratie populaire", in Grzybowski/Serda 159-167; R.M. Gorelik, "Dvustoronnie soglasheniia mezhdu sotsialisticheskimi stranami v oblasti okhrany avtorskikh prav" in Grzybowski/Serda 145-157; A.V. Turkin, "Dvustoronnie soglasheniia o vzaimnoi okhrane avtorskikh prav mezhdu SSSR i drugimi sotsialisticheskimi stranami", in Boguslavskii *et al.* 30-35.
185. This Decree was not published, but it was reproduced in a Decree of the Council of Ministers of the Moldavian Union Republic of 3 November 1972: PSM Moldavskoi SSR "O postanovlenii Soveta Ministrov SSSR ot 19 oktiabria 1972 No.762 'O dvustoronnikh soglasheniiakh s sotsialisticheskimi stranami o vzaimnoi okhrane avtorskikh prav'", *Sobranie Postanovlenii Pravitel'stva Moldavskoi SSR*, 1972, No.11, item 156, amend. 22 July 1974, *Sobranie Postanovlenii Pravitel'stva Moldavskoi SSR*, 1974, No.3, item 102.
186. "Soglashenie mezhdu Pravitel'stvom SSSR i Pravitel'stvom Vengerskoi Narodnoi Respubliki o vzaimnoi okhrane avtorskikh prav", *SP SSSR*, 1978, No.3, item 22. The old agreement of 1967 (*supra*, No.115) had already been amended in 1974: *RIDA*, 1975, vol.85, 212 and *DA*, 1975, 45.
187. French translation in *RIDA*, 1976, vol.90, 202-203 and *DA*, 1976, 157-158.
188. "Soglashenie mezhdu Soiuzom Sovetskikh Sotsialisticheskikh Respublik i Chekhoslovashchkoi Sotsialisticheskoi Respublikoi o vzaimnoi okhrane avtorskikh prav na proizvedeniia literatury, nauki i iskusstva", 18 March 1975, *VVS SSSR*, 1975, No.43, item 684. This agreement was preceded by an Agreement of 28 February 1972 on cultural and scientific cooperation (*SP SSSR*, 1973, No.4, item 18), art.16 of which read: "The Treaty Parties elect such a system for the protection of copyright as will enable a broad popularization of the cultural wealth of both Parties in the areas and according to the conditions determined in bilateral or multilateral agreements."
189. "Soglashenie mezhdu Pravitel'stvom SSSR i Pravitel'stvom Pol'skoi Narodnoi Respubliki o vzaimnoi okhrane avtorskikh prav", 4 October 1974, *SP SSSR*, 1975, No.4, item 28.
190. "Soglashenie mezhdu Soiuzom Sovetskikh Sotsialisticheskikh Respublik i Germanskoi Demokraticheskoi Respublikoi o vzaimnoi okhrane avtorskikh prav", 21 November 1973, *SP SSSR*, 1975, No.1, item 7. See W. Nordemann, "Der Urheberrechtsschutz von Angehörigen der Russischen Föderation in Deutschland", *ZUM*, 1997, 522.

Austria.[191] All these agreements were constructed from the principle which also lay at the basis of the UCC: the principle of assimilation, but with the application of the shortest term of protection, or the fixing of the term of protection at 25 years after the death of the author. The material reciprocity which was applied with regard to free uses in the first treaty with Hungary[192] no longer appeared in this second series of bilateral agreements, as it was contradictory to the UCC.[193] All Treaties surpassed the UCC because—unlike the UCC—they were enforced retroactively.[194] These bilateral agreements were considered the preparation to the conclusion of a multi-national East-European, socialist authors' treaty,[195] but this plan was never achieved.

Section 3. Conclusion

122. The law on copyright originated rather late in Russia (1828) and in the century-and-a-half which followed, the copyright legislation has been repeatedly and thoroughly restructured. In the period 1917-1985, the Soviet copyright legislation was reformed no less than four times: 1925-26, 1928, 1961-1964 and 1973-1974. This was not a linear development with an ever broadening definition of the rights of the author. After the October Revolution, the rather progressive Copyright Law of 1911 was not immediately rescinded, but with the approval of the Fundamentals 1925 the decline in the protection of rights became clear, mainly with regard to translation rights and the term of protection. During the Soviet period, progress was somewhat like the Echternach procession: two steps forward and one step back. After the initial abolition of the right of succession, which also affected the heirs of authors, for example, the term of copyright protection was set at 25 years after publication, then at 15 years *p.m.a.*, and then, with one step back, it was stipulated that during

191. "Abkommen zwischen der Republik Österreich und der Union der Sozialistischen Sowjetrepubliken über den gegenseitigen Urheberschutz", 16 December 1981, *UFITA*, 1982, Band 94, 243-247; German text with the official "Erläuternde Bemerkungen" on each article in Dittrich, R., *Österreichisches und internationales Urheberrecht*, Wenen, Manzsche Verlags- und Universitätsbuchhandlung, 1988, 760-766; English translation in *Rev. Soc. L.*, 1983, 85-88.

192. *Supra*, No.115.

193. M. Ficsor, "Lettre de Hongrie", *DA*, 1978, 480.

194. R. Dittrich, *op.cit.*, 763; Gavrilov 1979a, 332 and Gavrilov 1987, 226-228; K. Knap and J. Kordac, "Lettre de Tchécoslovaquie", *DA*, 1981, 192; A.V. Turkin, "Dvustoronnie soglasheniia o vzaimnoi okhrane avtorskikh prav mezhdu SSSR i drugimi sotsialisticheskimi stranami", in Boguslavskii *et al.* 33-34.

195. Gavrilov 1979b, 14; Majoros 120-122 & 177; V.P. Shatrov, *Mezhdunarodnoe sotrudnichestvo v oblasti izobretatel'skogo i avtorskogo prava*, M., 1982, 7, 194-209, 217-218. Boguslavskii also expresses himself on a further overture and harmonization of the copyright law of the socialist countries, without, however, mentioning a multilateral COMECON-agreement: M.M. Boguslavskii, "Avtorskoe pravo v usloviiakh mezhdunarodnogo kul'turnogo i nauchnogo sotrudnichestva", in Boguslavskii *et al.* 29.

the said term of 15 years the author's heirs only had the right to one-half the remuneration which the author would have received in life.

A remarkable constant in the history of copyright in Russia and the Soviet Union is the self-chosen isolationist policy. This was expressed in the fact that, on the one hand, the consecutive national copyright acts only granted rights to works of foreign authors if these were first published on Russian/Soviet territory (which was naturally a rare occurrence) and, on the other hand, denied authors translation rights in their works. In this way, the Czars and Soviet leaders tried to reduce Russia's scientific and cultural lag behind the West. The Soviet Union's accession to the UCC in 1973 meant a definitive break with both the "rightlessness" of foreign authors and the freedom of translation.

Chapter II. An Experiment Gone Wrong? The USSR'S Accession to the UCC

Introduction

123. The USSR's accession to the Universal Copyright Convention has been commented upon many times, mostly from the perspective of what the USSR could have had in mind when suddenly deciding to break out of its international copyright isolation. This is very interesting—and we, too, will deal with this question—but more important is the question of the effect that such move had on the USSR's national copyright law. It is, indeed, our opinion that the USSR's accession to the UCC had more further-reaching consequences for Soviet copyright law than was first thought and, in fact, endangered the specificity of socialist copyright.

The theory of the harmonious reconciliation of the interests of author, exploiter, and public led a sheltered existence within the closed borders of the Soviet Union (and the Eastern Bloc). Was there any device by which this theory could be maintained at the very moment that socialist copyright was confronted with copyright from a different (capitalist) system? This is the question we will ask in section 1. We will ascertain that the USSR's accession to the UCC directly (section 2) and indirectly (section 3) contributed to a doctrinal confusion, which contained the seeds of change. Thus, this Chapter is a bridge to the post-Communist period, which will be discussed in Parts II and III.

Section 1. A Dual System

Introduction

124. The USSR's accession to the UCC may have been inspired by noble ideals of political détente and the broadening of cultural exchange, but internally the Soviet Union wished to maintain Marxist-Leninist axioms and premises in full. Just as the USSR sought, through its collectivist and ideologically-sculpted fundamental rights, to limit the impact of the ratification of international human rights treaties derived from liberal thought on internal legislation,[1] so the USSR sought to screen socialist copyright off from Western, capitalist copyright.

The USSR, thus, found itself facing the apparently impossible task of both heeding Western pressure to recognize the rights of foreign authors, and continuing to safeguard the Soviet people's free access to (domestic and foreign) cultural treasures. The solution settled on was a dual system, *i.e.*, one system of protection for foreign use, and one for domestic use.[2]

1. *Supra*, Nos.57-58.
2. The same equivocal attitude was, moreover, adopted in the related field of inventors' rights. A Decree of the Council of Ministers of the USSR dated 21 August 1973 ("Polozhenie ob otkrytiiakh, izobreteniiakh i ratsionalizatorskikh predlozheniiakh", *SP SSSR*, 1973, No.19, item 109) on the one hand provided for the so-called "inventor's certificate" which entitled the inventor to remuneration and all sorts of material advantages (housing,

125. That the relationship between author and society was valued differently, in accordance with whether the interests concerned were those of a Soviet or a non-Soviet author, was apparent from the two different definitions of the concept of publication which were applied (§1). The relationship between the author and the other contracting party was also perceived differently if either of the contracting parties, and particularly the exploiter, operated outside the Soviet Union. This is apparent from the two forms of contract for copyright agreements and from the two contradictory theories concerning the transferability of rights which were applied simultaneously (§2).

§ 1. Two Definitions of the Word "Publication"

126. The dual system of copyright was apparent first of all in the double definition of the word "publication". For works directly protected by the Soviet legislation (*i.e.*, all works by Soviet citizens and works by foreigners which were first published on USSR territory or were present there in an objective form) a broad definition of the term publication (*opublikovanie/vypusk v svet*) was applied, namely the publishing, public performance, public display, broadcasting by radio or television, or an announcement by any other means to an undetermined number of people.[3] The law did not specify whether or not the author's permission was needed for publication to take place, but this was accepted in legal theory.[4] "An announcement by any means to an unspecified number of people" also included the erection of a building according to architectural plans, the sale of sound recordings, or the offering for sale of industrial products incorporating elements of applied or decorative art.[5]

For works by non-citizens published abroad and protected in the USSR by virtue of bilateral or multilateral agreements, the definition provided in the treaties was applied.[6] Thus article VI of the UCC defines the term "publication"

employment etc.), but implied no exclusive right to the invention. The right of ownership of the invention automatically fell to the state which was to ensure that the new know-how was to be disseminated as widely possible in the state enterprises. On the other hand a patent was recognized, based on Western models, which vested exclusive rights in natural and legal persons. On paper the Soviet citizen could choose between the two systems of protection. In reality the inventors' certificates were reserved for Soviet citizens, while the legally and economically stronger patents were reserved for foreign citizens or companies (A. Dietz, "Die Patentgesetzgebung der osteuropäischen Länder", *Grur Int.*, 1976, 140; K. Malfliet, "Juridische ondersteuning van technologische vooruitgang in de Sovjetunie: octrooibescherming en uitvinderseertificaat", in *De sociaal-economische rol van intellectuele rechten*, M. van Hoecke, (ed.), Brussels, Story-Scientia, 1991, 73-87). On this parallelism between patent law and copyright law, see U.K. Iskhanov, "O sviazi avtorskogo i izobretatel'skogo prava", in Boguslavskii *et al.* 89.

3. Art. 476 para. 1 CC RSFSR; see S.L. Levitsky, "The significance of 'publication' in Soviet copyright law", *Auteursrecht*, 1979 No.3, 43-49 and 59.
4. Gavrilov 1984a, 146-147; Serebrovskii 120.
5. Gringol'ts, I.A., in Fleishits/Ioffe 705; Levitsky 1985, 3.

much more narrowly as the reproduction in material form and making available to the public of copies of a work to be read or otherwise visually perceived. In the bilateral agreement with Austria, there was an explicit reference to the definition in the UCC,[7] but the other bilateral agreements[8] gave no definition of this concept. However, the working agreements between the national (state) copyright agencies, which were based on these bilateral treaties, either refer to article VI of the UCC or reproduce the relevant phrases therefrom.[9]

While under the UCC the concept of publication is therefore always tied to a material form which is reproduced and disseminated (in other words, to copies of a work), and furthermore assumes that these copies be read or otherwise visually perceived,[10] Soviet legislation recognizes ephemeral publication (*e.g.*, a public performance), publication without reproduction (the exhibiting of an original work of art), or publication of copies which can be perceived auditively but not visually (phonograms).[11]

127. The consequences of this difference in definition were felt particularly in the limitations of copyright.[12] The most far-reaching free uses and legal licenses applied to published works. A broad definition of the term "publication" consequently meant a broad application of the exceptions to copyright. A narrow definition of the term improved the position of the author as his work less easily came under the rules for free uses and legal licenses.

Since the UCC and the bilateral agreements applied a narrower definition of "publication" than did Soviet legislation, works published abroad by foreign authors[13] enjoyed broader protection in the USSR than did the works of Soviet authors. Thus, a musical work which had been publicly performed in the

6. Art.478 para.2 CC RSFSR. Levitsky 1985 (1-2)is incomplete where he says that art.VI UCC (*inter alia*) is applicable to the nationals of member states of the UCC (except Soviet citizens). In fact it applies only to their works published outside USSR territory. Works by UCC nationals published in the USSR are protected by both UCC and Soviet legislation, in which case precedence is given to national law. See Gavrilov 1979a, 333.
7. Art.2 Abkommen zwischen der Republik Österreich und der Union der Sozialistischen Sowjetrepubliken über den gegenseitigen Urheberschutz", 16 December 1981, *UFITA*, 1982, Band 94, 243-247.
8. *Supra*, No.121.
9. Voronkova *et al.* 80-127.
10. S. Durrande, "La notion de publication dans les conventions internationales", *RIDA*, 1982, vol. 111, 115-167 (application to *samizdat*); see also Nordemann *et al.* 303-307.
11. Beside the synonyms "*opublikovanie*" and "*vypusk v svet*", Soviet legislation also uses the term "*izdanie*", literally "issue", which only covers the publication of a work in printed form and thus comes close to the concept of "publication" as it occurs in the UCC, see Straus 200.
12. Straus 200.
13. Works by foreign authors first published in the USSR enjoyed the same protection in the USSR as works by Soviet authors. This is a case which was in practice as good as non-existent.

USSR could be freely reproduced in a film or freely broadcast on radio and television;[14] if a musical work by a foreign composer was publicly performed in a Contracting State to the UCC (not including the USSR), the composer's permission was still required in the USSR for exactly the same uses.[15] In the same way the public performance of a musical work recorded on phonogram and disseminated to the public was subject to a legal license,[16] in those cases where the Soviet legislator's definition of publication applied, but not when a work was protected in the USSR by virtue of the UCC.

This gave wider protection to foreigners than to domestic authors.[17] This was not a breach of the principle of assimilation of article 11 of the UCC, since this principle prevented a narrower, but not a broader, protection for non-nationals.

128. To explain this positive discrimination in favor of foreign authors, jurists pointed to the fact that these authors lacked the broad social advantages available to the Soviet authors through membership of the creative unions.[18] In other words, Western authors laboring under the yoke of capitalist entrepreneurs could, if their work was disseminated in the USSR, receive some compensation for the miserable condition (the "alienation") in which they had to work.

In any case, this broader protection for foreign authors perfectly fitted the Soviet Union's foreign policy aimed at improving understanding and defrosting relations with the West.[19]

§ 2. Two Forms of Contract and the Simultaneous Transferability and Non-Transferability of Rights

129. In the wake of the USSR's accession to the UCC, the license agreement made its appearance in Soviet copyright law. This distinguished itself from the already existing type of author's agreement in that its object was the *transfer of a right* while the other type of author agreement recognized by Soviet legislation concerned the *transfer of a work for use*.[20] In neither case was there any alienation of copyright (in the singular).

Another difference was that—unlike the agreements for the transfer of a work for use—all clauses of the license agreement could be negotiated freely.[21]

14. Art.103 point 4 Fundamentals 1961; art.492 point 4 CC RSFSR.
15. Gringol'ts 1974, 21.
16. Art.104 point 1 Fundamentals 1961; art.495 (1) CC RSFSR.
17. Ulmer was, therefore, mistaken when he wrote immediately after the USSR's accession to the UCC that "aber nicht anzunehmen ist, dass die Sowjetunion ihre Staatsangehörigen slechter stellen wird als die Urheber von Werken ausländischen Ursprungs" (E. Ulmer, "Der Beitritt der Sowjetunion zum Welturheberrechtsabkommen", *Grur Int.*, 1973, 94).
18. Gerassimov 30-31.
19. H. Bloom, "The end of samizdat? The Soviet Union signs the Universal Copyright Convention", *Index on Censorship*, 1973, No.2, 3.
20. Art.503 para.3 and 4, and art.516 CC RSFSR.
21. Art.516 CC RSFSR.

There were, after all, no administrative, quasi-normative model contracts guiding the composition of license agreements.[22] Nor were license agreements subject to the schedule of rates for the remuneration of authors fixed by the government.

130. The central question now is what circumstances decided when an agreement for the transfer of a work for use was to be drawn up and when was a license agreement of service. Did the choice of form of contract depended simply on the joint will of the contracting parties? By no means, given that in such a case the whole system of administrative model contracts would quickly have been set aside by the exploiters. Was the choice of form of contract related to the method of use in question? Although one would at first sight think the opposite,[23] the legal description of both types of author agreement lead one to conclude that the distinction between the two agreements was not based on the method of exploitation being agreed upon given that both types of contract could be used for all methods of exploitation.[24]

131. In our view, there are a number of indicators suggesting that the intention of the legislator was to reserve license agreements for international copyright traffic while agreements for the transfer of a work for use were meant for domestic dealings.

In the first place, there are a number of "coincidences" outside the text of the law, which point in this direction. The first of these is the timing of the introduction of the license agreement in Soviet legislation closely following the USSR's accession to the UCC. Only in a context in which an author's works were protected not only nationally, but beyond the borders of "the country of origin", is it meaningful to speak of international author agreements. That the accession of the USSR to the UCC on the one hand, and the introduction of the license agreements in Soviet legislation on the other, coincide can—in our view—scarcely be explained by chance.

22. There were, it is true, so-called exemplary forms. For instance, the publication in translation in the USSR of a published work by a foreign author ("Dogovor ob izdanii v SSSR v perevode vykhodivshego v svet proizvedeniia inostrannogo avtora (primernaia forma)", approved by Prikaz No.88 Predsedatelia Goskomizdata SSSR, 24 February 1975, Voronkova *et al.*, 202-204), but these did not have the normative value of model contracts.
23. In connection with the license agreement, art.503 para.4 CC RSFSR refers only to the exploiter of the translation or adaptation rights, not (explicitly at least) to other forms of exploitation. Art.516 CC RSFSR even dealt exclusively with the "license agreement for the granting of the right to use a work by translation of the work into another language or by adaptation". See Klyk 24-25; Savel'eva 1986, 114-116.
24. Art.504 CC RSFSR ended the listing of sorts of authors' agreements for the transfer of works for use with the phrase: "[...] and also other agreements concerning the transfer of works of literature, science or art for use *in any other fashion*". And arts.503 para.4 and 516 CC RSFSR only refer to license agreements for the granting of translation and adaptation rights as an example, not as an exhaustive listing.

The fact that these license agreements were not forced into the straitjacket of administrative model agreements, even though the subjection of civil-law rules to administrative regulation was, as it were, among the essentials of Soviet law, also makes it likely that license agreements as a form of contract were in the first place created to regulate contractual relations with a foreign partner. This seemed to be a concession to the desire, ascribed to potential Western contracting parties by the Soviet legislator, to be free of all the formalism typical of a planned economy when agreeing international author contracts.

There is however also a textual argument for our interpretation. Article 479 para. 4 CC RSFSR provided that "the manner of transfer by the author who is a citizen of the RSFSR, or of another Republic of the Union, of a right to the use of his work on the territory of a foreign state is determined by the legislation of the USSR". This meant that, in relations with a foreign exploiter, a Soviet author *transferred a right* of use.

This is also confirmed in the model author agreements. According to these quasi-normative models, the author transferred a particular work to the Soviet user organization for a specific use (*e.g.*, the publishing of a book) within the USSR. Here we clearly see the terminology from the very name of the "agreements for the transfer of a work for use", that is to say, there is no transfer of a right but, rather, the transfer of a work for (domestic) use. At the same time, however, one article of these model agreements states that the author *transfers* to the user organization (*e.g.*, the publisher) *his powers concerning the use abroad* of the work in question.[25] Where the use of his work abroad is concerned there is—in other words—talk of a transfer of rights, even of all rights of use, for the entire duration of copyright, to the first Soviet user organization with which the author signed an agreement concerning the work in question.[26]

Such differentiated terminology, in our view, indicates that it was the intention of the Soviet authorities to define the legal nature of the transaction differently depending on the territory for which the exploitation of the work

25. *E.g.*, art.24 MPC. See also Prins 1991a, 283 and 287. Under this clause the author did retain his right to remuneration for the exploitation of his work abroad, so that the whole arrangement—taking into account the actual impossibility for authors to negotiate other terms—boiled down to a compulsory license (Loeber 1980, 29-30). The Soviet user organization's only duty towards the author was to inform him of any proposals for publication received from abroad, and the duty of safeguarding the personal rights and economic rights of the author when negotiating an author's agreement with a foreign user organization (art.24 a) para.2 MPC). Only if the Soviet user organization did not meet the deadline for internal exploitation was the clause concerning the transfer of the rights for exploitation of the work abroad annulled by virtue of the model agreement itself (art.24 a) para.3 *in fine* MPC).

26. At a second or further agreement concerning a single work the author had to inform the other party of the fact that he had already transferred his competence concerning use of the work abroad to the first user organization.

was being permitted. To foreign publishers the *copyright* was transferred—to Soviet publishers the *work* "for use".

This does not, however, mean that the transfer of rights to a foreign exploiter would take place on the basis of a contract conforming to one of the model agreements. The above-mentioned clause was written into the agreement between the author and the first Soviet exploiter of his work. This last acquired the foreign exploitation rights, and could transfer these via the authors' agency *VAAP* (which held the state monopoly on importing and exporting copyrights[27]), to a foreign exploiter. The legal relations between *VAAP*, the author, and the first user organization were not always this clear, but it is certain that ultimately it would be *VAAP*, as representative, mediator, or in its own name, which concluded a license agreement with the foreign exploiter.[28]

132. In our view, the distinction between the two types of agreement lies precisely where Gavrilov puts it,[29] namely the agreement for the transfer of a work for use regulates the copyright relations between Soviet persons while the license agreement was meant as a form of contract for the importation and exportation of copyrights. But in contrast to the position of Gavrilov (as well as Boguslavskii and Matveev),[30] we are not of the opinion that it was the intent of the Soviet legislator to equalize the legal nature of the transaction to which each of the two types of contract gave form. In our view, it was indeed the intention to create the possibility of alienating specific exploitation rights to foreign exploiters while the Soviet user organization only received permission to use the work temporarily and in a specific manner without any author's rights being transferred to it. The Soviet legislator, apparently, judged it necessary to create clarity for the Western trading partners as to the legal nature of the transaction.[31] It was, however, not the intention to abandon the non-transferability of authors' rights in the internal legislation: after all, foreign influence could hardly be allowed to prevail over the values of socialist society.[32] And, thus, a dual system was established: the exploitation rights were consequently

27. *VAAP*'s monopoly on the foreign trade in copyrights meant that foreign user organization could make direct contact with Soviet authors and their legal heirs, but once the moment had come to draw up and sign the license agreement, *VAAP* had to be involved, and this *on pain of nullity*, see Punt 21 PPVS SSSR "O praktike rassmotreniia sudami sporov, vytekaiushchikh iz avtorskogo prava", 19 December 1967, *BVS SSSR*, 1968, No.1, 13, amend. 14 March 1975, *BVS SSR*, 1975, No.2, 21.
28. Dozortsev 1984b, 101-102; Loeber 1979, 419-427; Muravina 428-431.
29. Gavrilov 1981, 44–49.
30. Boguslavskii/Gavrilov 23; Matveev 1980, 43.
31. Compare Pechtl 68–69: "Insbesondere wird der Einwilligungstheorie mangelnde Praktiabilität im internationalen Austausch von Urheberwerken vorgehalten. Gerade diese Tatsache verdeutlicht den starken Einfluss des in internationalen Beziehungen gewonnenen Erfahrungsschatzes auf die innnerstaatliche Rechtsdiskussion [...]"
32. Savel'eva 1986, 107.

both transferable (for foreign use via license agreements) and non-transferable (for domestic use via agreements on the transfer of a work for use).

Section 2. The UCC as a Trojan Horse

133. The strategy of, on the one hand, favoring foreign authors and exploiters in comparison to their Soviet counterparts and, on the other, of safeguarding the socialist character of Soviet copyright clearly held the danger that the compartmentalization might not be watertight. Ideas from "capitalist" copyright could seep into socialist copyright via the UCC. The duality would, ultimately, be untenable.

134. Thus, Matveev found the privileged situation of foreign authors, which followed from the double definition of "publication", problematic given that it went against the principles of foreigner's legal position in the Soviet Union.[33] In order to straighten the situation out, according to Matveev, there was strictly speaking no need even to change national legislation since the supremacy of international law over national law by virtue of article 129 Fundamentals (1961) meant that the UCC definition automatically had replaced the national. According to this author, in other words, the narrower UCC definition of "publication" should have been applied to both foreign and Soviet authors under legislation in force since 1973.[34] Nevertheless, this author considered it desirable to adapt the Soviet definition of "publication" to the UCC definition. Such a correction to the legislation should, furthermore, not only be seen as a purely technical-legal operation but, rather, would amount to a considerable broadening of the collection of authors' competences of Soviet citizens "which accords completely with the general process of development of Soviet copyright, aimed at guaranteeing the most complete possible freedom of scientific, technical and artistic creation of the Soviet people".[35] Only in this way could the balance between the interests of the author and those of the community

33. Matveev 1980, 37-38. He referred at this point to the USSR's 1981 Foreigners Law (Zakon SSSR "O pravovom polozhenii inostrannykh grazhdan v SSSR", 24 June 1981, *VVS SSSR*, 1981, No.26, item 836), which recognized in principle the equality of foreign and Soviet citizens in the USSR (art.3 para.1), as well as the right of foreign citizens to hold copyright to works of science, literature and art in accordance with the Soviet legislation (art.12).

34. Iu.G. Matveev, "K voprosu o poniatii 'vypusk proizvedeniia v svet'", in Boguslavskii *et al.* 204-205. This is in our view incorrect. The UCC is only applicable to problems in international law. In purely national situations only national legislation is applied (see also I.V. Savel'eva, "Osobennosti pravovogo regulirovaniia avtorsko-pravovykh otnoshenii s inostrannym elementom v SSSR", in *Sovetskii ezhegodnik mezhdunarodnogo prava 1983*, M., 1984, 207). Furthermore, the direct application of international treaties was—despite art.129 Fundamentals 1961—a much disputed issue, the main tendency in Soviet legal theory being against the possibility of direct applicability. (On these disputes, see van den Berg 1991, 46-51.)

35. Matveev 1980, 38.

be defined in the same way irrespective of the nationality of the author or the place of publication of the work.

Matveev's comments clearly brought out that the discriminatory treatment of Soviet authors in comparison with Western authors was untenable and that there was only one way to put an end to it, namely the adaptation of socialist copyright to international law, and not the reverse.

135. The dualism with regard to the forms of contracts and the transferability of exploitation rights was ultimately also untenable for two reasons: the dualism undermined the credibility of the theory of the harmonious reconciliation of interests which lay at the basis of socialist copyright, and had furthermore been introduced clumsily, so that serious problems of interpretation arose on the basis of the amended legislation and threatened to breach the compartmentalization.

136. How could a socialist copyright law declare the exploitation rights of the author to be simultaneously both inalienable and alienable? Why was it necessary for a system of quasi-normative model contracts to streamline the relations between Soviet authors and the socialist user organizations, *all supposed to be striving in an harmonious way for the same goal*, when not a single mechanism of protection at the level of contract law or in determining the authors' remuneration was available in the relationship between Soviet authors and foreign (capitalist!) exploiters?

137. These questions were made more pointed by the failure of the Soviet legislator to make an unambiguous division between copyright for foreign and for domestic use with the consequent danger of "contamination".

Thus, in the definition of the license agreement, no reference was made to the fact that these agreements were intended to regulate the relations between a Soviet person and a foreign person. It was specified that, by virtue of a license agreement, the author granted the organization the right to use his work *including by way of translation into another language and adaptation*.[36] The explicit mention of translation rights can be attributed to the will of the legislator for the first time in Russian history to underline the recognition of translation rights,[37] while the reference to adaptation rights were to lay a connection between articles 503 and 516 CC RSFSR. Prior to 1973, this article 516 CC RSFSR regulated agreements relating to the adaptation of a work; after accession to the UCC, the article was rewritten under the title: "the author's license agreement concerning the granting of the right to use a work by means of translation into another language or adaptation". This article, consequently, only treats license agreements for translation and adaptation rights while article 503 CC RSFSR treats the license agreement in general with translation and adaptation rights only serving as examples.

36. Art.503 para.4 CC RSFSR.
37. Gavrilov 1981, 45.

The explicit mention of translation and adaptation rights in the definition of the license agreement has, however, given rise to confusion in the legal theory. Some thought that the dividing line between the agreement for the transfer of the work for use and the license agreement was to be drawn between the exploitation of the work in its original form and the exploitation of the work in altered form (translation, adaptation).[38]

If this interpretation were followed, and one were to accept that the license agreements "transfer" rights, while this is not the case in an agreement for the transfer of a work for use, the transferability of rights creeps into the internal Soviet system: some economic rights (namely, translation and adaptation rights) could then be transferred while others could not, and this irrespective of whether the author's agreement was with a socialist or a capitalist user organization.

138. But some go even further. They point to the (re)introduction in 1973-1974 of the concept "legal successor" (*pravopreemnik*), not only in the license agreement but, also, in the agreement for the transfer of a work for use, and deduce from this that not only with the license agreement but, also, with the agreement for the transfer of a work for use for domestic purposes is there a "transfer" of rights for the use the work.[39] This made unavoidable the question of whether "the fiction of the non-transferability of copyright [could] be maintained after 1973, particularly since the legislator had reintroduced the institution of "legal successors", without confining it to relationships arising under the UCC"?[40]

139. The gradual acceptance of the transferability of exploitation rights opened the door to a shift in the attention of socialist copyright from the personal rights aspect to the economic aspect. Certainly, this was only a shift of emphasis since the unbreakable bond between the author and his work was unanimously accepted and the alienation of "copyright" (in singular) was still ruled out.[41] Nonetheless, a few isolated voices were raised in favor of new views of basic principles always *en passant* and without much theoretical support.

Thus, Zharov wrote that "copyright as such has come to have the quality of a property value" (*imushchestvennaia tsennost'*).[42] Did this author mean that copyright had come to have the quality of a piece of property or a good (*tovar*)?[43] Such a statement would have been unthinkable before accession to the UCC since this was the language of a bourgeois copyright that "enabled

38. Grishaev 1991, 11-12; Klyk 24-25; Savel'eva 1986, 114-116; Shatrov 107; M. Voronkova, "Tipovye avtorskie dogovory", *Sov. Iust.*, 1975, No.22, 5. See also Ploman/Hamilton 125
39. Boguslavskii/Gavrilov 23; Matveev 1980, 41-44; Levitsky 1983, 8-9.
40. Levitsky 1983, 8.
41. *Infra*, Nos. 988 ff.
42. Quoted by Loeber 1 979, 438.
43. Loeber 1979, 438.

monopolistic, capitalist enterprises to make enormous profits" and had, therefore, become an "instrument for the exploitation of authors".[44] Nevertheless, it was Dozortsev who first described copyright as "a good", and the author as a producer of goods.[45] Rudakov and Gringol'ts were rather more careful in limiting this qualification to the obtaining and selling of copyright as part of foreign commerce[46] and in adding that copyright was no ordinary piece of merchandise given that its sale, due to the personal character of copyright, is always dependent on the permission of the author.[47] After accession to the UCC, voices were (again) to be heard describing copyright as an exclusive right.[48]

140. In conclusion, we can state that breaking out of copyright isolation led to the introduction of elements which put strong pressure on the internal consistency and a number of fundamental principles of socialist copyright. The accession of the USSR to the UCC, which had largely taken place for reasons of international policy and prestige, appeared to be neither more nor less than the bringing in of a Trojan horse, out of which—at the middle of the era of developed Socialism—crept the Gavrilovs, Dozortsevs, and Gringol'tses with their demands for internal legal consistency.

Section 3. The UCC as a Pandora's Box

141. The USSR's accession to the UCC not only led to great confusion about those points in copyright law in which the Soviet authorities had attempted to introduce a dual system. The mutability of the basic principles of Socialist copyright, which was demonstrated by the legal changes of 1973-1974, was the signal for legal theorists to demand reforms of various aspects of Soviet copyright. The discussion was already well established by the late seventies[49] and continued into the early nineties.

This discussion never brought into question the specific role of copyright law within an administrative-command economy in a communist society but did contain suggestions for legal changes, which, if accepted, would undermine the internal specificity of Soviet copyright.[50]

44. Antimonov/Fleishits 60-61; Serebrovskii 7 and 12. See also Boguslavskii 1979, 17-18 ("[In capitalist countries], works of literature, science and art are commodities exchanged for money, the author is the commodity producer and the capitalist is the commodity owner deriving profit from the work assigned by the author under a publishing contract or by any other legal means.").
45. V.A. Dozortsev, "Avtorskii dogovor i ego tipy", *SGiP*, 1977, No.2, 43-44 and 50; Dozortsev 1984a, 163. *Contra:* Shatrov 105.
46. Rudakov/Gringol'ts 15. They hereby acknowledge the dualism concerning the transferability of exploitation rights intended by the Soviet legislator.
47. Rudakov/Gringol'ts 23.
48. *Infra*, No.931.
49. Sergeev 15.

142. First of all, there was clear discontent with the division of legislative powers with regard to copyright between the Union and in the Union Republics. The necessity of such a division of powers, which was ascribed to the economic differences and national uniqueness of the Union Republics, no longer seemed obvious in the early eighties[51] as unity in the economic development of the whole country was said to have been achieved.[52] Furthermore, the fulfillment of the international copyright obligations entered into by the USSR required a uniform approach,[53] and unjustified differences in the legislation of different Union Republics (*e.g.*, with regard to the duration of protection of photographs) caused problems of collision, made the activity of creative workers more difficult, created advantages for authors working in particular Republics, and impeded the exchange of works of science, art, and literature between Republics.[54] If these considerations were not enough to support a case for the exclusive power of the federal legislator with regard to copyright, the legal theorists were unanimous in arguing for a greater role for Union legislation at the expense of the powers of the Union Republics.[55]

143. In relation to the object of copyright and the preconditions for protection, one suggestion was to stop talking of "works of science, literature, and art" and, instead, to use the more general "original, creative works of authors",[56] while another was to make the following additions to the (in any case non-exhaustive) list of works protected by copyright:[57] architectural plans,[58] slides, microfilms, collections, annotations, papers,[59] audio and visual recordings,[60] computer programs,[61] the achievements of performing artists,[62] etc. Furthermore,

50. Dozortsev 1984a, 162 wrote one year before the beginning of the period of *perestroika*: "[...] Therefore it is exceptionally important to bring copyright into conformity with the demands which the development of social relations and the new level of productive forces of the present era—the era of developed Socialism—put upon it. The abolition of the legislation currently in force is not necessary and would even be damaging."
51. Different authors indicated that the tendency to unification was already discernible because the model agreements, which according to the law were only exceptionally to be approved by the Union (art.506 para.1 CC RSFSR), in practice were always confirmed by the Union: Dozortsev 1979, 199; U.K. Iskhanov, "O sviazi avtorskogo i izobretatel'skogo prava", in Boguslavskii *et al.* 90; Gavrilov 1981, 43 and 1984a, 52-53; Leikauskas 192.
52. Gavrilov 1983, 783.
53. M.M. Boguslavskii, "Avtorskoe pravo v usloviiakh mezhdunarodnogo kul'turnogo i nauchnogo sotrudnichestva", in Boguslavskii *et al.* 29; Gavrilov 1979b, 13-14.
54. Gavrilov 1984aa, 48-50.
55. M.M. Boguslavskii, "Avtorskoe pravo v usloviiakh mezhdunarodnogo kul'turnogo i nauchnogo sotrudnichestva", in Boguslavskii *et al.* 29; Chertkov 1985, 88; Dozortsev 1979, 198-200; Dozortsev 1984a, 175-178; Gavrilov 1979b, 13-14.
56. Gavrilov 1980b, 63.
57. Art.475 para.3 CC RSFSR.
58. Pizuke 128-129.
59. Gavrilov 1979b, 10; Savel'eva 1985, 50. Collections were already mentioned in art.487 CC RSFSR.

a case was made for expressly mentioning the distinction between independent and derivative works (translations, adaptations).[63] Official documents should be (more) explicitly[64] included in a list of unprotected works.[65]

In the legal theory, some voices were raised for the abolition of the formalities for photographs,[66] the requirement of "fixing" works of choreography,[67] and the reproducibility of the objective form of the work as separate preconditions for protection.[68] To make the distinction between published and unpublished works clearer, there should only be talk of publication if the author had given permission for publication.[69]

144. In connection with the initial ownership of copyright, we refer to the clear rejection in legal theory of the original authorship of any legal person.[70] With regard to employee copyrights, Dozortsev and Gavrilov agreed that the

60. Gavrilov 1982, 6. With regard to video recordings, see also Savel'eva 1 985, 50. By virtue of art.475 para.3 CC RSFSR, "works brought to expression with the aid of mechanical or other technical recording" were considered possible objects of copyright protection. This formulation dated from the legal amendments of 1974. The original 1964 version had "gramophone records and other types of technical recordings of works", but this passage was altered to include magnetic tape. It was unclear whether the new formulation also made video grams an object of copyright (Gavrilov 1984a, 28-29; Dietz 1981, 168). Sound recordings were, thus, at least in theory protected as authorial works, independently of the protection of the work that was recorded, and irrespective of the form in which it was brought to expression (gramophone records, cassettes, etc.) (Dietz 1981, 168-169; Loeber 1980, 41), at least if one accepted that they were as such "the result of the creative activity of the author" (art.96 para.2 Fundamentals 1961; art.475 para.2 CC RSFSR). There was no separate category of so-called neighboring rights for phonogram producers.
61. Gorelik/Savel'eva 35.
62. Chernysheva 1979, 100-101; Savel'eva 1985, 50.
63. Gavrilov 1979b, 10.
64. See art.487 para.1 CC RSFSR.
65. Gavrilov 1979b, 10; Gavrilov 1980a, 69, note 4; Gavrilov 1980b, 65-66. The exclusion of old acts and monuments (art.487 para.1 CC RSFSR) was considered pointless, given that these are works which—if they ever had satisfied the requirements for copyright protection—are already unprotected due to the expiry of the term of protection (Gavrilov 1984a, 103; Savel'eva 1986, 29-30).
66. Gavrilov 1984a, 96; Gavrilov 1980b, 66; Gavrilov 1979b, 10-11; Savel'eva 1986, 3233. Gavrilov and Savel'eva point out that the formality imposed dates from the period that there was great suspicion concerning the originality and the personal nature of photographs, a suspicion which is no longer justified. Gavrilov draws a further argument from the fact that the formality was imposed by the CC RSFSR, contrary to the Fundamentals 1961 which provided for no formalities (Gavrilov 1984a, 51).
67. B.V. Kaitmazova, "Avtorskoe pravo na proizvedeniia khoreograficheskogo iskusstva", in Boguslavskii *et al.* 100.
68. Gavrilov 1984a, 88.
69. Gavrilov 1984a, 147. More on this discussion concerning the definition of the term "publication", Nos.126 ff. above.
70. *Infra*, No.973.

employee had to be considered the original author, but argued for more detailed regulation of the legal relations between employee, employer, and third user.[71]

145. With regard to the author's moral rights, Gavrilov argued for the legal codification of the inalienability of these rights,[72] for the extension of the prohibition of introducing—without the author's permission—any additions to a work (illustrations, prefaces, postscripts, commentary) upon its *publication*[73] to any method of exploitation,[74] and for the renaming of the right to inviolability as the "right of the author to give definitive shape to his work at its exploitation".[75] Pavlova wished to see recognition of a moral right to retain the original of a work of visual art.[76]

146. The economic rights of the author should, according to Gavrilov, be reorganized and extended, in the sense that in the listing of these rights in article 479 CC RSFSR translation rights[77] and the explicit recognition of adaptation rights should be included;[78] the right of publication should be formulated independently of the rights to dissemination and reproduction[79] while these latter two rights should be catalogued as aspects of the general right to use, alongside other aspects such as the right to public display, the right to public performance, the right to the reproduction of audio and visual recordings, and the right to broadcast.[80]

With regard to the specification of remuneration, Dozortsev defended the combination of a fixed sum which would function as a sort of social minimum, with a percentage of turnover from the use of the work (in other words, "dependent on the economic results of the exploitation by the user organization"). In this way, the author's remuneration would at least partially be related to the social need of the work as this was assumed to be expressed by the extent of exploitation (print-run, number of performances) but not the actual demand of cultural consumers (*e.g.*, actual sales figures).[81] Only at the beginning of the nineties would Grishaev argue for a clearer link between the sales of a book and the remuneration of the author[82] while Gavrilov took the position that

71. Dozortsev 1984a, 169-170; Gavrilov 1984a, 77.
72. Gavrilov 1988, 75.
73. Art.480 para.2 CC RSFSR.
74. Gavrilov 1984a, 143.
75. Gavrilov 1984a, 143-144. *Contra:* Savel'eva 1986, 77-78.
76. Pavlova 83.
77. Gavrilov 1979b, 11; Gavrilov 1980a, 67. At the same time, arts.489 (1) and 491 CC RSFSR had to be deleted.
78. Gavrilov 1984b, 28; Savel'eva 1985, 50.
79. Gavrilov 1984a, 150.
80. Gavrilov 1984a, 158-159 and 1988, 74.
81. Dozortsev 1984a, 170-172 and 1979, 200-202.
82. Grishaev 1991, 35-36.

the remuneration of authors should be by a fixed percentage or, if fixed sums were opted for, only minimum rates should be fixed by law.[83]

147. As we will see later, from the mid-seventies onwards, the extensive limitations of authors' rights were spoken of in legal theory with a certain embarrassment: attempts were made to minimize them, and a number of legal theorists defended the abolition of the most far-reaching free uses and legal licenses.[84]

148. With regard to the duration of copyright, there were demands that the legal confirmation be given to positions of (some) legal theorists that moral copyright be of unlimited duration,[85] unlimited original copyright vested in legal persons be reduced to a period of protection of 25 or 50 years after publication of the work, and the limitation of the period of protection of posthumously published works to ten years after publication.[86]

149. In contract law, there were arguments for increasing the liability of author and especially user organizations in cases of failure to meet commitments[87] and the extension of the maximum duration of the author's contract from three to eight or nine years, linked to a duty of exploitation on the part of the user organization.[88] Dozortsev wished to see the unjustified differences between the various model agreements harmonized through a federal government decree on authors' contracts.[89] Chernysheva made a whole series of proposals for improving the texts of the different model agreements.[90]

150. With regard to the authors' organization *VAAP* there were suggestions that it should exchange its status of legal representative for a system of normal contractual relations with authors and user organizations[91] while it was also considered useful that the position of *VAAP* in the copyright system be determined in the law itself.[92]

151. The Soviet legislation contained no separate category of neighboring rights for performing artists. An important section of legal theory was, fur-

83. Gavrilov 1991, 57.
84. *Infra*, No. 1045.
85. Boguslavskii/Gavrilov 26.
86. Gavrilov 1977, 30-31.
87. Gavrilov 1991, 54-55. Only in connection with the user organization failing to meet commitments, see: Savel'eva 1985, 51; S.A. Chernysheva, "Pravovaia reglamentatsiia avtorskikh dogovorov", in Boguslavskii *et al.* 142-143; L.V. Glebova, "Pravovye voprosy publichnogo ispolneniia muzykal'nykh proizvedenii", in Boguslavskii *et al.* 145-148; T.I. Illarionova, "Sistema okhranitel'nykh mer v sovetskom avtorskom prave", in Boguslavskii *et al.* 179-180.
88. Gavrilov 1991a, 56-57.
89. Dozortsev 1984a, 167-168.
90. S.A. Chernysheva, "Pravovaia reglamentatsiia avtorskikh dogovorov", in Boguslavskii *et al.* 137-143.
91. Dozortsev 1984b, 100, note 10; Gavrilov 1984a, 183.
92. Dozortsev 1984b, 103-104.

thermore, of the opinion that the performing artists could not be recognized as authors and thus as the holders of copyright[93] because the performance of a work by a performing artist did not bring into existence a new, independent work.[94] There was said to be a difference in creative purpose between author (self expression) and performing artist (bringing the "author's thought" across to spectators or listeners).[95] It was, moreover, indicated that a (non-fixed) performance cannot possibly be reproduced without the participation of the performing artist.[96]

De lege ferenda, Soviet legal theory did argue for the recognition of the authorship of performing artists[97] and of directors[98] or for the recognition of further undefined neighboring rights (*smezhnoe pravo* or *rodstvennoe pravo*) vested in performing artists.[99]

152.Considering all this, the accession of the USSR to the UCC seems to have opened a veritable Pandora's box. Suddenly, a whole block of issues was less settled[100] even those, which should, in no way, have been influenced by the UCC. Certainly, many of the reforms suggested related to details, formal rearrangements, or were so vague that their impact was incalculable. Of es-

93. Before the coming into effect of CC RSFSR: Antimonov/Fleishits 92-93; Koretskii, 245, 256-257; Serebrovskii 85-88. After the coming into effect of the CC RSFSR: Chernysheva 1979, 100-103; Dozortsev 1984a, 174-175; Kuznetsov 50; Martem'ianov 1984, 68-69; Sevast'ianova 189-191. *Contra:* I.A. Gringol'ts, in Fleishits/Ioffe 704; Ionas 80-85; M.Ia. Kirillova, "Sub"ekty avtorskogo prava", in Boguslavskii/Krasavchikov 51-52; N.A. Raigorodskii, *Avtorskoe pravo na kinematograficheskoe proizvedenie*, L., Izd. LGU, 1958, 11-12, 19, 52; Savel'eva 1986, 41-43; A. Vaksberg,, "S tochki zreniia praktiki", *SGiP*, 1961, No.3, 97. With regard to screen actors: Ioffe/Tolstoi 401; Vaksberg 1972, 119-121. The achievements of performing artists were then characterized as derived author's works: Chernysheva 1984, 123-124; Ionas 80-85; Savel'eva 1986, 43. According to Voronkova, however, there was absolutely no need to protect performing artists given that their rights were sufficiently protected by labor law: quoted in Ploman/Hamilton 127.
94. Gordon 29, 59; Martem'ianov 1984, 69; Serebrovskii 88.
95. Sevast'ianova 190.
96. Ioffe 1969, 21. However, technical advances and the possibility of recording performances on magnetic audio or video tape solved this problem of the reproducibility of performances: Antimonov/Fleishits 91-93; Ioffe 1969, 21-22; Savel'eva 1986, 41-42.
97. Chernysheva 1979, 100-101; M.Ia. Kirillova, "Sub"ekty avtorskogo prava", in Boguslavskii/Krasavchikov 51-52. This applied just as much to screen actors: Chernysheva 1984, 122-124.
98. Chernysheva 1979, 102-103.
99. Martem'ianov 1984, 67-74; Serebrovskii 88; Sevast'ianova 173-193; L.A. Sevast'ianova, "Proizvedeniia ispolnitel'skogo i rezhisserskogo iskusstva kak ob"ekty pravovoi okhrany", in *Materialy po inostrannomu zakonodatel'stvu i mezhdunarodnomu chastnomu pravu*, Trud No.44, M., 1989, 41-49.
100. The many suggestions we have reproduced above mostly have to be put against a background of doctrinal disputes, many of which have not been discussed here (co-authorship, the relationship between authors' rights and inventors' rights, etc.).

sential importance, in our view, were the suggestions for recognizing the right to the broadcasting of published works, for abolishing original copyright in legal persons, and for more closely circumscribing the exceptions to copyright. The consciousness that "something should be done" for performing artists, and that the copyright regulation for employee-made works needed revision, was growing. All these suggestions tended towards the strengthening of the legal position of the author in objective copyright.

It is, however, remarkable that no more radical, critical view of Soviet copyright legislation appeared. No one questioned the administrative regulation of authors' agreements and remuneration. Not one legal theorist argued for an extension of the period of protection to 50 years *p.m.a.* There was chaste silence concerning any possibility of joining the Berne Convention as well as concerning the rights of phonogram producers, resale rights, lending and rental rights, etc. The challenges posed to copyright by technical advances were only investigated sporadically—with the possible exception of the issues concerning the protection of computer programs which fall outside the scope of our study.

Section 4. Conclusion

153. The decision of the USSR to join the UCC was, in the first place, inspired by reasons of international prestige and was part of a much broader strategy aimed at acquiring Western recognition of the USSR as a power which could participate in the safeguarding of peace and security in Europe. Opting for the UCC was the path of least economic cost that yielded the greatest political profit. By setting up a dual system, the Soviet authorities thought they could shield socialist copyright from the influence of what they saw as the evil capitalist world, but the inconsistent practice of this dualism, the ultimately untenable privileging of foreign authors and exploiters, and generally the discrepancies which crept into the over-hasty amendments to the copyright legislation, made accession to the UCC the undesired point from which "classical Socialist copyright" was undermined. The unrest in Soviet legal theory grew enormously: countless doctrinal quarrels about points of principle and side issues disrupted former certainties.

In 1983 Levitsky sighed:

> Soviet accession to the Universal Copyright Convention (UCC), exactly ten years ago, appears to have disrupted the domestic copyright system far more seriously than had been anticipated, casting doubt on the continued validity of many fundamental concepts introduced in 1961-1964, and causing unexpected difficulties in the interpretation of the lex lata. […] No issue relating to copyright remains unaffected by their divided views, no copyright norm unmarked by conflicting interpretations. The UCC is invoked, in these confrontations, as an argument for change, or pointedly ignored, thus creating the distinct impression that two competing copyright systems exist simultaneously within Soviet civil legislation.[101]

In our view, Levitsky confuses cause and effect. The dual copyright system did not appear as a result of differences of theory, but, rather, the formation of different theoretical schools resulted from the dual system. A poor separation between "Soviet copyright for domestic use" and "Soviet copyright for foreign use" threw the doors wide open for "unorthodox" theories and interpretations. Most theoretical suggestions remained within the pale of the established system: they suggested only "perfecting" the legislation in the area of the internal specificity of Soviet copyright. Occasionally, a legal theorist would slip unexplained into different terminology or would make a chance remark ("exclusivity", "the author as a producer of goods") which indicated that the seeds of the downfall of socialist copyright were germinating. After all, the new terms could only become meaningful if there was a thorough transformation of the economic and political system and, consequently, the end of the external framework within which socialist copyright had to function.

101. Levitsky 1983, 5-6. Compare Ploman/Hamilton 121:

> "At present the copyright legislation in the USSR appears to be going through a transitional period resulting from the Soviet adherence to the Universal Copyright Convention which was effective 27 May 1973. Before this date Soviet policy was primarily dictated by domestic considerations. With foreign authors receiving the benefit of national treatment in the Soviet Union, in exchange for national treatment regarding Soviet authors, a greater dialogue concerning Soviet copyright principles is likely to ensue both inside and outside the Soviet Union."

PART II

SYSTEM TRANSFORMATION IN THE PERIOD 1985–2000

Introduction

154. The Soviet Union of 1985 was clearly no longer the same country as the czarist Russia of 1917. From an agricultural society, the country had developed into an industrialized state in which scarcely one fifth of the workforce was employed in the agrarian sector whereas approximately 60% were employed in industry, construction, health care, education, and the cultural (or scholarly) sectors.[1] Whereas in 1939 only 10.8 per cent of the population aged ten and above had received more than an elementary education, by 1984, 86.4 per cent of the workforce had had secondary or further education.[2] A generation of well-educated city-dwellers grew up, born after the Second World War and thus with no personal experience of the horrors of the war and the arbitrary political terror. Slowly but assuredly, and with great opportunism, they moved into the higher echelons of the *nomenklatura*.

These "young urban professionals" were dissatisfied with their Soviet life: unlike previous generations, they did not compare things with the past, when life in the USSR was much worse, but with the wealth which their European, but especially American contemporaries supposedly enjoyed according to the utterly unrealistic vision they had of the West. And such a comparison was not flattering for the post-1975 Soviet Union, with the economy as stagnant as Brezhnev's life-force especially in the production of consumer goods.[3]

Gradually, a consensus grew within the rising elite that, after the years of stagnation, economic reform was necessary.[4] But until the Communist Party had a leader aware of this need, one who had even been the co-architect of this consensus,[5] the transformation could not begin. In other words, if Gorbachev had not been born, he would have had to be invented. But as he had been born, he assumed power over the Communist Party on 11 March 1985.

155. Historians and political scientists will, undoubtedly, have their work cut out for a long time to come describing and analyzing the events which have taken place in the Soviet Union and the Russian Federation since 1985. Within a short period of time, the two pillars of the totalitarian Soviet system—the political and economic monopolies of State and Party—collapsed. Looking only at the moments when legal form was given to crucial political decisions (admittedly the results of longer-term causes), one can situate the heart of the system's transformation in the months between 14 March 1990 and 25 December 1991. The first date is that of the change in the Constitution in which—not without some symbolic drama—the Communist Party's monopoly was abrogated at the same time as the citizen's property was acknowledged as

1. A. Jones, "Social stratification", in Brown/Kaser/Smith 445.
2. *Ibid.*
3. On this new generation and their role as the "hidden engine of transition", see Löwenhardt 56-61.
4. Casier 74.
5. Casier 74-75.

equal to socialist property. The terminal date is that of Gorbachev's abdication as the President of the USSR by which the Union's last organ of state was relegated to the history books. Within this short period of just over 21 months, one more key date should be mentioned: 12 June 1990, the day of the Russian Congress of People's Representatives' Declaration of Sovereignty *and* the day on which the Supreme Soviet of the USSR forbade censorship.

156. One of the remarkable facts in the system's transformation is the joint decline of the Communist Party and of the state in which it held a monopoly position. The entwining of Party and state seemed so strong that, although both could still be distinguished, they could no longer be separated. The attempt to do so, in the second half of the eighties, led to the fall of the Party and of the State which it had overgrown. A short analysis of the fall of both and the results of this on the political debate on culture (Title I) will, thus, precede an examination of the changing conditions of creation and entrepreneurship in the Soviet Union and in Russia—first from the point of view of the establishment of a law-governed State and the recognition of human rights (Title II), and then seen from the economic perspective (Title III). Clearly, we will have to limit ourselves to the key moments and main lines of the transition from communism. Finally, we will explore the changed functions of the cultural administrations as well as the culture-specific measures which these administrations took in the different sectors (Title IV).

TITLE I
PERESTROIKA AND ITS EFFECTS ON STATE, PARTY, AND CULTURE

Chapter I. *Perestroika* and the Fall of the CPSU and the USSR

Introduction

157. Few statesmen, either in their own countries or around the world, are as strongly identified with as few words as is Mikhail Gorbachev: *perestroika* and *glasnost'*. In this Chapter, we will first recall the meaning of the buzzwords of Gorbachev's policy (section 1). Next, we investigate the transformation's main lines and, finally, the shriveling of communist ideology, the prohibition of the Party which embodied it, and the disintegration of the state in which this Party exercised an absolute monopoly on power (section 2). Here, we will concentrate only on the general outlines: many of the elements of renewal mentioned here will be discussed in greater depth from a legal perspective in subsequent chapters and titles.

Section 1. Key Concepts in Gorbachev's Reform Policy[6]

158. Gorbachev, almost immediately, acknowledged that the communist Soviet Union was going in the wrong direction,[7] a fact which was accepted just one month after the new party leader's accession in April 1985 at the plenary session of the Central Committee. Gorbachev realized that the rigidity of the Brezhnev period had to be broken to reduce the growing distance behind the West. The stagnation was to be solved by an acceleration (*uskorenie*) of the country's socio-economic development.[8] To this end, drastic reforms were necessary in all areas of society (the economy, social policy, the law, scientific research, education, culture, foreign policy): this *perestroika* in the broadest sense was "an urgent necessity which results from radical processes of development in our socialist society".[9]

The activation of the stagnating economy could only be achieved by, among other things, giving enterprises greater freedom of action, reducing the number of planning indicators, and engaging in a battle against bureaucratic methods. This was economic *perestroika*, or *perestroika* in the narrow sense.

6. For a detailed chronology of the ideological developments under Gorbachev, see Casier 71-124.
7. "An unbiased and honest approach led us to the only possible conclusion, namely that the country was on the edge of a crisis." (Gorbachev 1987, 25).
8. Gorbachev 1987, 29. See also Casier 76-77.
9. Gorbachev 1987, 17.

Gorbachev, however, understood that such an enormous task could only succeed if the populace were mobilized behind this goal: economic *perestroika* had to be backed up with socio-political *perestroika*. The Soviet citizen's involvement could only be enhanced by letting him participate in the decision-making process at all levels and in all spheres (*democratization*), not only in the state but, also, in the social organizations (such as the creative unions) and in the state enterprises. In concrete terms, this meant a reformation of the electoral system with the introduction of the possibility of choosing between different candidates,[10] election of the board of the creative unions by the members and the election of the manager of an enterprise by the employees.

For this democratization to have the envisaged effect, it was necessary that the population have reliable information on which to base decisions, and that the decision-making bodies be informed by the base itself about the shortcomings of the socialist system. That is the reason why the culture of secrecy had to be broken: the Soviet citizen had to put his finger on the sore spot, the government had to make secret information public more quickly including that relating to dark episodes in Soviet history. The Russian word for this openness was *glasnost'*.[11]

Equally important to get the workers out of their apathy was the improvement of their generally dull lives by the greater production and more equitable distribution of consumer goods and by directing politics towards the daily problems of ordinary people, the so-called *attention for the human factor*.[12] The citizen who had opportunities to develop himself in all areas of life would also develop a sense of initiative with regard to the economy.

Economic reforms, democratization, openness, and attention for the individual in society—all this could not happen without a change in the legal framework. The Soviet citizen had to be protected from the government's abuse of power, his rights and freedoms needed repackaging. The legal nihilism of the past had thus to be cast aside, those in power would henceforth speak of *the construction of a socialist constitutional state*.

10. Malfliet 1989a, 1046-1049.
11. Gorbachev 1987, 85-92; Iu.M. Baturin, (ed.), *Glasnost': mneniia, poiski, politika*, M., Iuridicheskaia Literatura, 1989. Gorbachev, in his early years as secretary-general of the CPSU, avoided the term 'freedom of the press', which was too much associated with a bourgeois society and initially even evoked the idea of chaos in reform-minded people: H. Brahm, "Glasnost—die Stunde der Wahrheit", *Osteuropa*, 1991, No.3, 239.
12. David Lane called this mobilization strategy "the self-interest of the individual and the group, including the application of the *khozraschet* principle" (D. Lane, *Soviet society under Perestroika*, London, Unwin Hyman, 1990, 13-17). In our opinion, reducing the revaluation of the individual to the acknowledgement of his economic self-interest falls short of the broad social meaning which was given to the expression 'attention for the human factor'.

Finally, all these strategies were aimed at mobilizing the populace around this one goal: the economy's *perestroika* which itself was, ultimately, intended to protect the Communist Party's monopoly of power institutionally. The aim was not the destruction of socialism, but its strengthening and the strengthening of the Party, which embodied socialism.

159. Outlined thus, Gorbachev's policy seems to be a well thought-out plan, which only needed implementing. But, this is to ignore the fact that the different elements of *perestroika* in the broad sense were not unified but, rather, were gradually added to the policy, generally in reaction to a problem which only became apparent from working on a different part of the totalitarian system.[13] Many decisions depended on whether the current alliance happened to be with "hawks" or "doves" and could be repealed at any time when their effect became apparent, to be replaced by another measure.[14]

In fact, *perestroika* was a learning process for the political leaders: incidental measures of reform, aimed at redressing particular inadequacies, uncovered new problems. Gradually, it became clear that the problems were all connected and that the old system was, itself, the greatest obstacle to overcoming the crisis in the USSR.[15]

160. The different components of *perestroika*—in the broadest sense—gradually lost their specific purposes and found their own dynamics. *Glasnost'* became freedom of expression, socialist constitutional state became constitutional state (law-based state or *Rechtsstaat*) full stop; *perestroika* of the administrative command economy became restructuring of the economic system along market lines, attention for the human factor became acknowledgement of universal

13. According to Feldbrugge it was precisely this which was
> "Gorbachev's rather unique talent, not to mention genius […] always to tune the direction and the extent of the reforms to the demands of the moment and their feasibility. As a consequence of this the political-economic-social-ideological system, very gradually and without an advance plan, evolved away from fully totalitarian principles. Gorbachev's position as the highest leader and his personal talents as a political manipulator and an extreme pragmatist gave him a unique qualification to carry this process through successfully."

(F.J.M. Feldbrugge, "The Future of the Commonwealth of Independent States", in *Post perestrojka*, K. Malfliet, (ed.), Leuven, Garant, 1993, 149)

14. It is, for example, clear that the *glasnost'* policy made a breakthrough, "thanks" to an unforeseen event, the nuclear accident in Chernobyl' in 1986, where secrecy had cost human lives, but the transnational nature of the effects of the accident forced the Soviet leaders to make the facts public many days later. From Politburo documents, published exactly six years after the events, it appears that a month after the disaster Gorbachev ordered the press to speculate less about the causes of the catastrophe and concentrate more on the positive aspects, such as the heroism of the helpers with the evacuation procedure, and the state of health of the evacuees: "Pressezensur nach Tschernobyl-Katastrophe", *Süddeutsche Zeitung*, 18 April 1992.

15. Feldbrugge 1993, 51-53.

and natural human rights. Higher authorities gave citizens, associations, and enterprises freedom to do as they thought fit—ultimately in opposition to these authorities. The collectivity was, in other words, again divided into individual components—each with its own sphere of activity, its own dilemmas and options. The public and private spheres were slowly separated from one another, a "privatization operation" in the broadest sense was initiated, of which economic privatization (in the narrow sense) was only one component. What had first seemed the fine-tuning of disparate aspects of the political and economic systems of the Soviet Union, resulted in the transformation of the system as a whole.

What is most remarkable is that this entire transformation was started, not by organized pressure from the populace, but by the initiative of the highest circles within the Communist Party itself. How did *perestroika* effect the position of the CPSU and of ideology?

Section 2. The Decline of Communism and the Soviet State

§ 1. The Fall of the Communist Party

161. The essence of a totalitarian regime is its unlimited hunger for power. In the rhetoric of the leaders, this power is to be used (and was necessary) to achieve a certain goal, but in fact obtaining power becomes a goal in itself. The lust for power stretches across all areas of life and is, thus, also totalitarian. A "free space" for the subjects is intolerable and, unrestrained, will expand faster and faster until control of society is lost. It is exactly this form of implosion, which ended communist rule in the Soviet Union.[16]

It is difficult to divine the exact cause for the Soviet regime's collapse since, in a totalitarian state, everything is linked to everything else. This might well, itself, be a cause of the downfall as it means a problem can never be isolated.

162. A totalitarian regime also tends towards conservatism; it wants to keep everything the way it is. Internal reforms are very difficult and life-threatening. Gorbachev too found this out. The more problems and the common links between these problems he discovered, the more new ideas he introduced into the political debate which he tried to immunize from the attacks of "hardliners" in the CPSU by legitimizing these ideas on the basis of traditional theories. Here, Gorbachev referred to Lenin, not in his role of revolutionary but in his role of reformer in the early twenties. This was necessary for Gorbachev to convince the opponents of *perestroika* within the Party of the benefits of the reforms: "there was no reason to panic at the sound of the word 'reform', as Lenin himself was a reformer", the argument ran.[17] Lenin became a means to

16. In the eloquent words of Feldbrugge 1993 (43), such a totalitarian system "is not killed, it is not even attacked; it succumbs under the weight of its armour".

17. See, *e.g.*, Gorbachev 1987, 27-28.

legitimize revolt against the deviations of Stalin and Brezhnev.[18] In this way, however, he distanced himself further and further from the classic ideology replacing it with postulates and goals, which were largely in contradiction therewith.[19]

163.In the "Manifesto" of the 28th Party Congress (July 1990), entitled "Towards a democratic and human socialism", ideology had shrunk to a single paragraph:"The CPSU is a party of socialist choice and of communist outlook. We consider this perspective a natural historical tendency in the development of civilization. The party's social ideals included the humanist fundamentals of human culture, a constant striving for a better life and social justice."[20] We also read that human socialism is a society "in which man is the goal of social development; [...] man's alienation from political power and material and spiritual values which were created by himself is eliminated", and this document demands "the formation of a civil society in which man does not exist for the state but the state for man".[21] And then: in the desired constitutional state "the dictatorship of any class, party, group, or administrative bureaucracy is excluded".[22]

At least two fundamental dogmas of Marxism-Leninism perished in this Manifesto: the dictatorship of the proletariat and its vanguard party, and the priority of the state over the individual.[23] Also, the historic laws, which lead to communism were now very carefully formulated. One gets the impression that "the communist outlook" (an eschatological expectation which remains intact) can only be reached if the "socialist, political choice" is taken in its favor, a choice which is to be made by the people. It is the person who determines history, not the laws of social development which are in vague terms reduced to an "orientation" (*napravlennost'*).With a few meaningless references to Lenin's *Collected Works*, the primacy of general human interests and values over the Marxist-Leninist postulates of the class struggle and the world revolution is presented.[24] The "New thinking" was, thus, indeed full of novelties and, despite the appeal to Lenin's authority, was far removed from Marxism-Leninism.[25]

164.This turnaround had no great impact on social and legal developments as, by then, the party program no longer had quasi-constitutional force. The CPSU's monopoly of ideology and politics had already been lost, not through

18. Casier 82-90.
19. Buchholz 220.
20. *Pravda*, 15 July 1990.
21. *Ibid*.
22. *Ibid*.
23. A. Ignatow, "The breakdown of ideology and the new intellectual dispositions", in *The Soviet Union 1990/91. Crisis—Disintegration—New Orientation. Domestic Policy*, in *BoiS*, February 1992, Sonderveröffentlichung, 90.
24. Buchholz 224-225; Casier 103-105, 113-114.
25. Buchholz 221-223.

external pressure but by the CPSU's voluntary distancing of itself. The state had to emancipate itself from the CPSU; the CPSU would concentrate on its executive task and less on the operational management of state, society, and economy.

165. This rhetoric was, however, not very revolutionary. When under Gorbachev's rule there was a plea for a clearer division between the tasks of party and state,[26] this was in fact merely a repetition of the traditional condemnation of the practice of the *podmena* or the exercise of functions of state by party organs.[27] Now, however, more was going on. It was increasingly clear that *perestroika* could not succeed without the support of the *nomenklatura*, but that this *nomenklatura* was, itself, part of the problem to which *perestroika* was deemed the necessary solution. Gorbachev thought he had found the way out of this dilemma by dividing state and party, putting emphasis on the state's own tasks and, thus, creating a new power base.[28]

166. The consequences of this policy became apparent on 14 March 1990 when, at the same time, as the institution of a strong presidency, article 6 Constitution (1977) was altered.[29] The article's new text ran:

> The Soviet Union's Communist Party, other political parties, as well as the union, youth and other social organizations and mass movements take part in the execution the Soviet State's policy and in the management of state and social affairs through their elected representatives for the Council of representatives, and in other forms.[30]

Immediately one pillar of Leninism collapsed: the CPSU's executive role in state and society. This loss was confirmed by the removal from the preamble to the Constitution of reference to the CPSU's leading role as vanguard of the whole people.[31]

26. See, *e.g.*, the Resolution on the democratization of Soviet Society and the Reform of the Political System ("o demokratizatsii sovetskogo obshchestva i reforme politicheskoi sistemy"), approved by the 19th All-Union Conference of the CPSU (1988), *KPSS v rezoliutsiiakh*, XV, 628-637; Gorbachev 1989a, 35-47.
27. Van den Berg 1991, 740-741.
28. F.J.M. Feldbrugge, "Constitutionele hervormingen in de USSR. Een momentopname", *NJ*, 1990, 1273.
29. Zakon SSSR "Ob uchrezhdenii posta Prezidenta SSSR i vnesenii izmenenii i dopolnenii v Konstitutsiiu (Osnovnoi Zakon) SSSR", 14 March 1991, *VSND i VS SSSR*, 1990, No.12, item 189.
30. Also in the Constitution of the RSFSR art.6 was changed with the same text as in the Union constitution, but without any explicit mention of the Communist Party: Zakon RSFSR "Ob izmeneniiakh i dopolneniiakh Konstitutsii (Osnovnogo Zakona) RSFSR", 16 June 1990, *VSND i VS RSFSR*, 1990, No.3, item 25.
31. Zakon SSSR "Ob uchrezhdenii posta Prezidenta SSSR i vnesenii izmenenii i dopolnenii v Konstitutsiiu (Osnovnoi Zakon) SSSR", 14 March 1991, *VSND i VS SSSR*, 1990, No.12, item 189. See also B. Meissner, "Die zweite Phase der Verfassungsreform Gorbachevs—Abbau der Einparteidiktatur und Errichtung eines Präsidentenamtes", *ROW*, 1991, 70, 72.

Even after this constitutional change, the CPSU retained a privileged position[32] but, now, was in competition with other parties and all manner of groups in the public arena (pluriformity).

167. The most important "head start" the CPSU had in comparison with new political movements was its well-organized omnipresence in the state apparatus, the state enterprises, the army, and so forth, thanks to the primary party organizations (PPO).[33] It is clear that, in the highest party circles, no one was prepared to give up this instrument of power. This explains the remarkable phenomenon that the economic legislation of the *perestroika* period gave enterprises greater autonomy with respect to the state but not with respect to the CPSU, which remained present in the enterprises in the form of the PPOs.[34]

168. Whereas Gorbachev wanted to safeguard the CPSU's actual monopoly by the maintenance of the PPOs, El'tsin saw in their presence in enterprises and administration the cause for the slowness with which reforms were being executed. Almost immediately after his election, on 12 June 1991, to the presidency of the most important Union Republic, the Russian Soviet Federative Socialist Republic (RSFSR), El'tsin prohibited the activities of "organizational structures" of political parties and social mass movements (with the exception of the trade unions) at all levels of the RSFSR's state organs, in the state institutions, organizations, associations, and in the enterprises which were situated in the territory of the RSFSR, irrespective of their administrative subordination and throughout the territory of the RSFSR. The *Ukaz* on "departization" (*departizatsiia*) of 20 July 1991,[35] which was prudently declared not applicable to the armed forces,[36] "struck the Communist Party at its heart".[37]

32. This already became apparent from the first place which the CPSU continued to occupy in art.6 Const.1977, but, also, became clear in the reformed electoral system, according to which a number of seats in the Congress of Representatives were reserved for CPSU members.
33. *Supra*, Nos.33 ff.
34. For example, in the law on state enterprises of 30 June 1987:
    > "The party organization of the enterprise, which is the political blood-vessel of the collective, acts within the framework of the Constitution of the USSR, guides the labor of the whole collective, of its organs of self-administration, of the trade-union, komsomol and other social organizations and monitors the operation of the administration. Social-economic decisions concerning the functioning of the enterprise are worked out and taken by the manager with the participation of the labor collective, the enterprise's internal party, union, komsomol and other social organizations in accordance with their statutes and with the law."

    (art.6 (1) para.2 Zakon SSSR "O Gosudarstvennom predpriiatii (ob"edinenii)", *VVS SSSR*, 1987, No.26, item 385.
35. Ukaz Prezidenta RSFSR "O prekrashchenii deiatel'nosti organizatsionnykh struktur politicheskikh partii i massovykh obshchestvennykh dvizhenii v Gosudarstvennykh organakh, uchrezhdeniiakh i organizatsiiakh RSFSR", 20 July 1991, *VSND i VS RSFSR*, 1991, No.31, item 1035.

169. About the same time, the CPSU made a final stab at internal reform. On 25 July 1991, the Central Committee "in principle" approved a draft of the Party program[38], which was sent through to a Party Congress in November/December 1991 for final approval.[39] This draft contained an essentially social-democratic program, without, however, a change of name for the Party. The CPSU's political activities were to be guided by social progress, the principles of humanism and general human values, the principles of democracy and liberty in all its manifestations; social justice, patriotism, and internationalism, and the integration of the country into the world community. Other important points were the protection of the rights of the citizen, the call for a free, mixed market economy, for democratization and the development of the constitutional state, the acknowledgement of private property as a valid form of ownership, and respect for religious convictions. This draft party program irrefutably confirmed the party's evolution towards social-democracy.[40] Marxism-Leninism disappeared as the guideline for social organization. Socialism was to reach its goal by the means typical of a *Rechtsstaat*.[41]

170. The attempted coup of 18 to 21 August 1991[42] was the deathblow for the Communist Party. In the Parliament on 23 August 1991, in the presence of Gorbachev, who had just returned from his enforced absence, El'tsin signed the *Ukaz* suspending the CPSU's activities on Russian territory.[43] Two days later the property of the CPSU and the CP RSFSR was nationalized.[44] On 24 August 1991, Gorbachev—who had at that time already abdicated as Party secretary and had requested the Central Committee to disband itself—extended *departizatsiia* to the Armed Forces, the security forces, and the state apparatus throughout the Soviet Union.[45] On 6 November 1991, El'tsin would change the suspension of the CPSU's activities to an outright prohibition.[46] In this

36. B. Meissner, "Gorbatschow, Jelzin und der revolutionäre Umbruch in der Sowjetunion (II)", *Osteuropa*, 1992, No.1, 39.
37. Löwenhardt 98. In the words of A. Brown, "it was to the CPSU [...] that [the decree on departization] came as a body-blow" (A. Brown, "History. The Gorbachev Era, 1985-91", in Brown/Kaser/Smith 141).
38. "Programma Kommunisticheskoi Partii Sovetskogo Soiuza. Sotsializm, demokratiia, Progress", *Pravda*, 8 August 1991. For a discussion of this draft party program, see M. Sandle, "The Final Word: The Draft Party Programme of July/August 1991", *Europe-Asia Studies*, 1996, 1131-1150.
39. See D. Mann, "Draft Party Program Approved", *Report on the USSR*, 1991, No.32, 1-5.
40. Casier 121.
41. Malfliet 1991, 360-361.
42. On this putsch, with reference to the legal acts which in that brief period were issued by the different parties involved, see B. Meissner, "Gorbatschow, Jelzin und der revolutionäre Umbruch in der Sowjetunion (III)", *Osteuropa*, 1992, No.3, 212-217.
43. *VSND i VS RSFSR*, 1991, No.35, item 1149.
44. *VSND i VS RSFSR*, 1991, No.35, item 1164.

way, the Party effectively ceased to exist in Russia as an officially-recognized organization.[47]

171. In reality, the CPSU had already lost its ideological grip on the tempestuous events in the country. The social changes, initiated by the CPSU, had turned against it. Canceling the CPSU's monopoly of power from the Constitution at the beginning of 1990 was little more than a confirmation of the decline of the CPSU's leading role which had already become apparent in many aspects of society. After all, the policy of *glasnost'* had after a while led to open opposition to the Communist Party, but what was even worse, to factionalism and discord along ideological and national lines within the CPSU itself.

172. Finally, the figure of Lenin—who had, nonetheless, been called upon by the reformers in legitimation of *perestroika*—itself became subject to discussion.[48] The "Lenin" taboo was broken, Lenin could be discussed, and the sacred, mobilizing, consensus-forming totem was gone. Lenin and his Party lost their unassailability. This became apparent on the last May Day procession in 1990 when the populace booed the Soviet leaders from their gallery on Lenin's mausoleum. Communism's symbolic system collapsed.[49]

In various Union republics, this led to a true movement of iconoclasm against the statues of communist revolutionaries.[50] In an *Ukaz* of 13 October 1990, President Gorbachev ordered the Supreme Soviets of the USSR and the Union republics to increase the penalties for the vandalizing memorials. The members of soviets at all levels could no longer adopt "demolition resolutions", and already existing resolutions were suspended.[51] This *Ukaz* was definitely not executed in the Baltic states.[52] Once the institutional turnabout was a fact and

45. *VSND i VS SSSR*, 1991, No.35, item 1026. The question whether both presidents had the authority to take such drastic decisions, was asked, but was soon drowned out in the background noise of yet another historic event. See nonetheless van den Berg 1992, 220-222; C. Thorson, "Has the Communist Party Been Legally Suspended?", *Report on the USSR*, 4 October 1991, 4-8.
46. Ukaz Prezidenta RSFSR "O deiatel'nosti KPSS i KP RSFSR", 6 November 1991, *VSND i VS RSFSR*, 1991, No.45, item 1537.
47. Feldbrugge 1993, 121. The prohibition on the interference of political parties in the activity of state organs, enterprises, institutions and other organizations was later repeated in independent Russia: Ukaz Prezidenta RF "O dopolnitel'nykh merakh po predotvrashcheniiu vmeshatel'stva politicheskikh partii i ikh struktur v deiatel'nost' Gosudarstvennykh organov, predpriiatii, uchrezhdenii i inykh organizatsii", 27 April 1993, *SAPP RF*, 1993, No.18, item 1596; *Rossiiskaia gazeta*, 5 May 1993.
48. Saizew 23-32.
49. M. Elst, "Verleden en toekomst van de socialistische riten in de Sovjetunie", *Contactblad. Tijdschrift van de Interuniversitair Centrum voor Oosteuropakunde*, February 1991, 3-7.
50. Saizew 32-36.
51. *Pravda*, 14 October 1990, 2.
52. Saizew 37.

the USSR had been relegated to the history books, the state symbols of the Soviet Union were (here and there) removed from buildings or monuments, often causing a significant amount of damage to the buildings concerned. Steps were also taken against this iconoclasm, by a Decree of the Supreme Soviet of the then independent Russian Federation of 12 June 1992.[53]

173. Finally, we should mention two more events, which happened to the CPSU in Russia after it had become sovereign with the collapse of the USSR. The first is the verdict of the Russian Constitutional Court in the CPSU case of 30 November 1992.[54] In a scantily-justified judgment, the suspension and later the prohibition of the activities of the CPSU and Russia's CPSU by the *Ukazy* of 23 August 1991[55] and 6 November 1991[56] were declared constitutional (except insofar as the local, territorially-organized PPOs which did not exercise any state functions were affected), whereas the nationalization of the property of the CPSU and Russia's CPSU by the *Ukaz* of 25 August 1991[57] was found unconstitutional (in part).[58] For the development of the law, a valueless arrest but, in political terms, a beautiful compromise which defused a political landmine. The second event was the successive electoral victory of Russia's new Communist Party (*e.g.*, 23% in the Russian Parliamentary election of 17 December 1995; around 30% for the CPSU's candidate Ziuganov in the presidential elections of 26 March 2000). It still remains to be seen whether or not the Communist Party will ever acquire an ineluctable position of power by democratic means.

§ 2. The Fall of the Soviet Union

174. The USSR's collapse paralleled the Communist Party's fall. As a federal state, the USSR never had any credibility. Although the fifteen Union republics had their own constitutions and were referred to as "sovereign" by article 76 Constitution (1977); the consequences of this (such as the Union republics'

53. PVS RF "Ob izobrazheniiakh Gosudarstvennykh simvolov byvshego SSSR", 12 June 1992, *VSND i VS RF*, 1992, No.26, item 1450. Out of care for the historical and cultural heritage the Supreme Soviet decided that the images of the state symbols of the old USSR—coat of arms and flag—could only be replaced, if they were found on official buildings or other constructions, or on objects which had come under the authority of Russia and were intended for the images of the state symbols of the Russian Federation. The replacement of them, however, was absolutely forbidden, if the state symbols of the USSR were objets d'art or part of a historical or cultural memorial, or if their replacement was not possible without damaging the construction as a whole.
54. *Rossiiskaia gazeta*, 16 December 1992, English translation in *SD*, July-August 1994, 8-43.
55. *Supra*, note 43.
56. *Supra*, note 46.
57. *Supra*, note 44.
58. Y. Feofanov, "The Establishment of the Constitutional Court in Russia and the Communist Party Case", *RCEEL*, 1993, 636-637.

residuary powers[59] and their right to secede[60]) were only accepted in theory and veiled strong centralization under the unitary leadership of the CPSU.

175. At a legal level, the federal system came under pressure in the second half of the eighties, when the federal government annulled or suspended a number of acts passed by the Baltic and Caucasian Union Republics, and these federal decrees were ignored by the republics concerned. This was the origin of what was called the war of the laws (*voina zakonov*).[61]

To give force to their demands, most Union Republics declared themselves sovereign or even independent in the course of 1989 and 1990.[62] The most important of these was undoubtedly the RSFSR's declaration of sovereignty on 12 June 1990.[63] This declaration overturned the hierarchy of norms: USSR acts, which were in conflict with the RSFSR's "sovereign rights", lost their force throughout Russian territory.[64] This principle was further elaborated in a law of 24 October 1990.[65] By virtue of this act, Soviet legislation (in a material sense) dating from before the declaration of sovereignty retained its validity until suspended by the Supreme Soviet or the Council of Ministers of the RSFSR; Soviet legislation, which was issued later, was applicable on Russian territory either directly if it concerned affairs which remained within the limits of the powers transferred to the USSR—otherwise only after ratification by the RSFSR's Supreme Soviet.[66] From the declaration of sovereignty onwards, more and more legislation was developed in parallel at the level of the Union and of the Union Republics.

59. Art.76 para.2 Const.1977.
60. Art.72 Const.1977.
61. Malfliet 1991, 362.
62. In early April 1990, a law was passed at the level of the Union which detailed the procedure for secession from the USSR (Zakon SSSR "O poriadke resheniia voprosov, sviazannykh s vykhodom soiuznoi respubliki iz SSSR", 3 April 1990, *VVS SSSR*, 1990, No.15, item 252), but the conditions of this were so strict that in the peripheral Republics this law was scornfully referred to as the law on non-secession. By virtue of a Law of the USSR of 26 April 1990 on defining the powers of the USSR and the subjects of the Federation (Zakon SSSR "O razgranichenii polnomochii mezhdu Soiuzom SSR i sub"ektami federatsii", 26 April 1990, *VSND i VS SSSR*, 1990, No.19, item 329) the USSR was a "sovereign, socialist federal state" (art.1 para.1), in which the Union republics were also sovereign (art.1 para.2). This Law allowed the Union republics to sign bilateral of multilateral agreements with one another in the field of economic and social-cultural cooperation, agreements which could not be contrary to the interests of the Union, nor to those of other member entities (art.4 para.3). This gave rise to regional cooperation accords: the Baltic States, the Central-Asian States, and the Slavonic States supplemented by Kazakhstan (Malfliet 1991, 364-365).
63. Deklaratsiia "O Gosudarstvennom suverenitete Rossiiskoi Sovetskoi Federativnoi Sotsialisticheskoi Respubliki", *VSND i VS RSFSR*, 1990, No.2, item 22.
64. Löwenhardt 84.
65. Zakon RSFSR "O deistvii aktov organov Soiuza SSR na territorii RSFSR", 24 October 1990, *VSND i VS RSFSR*, 1990, No.21, item 237.

176. The only way out of the federal system's crisis seemed to be the drafting of a new Treaty of Union to replace the old Treaty of Union of 1922 which was the basis for the existing structure; however, all attempts at this failed.[67] After the unsuccessful coup of mid-August 1991, the independence of the Baltic Republics was acknowledged by the other Union Republics[68] and by the USSR itself,[69] and other Union Republics also declared their independence: Georgia, the Ukraine (conditional on subsequent approval by referendum), Belorussia, Moldavia, Azerbajdzhan, Uzbekistan, and Kyrgyzia (Kyrgyzstan).[70] All further attempts to keep the country together were futile especially after the Ukrainians confirmed their Republic's declaration of independence in a referendum.[71]

177. On 8 December 1991, the three Slavic Republics—Russia, the Ukraine, and Belorussia—signed an "Agreement on the Foundation of a Commonwealth of Independent States" in the Belarus village Belovezhskaia Pushcha, near Minsk (henceforth: "the Minsk Agreement").[72] On 21 December, eight more Republics signed a Protocol by which they joined this Commonwealth.[73]

According to the preamble of the Minsk Agreement, at the foundation of the CIS the Soviet Union disappeared "as a subject of international law and as a geopolitical reality". The declaration of Alma-Ata of 21 December 1991, signed by eleven of the old Union Republics, gave this basically political declaration from the Minsk Agreement legal force.[74] All remaining central

66. The declaration of sovereignty is elaborated further in different legislative and executive norms. See among others Postanovlenie S"ezda narodnykh deputatov RSFSR "O razgranichenii funktsii upravleniia organizatsiiami na territorii RSFSR (osnovy novogo Soiuznogo dogovora)", 22 June 1990, *VSND i VS RSFSR*, 1990, No.4, item 63; Zakon RSFSR "Ob obespechenii ekonomicheskoi osnovy suvereniteta RSFSR", 31 October 1990, *VSND i VS RSFSR*, 1990, No.22, item 260.
67. For an overview, see J. Russell, "Improbable Unions: The Draft Union Treaties in the USSR, 1990-1991", *RCEEL*, 1996, 389-416.
68. *E.g.*, by the RSFSR: *VSND i VS RSFSR*, 1991, No.35, item 1157 and 1158.
69. See the three decrees of the Council of State of the USSR, ratified on 6 September 1991: *VSND i VS SSSR*, 1991, No.37, items 1091 (Lithuania), 1092 (Latvia) and 1093 (Estonia).
70. B. Meissner, "Gorbatschow, Jelzin und der revolutionäre Umbruch in der Sowjetunion (III)", *Osteuropa*, 1992, No.3, 219.
71. Löwenhardt 105.
72. "Soglashenie o sozdanii Sodruzhestva Nezavisimykh Gosudarstv", *Rossiiskaia gazeta*, 10 December 1991; *Diplomaticheskii vestnik*, 1992, No.1, 3-6.
73. *Pravda* and *Izvestiia*, 23 December 1991. See also Schweisfurth 1994a, 102. At that moment, of all the former Soviet republics only Georgia and the Baltic States were not members of the Commonwealth.
74. The so-called Alma-Ata Declaration (*Alma-Atinskaia deklaratsiia*), signed by 11 former Union republics (not Georgia) on 21 December 1991, *Pravda* and *Izvestiia*, 23 December 1991. Much later, under pressure from Russia, Georgia also became a member of the CIS.

institutions were abolished, including the office of president. On 25 December 1991, Gorbachev resigned as President of the USSR.

178. The CIS's first years were characterized by great contradictions between those countries which considered the CIS a transitional structure to facilitate the liquidation of the USSR and organize the complete independence of the different states (*e.g.*, the Ukraine), and those which considered the CIS the groundwork for expanding a new political and economic union (*e.g.*, Russia[75] and Kazakhstan). The deeper the economy slumped, and the economic, social, cultural, and military interdependence of the old Soviet republics and especially their dependence on Russia became apparent, the readiness of the stubborn Republics to cooperate in the expansion of the CIS grew.[76] The most important steps in this further integration were the signing of the Charter of the CIS on 22 January 1993[77] and of an Agreement on the foundation of an economic union on 24 September 1993.[78] The economic-juridical integration continued asymmetrically, *i.e.*, at a different rate. First, Russia signed bilateral agreements for the foundation of a free-trade area with a number of other member states of the CIS.[79] On 15 April 1994, the Council of Heads of State

75. Especially for Russia, the Soviet Union's collapse was an almost traumatic experience: "Durch das Ende der Sowjetunion habe 14 Völker einen Staat gewonnen. Die Russen aber haben ihren Staat verloren, denn sie betrachteten das multinationale Grossreich Sowjetunion als ihren Staat" (Simon 5). Russia lost its common borders with Czechoslovakia, Hungary, Romania, Turkey, Iran and Afghanistan, keeping only one short stretch of common border with Poland on the enclave Kaliningrad. Russia's Black-Sea coastline was reduced to one-third of its former extent, the Caspian-Sea to one-quarter, and the Baltic to one-fifth (Löwenhardt 110).

76. On this reintegration process and Russia's role in it, see K. Malfliet, "Is er een toekomst voor 'Gossologen'? Naar een evolutieve kwalificatie van de Gemenebest van Onafhankelijke Staten", in de Meyere *et par.* 21-45.

77. "Ustav Sodruzhestva Nezavisimykh Gosudarstv", *Rossiiskaia gazeta*, 12 February 1993; *Diplomaticheskii vestnik*, 1993, No.9-10, 31-38; *BMD*, 1994, No.1, 4-14. See, also, Meissner 230-237. Ratification by Russia occurred on 15 April 1993: PVS RF "O ratifikatsii Ustava Sodruzhestva Nezavisimykh Gosudarstv", *VSND i VS RF*, 1993, No.17, item 608; *Diplomaticheskii vestnik*, 1993, No.9-10, 29-38.

78. "Dogovor o sozdanii Ekonomicheskogo soiuza", *Diplomaticheskii vestnik*, 1993, Nos.19-20, 36-41. Law of approval of Russia: Federal'nyi zakon "O ratifikatsii Dogovora o sozdanii Ekonomicheskogo soiuza", 25 October 1994, *SZ RF*, 1994, No.28, item 2925. Considering the length of time ratification procedures could take, exactly three months after the signing of this treaty the Council of heads of state decided to apply it immediately on a provisional basis, until it could start functioning according to the normal principles: Reshenie "O vremennom primenenii Dogovora o sozdanii Ekonomicheskogo soiuza", 24 December 1993, *Vestnik Vysshego Arbitrazhnogo Suda Rossiiskoi Federatsii*, 1994, No.3, 53, *BMD*, 1995, No.2. On the contents of the treaty, see Göckeritz 1994, 160-161. On the same day an Agreement on the foundation of an Interstate Eurasian association of coal and steel was also approved (*CDSP*, 1994, No.2, 25-26). This was ratified by the Russian Federation on 17 February 1995: *SZ RF*, 1995, No.8, item 602.

79. See, *e.g.*, Russia's free trade agreements with Armenia (30 September 1992, *BMD*, 1993, No.7, 40-43), Kazakhstan (22 October 1992, *Zakon*, 1993, No.1, 22-24) and Ukraine (24 June 1993, *SAPP RF*, 1994, No.8, item 600; *BMD*, 1994, No.8) respectively.

decided to expand the CIS into a (multilateral) free-trade zone (the first step in the Treaty for a Economic Union) with the gradual abolition of the customs duties, taxes, and non-tariff barriers in the mutual trade of the countries of the CIS.[80] Since then Russia and Belarus[81]—together with Kazakhstan[82]—formed a customs union in January 1995, joined later on by Kyrgyzstan and Tadzhikistan.[83] On 29 March 1996 Russia, Belarus, Kazakhstan, and Kyrgyzstan signed an agreement on the deepening of economic and humanitarian integration;[84] moreover, on 2 April 1996, Russia and Belarus signed a Treaty on the formation of a Community (*Dogovor ob obrazovanii Soobshchestva*),[85] which was followed barely one year later by an even more enriching agreement on a Union (*Soiuz*) of Belarus and Russia.[86] On 8 December 1999, a new Convention on the creation of a Union State was signed by the presidents of the Russian Federation and Belarus.[87] Finally, on 10 October 2000, the Customs Union Member States

80. "Soglashenie o sozdanii zony svobodnoi torgovli", 15 April 1994, *BMD*, 1994, No.9, 10.
81. PP RF "Ob utverzhdenii rossiisko-belorusskikh dokumentov", 17 January 1995, *SZ RF*, 1995, No.5, item 417. See in execution of this: Ukaz Prezidenta RF "Ob otmene tamozhennogo kontrolia na granitse Rossiiskoi Federatsii s Respublikoi Belarus'", 25 May 1995, *Rossiiskaia gazeta*, 27 May 1995; PP RF "O merakh po realizatsii dogovorennostei mezhdu Rossiiskoi Federatsiei i Respublikoi Belarus' o formirovanii tamozhennogo soiuza", 24 May 1995, *Rossiiskaia gazeta*, 27 May 1995. For the final ratification, see Federal'nyi zakon RF "O ratifikatsii Soglasheniia o Tamozhennom soiuze mezhdu Rossiiskoi Federatsiei i Respublikoi Belarus' i Protokola o vvedenii rezhima svobodnoi torgovli bez iz"iatii i ogranichenii mezhdu Rossiiskoi Federatsiei i Respublikoi Belarus'", 4 November 1995, *Rossiiskaia gazeta*, 11 November 1995.
82. Ukaz Prezidenta RF "Ob otmene tamozhennogo kontrolia na granitse Rossiiskoi Federatsii s Respublikoi Kazakhstan", 31 December 1995, and PP RF "O merakh po realizatsii Ukaza Prezidenta Rossiiskoi Federatsii ot 31 dekabria 1995 g. No.1343 'Ob otmene tamozhennogo kontrolia na granitse Rossiiskoi Federatsii s Respublikoi Kazakhstan'", 6 March 1996, *Rossiiskaia gazeta*, 27 March 1996.
83. M. Shchipanov, "Moshchnyi impul's k sotrudnichestvu", *Rossiiskaia gazeta*, 8 February 1995. Kyrgyzstan's admission to WTO in 1998, without any specification of preferential treatment in trade with the other customs union countries, has put its further membership of the customs union at risk.
84. "Dogovor mezhdu Respublikoi Belorussiia, Respublikoi Kazakhstan, Kirgizskoi Respublikoi i Rossiiskoi Federatsiei ob uglublenii integratsii v ekonomicheskoi i gumanitarnoi oblastiakh", 29 March 1996, *Rossiiskaia gazeta*, 2 April 1996. This agreement was ratified by Russia on 21 May 1996: *Rossiiskaia gazeta*, 23 May 1996. See also the Joint declaration by the Presidents of the four Contracting Parties: *Rossiiskaia gazeta*, 30 March 1996.
85. *Rossiiskaia gazeta*, 13 May 1996. This treaty was ratified by Russia on 21 May 1996: *Rossiiskaia gazeta*, 23 May 1996. An English translation of the Treaty is published in *I.L.M.* 1996, 1190. The treaties of 29 March 1996 and 2 April 1996 are commented on by W. Göckeritz, "Die vertraglichen Grundlagen der Gemeinschaft Unabhängiger Staaten (Teil 6)", *ROW*, 1996, 241-247 (with a German translation of both treaties in the Appendix).
86. Ustav Soiuza Belarusi i Rossii, *Rossiiskaia gazeta*, 24 May 1997.
87. "Dogovor o sozdanii Soiuznogo gosudarstva", *Rossiiskaia gazeta*, 29 January 2000.

deepened their integration by signing a new treaty on the Eurasian Economic Community.[88]

179. The basic documents—to which we have made reference above—suggest that the CIS is a regional inter-governmental organization.[89] In article 1 Charter, as in the Declaration of Alma-Ata,[90] it is stated that the CIS is neither a state nor a supranational organization but, rather, cooperation between sovereign and legally-equal states. Such an organization has no means by which to force a decision onto a member State, which disagrees with the decision.[91] Relations between CIS Member states are regulated after the fashion of treaty law, rather than that of national law.[92] One could quite accurately call it integration *à la carte*: relatively few documents have yet been signed and ratified by all member states.[93] That is why they are referred to as "Agreements signed in the framework of the CIS" rather than "CIS agreements". We will see later that in the field of copyright law, one bilateral and one multilateral "agreement in the framework of the CIS" have been signed.[94]

88. "Dogovor o Evraziiskom ekonomicheskom soobshchestve (EAS)", see "CIS Customs Union States create new Eurasian Economic Union", *RFE/RL Newsline*, Part I, 11 October 2000.
89. O. Luchterhandt, "Das institutionelle und rechtliche Profil der Gemeinschaft Unabhängiger Staaten (GUS)", *Beilage zur Wochenzeitung "Das Parlament"*, 1993, No.52-53, 31, quoted by Meissner 228 note 17; Pustogarov 28-30. Meissner 227-228 characterizes the CIS as a league of states. Compare also Fisenko/Fisenko 39; W. Seiffert, "Die Stellung Russlands und der anderen GUS-Staaten in then internationalen Organisationen", in B. Meissner, (ed.), *Die Aussenpolitik der GUS-Staaten und ihr Verhältnis zu Deutschland und Europa*, Köln, 1994, 75 ff.
90. The so-called Alma-Ata Declaration (*Alma-Atinskaia deklaratsiia*), signed by 11 former Union republics (not Georgia) on 21 December 1991, *Pravda* and *Izvestiia*, 23 December 1991. (see footnote 77).
91. Art.23 Charter; art.27 para.2 Treaty on Economic Union. In the future, this could change, as it will be possible to take decisions on a number of occasions in the recently founded Interstate Economic Committee with a qualified (or exceptionally, in matters of procedure, even with a normal) majority: art.10 and Appendix 2 Agreement on the foundation of the Interstate Economic Committee of the Economic Union (*supra*, No.631, footnote 75).
92. Meissner 227.
93. A. Sheeny, "The CIS Charter", *RFE/RL Research Report*, 1993, No.12, 25.
94. *Infra*, Nos.821 ff. and No.840.

Chapter II. The Political Discourse on Culture after 1985

Section 1. Gorbachev

180. In 1985, Gorbachev became the leader of a country that had been reduced to a cultural wasteland after decades of totalitarianism. Not only had important cultural monuments been destroyed or were depositories of cultural objects (archives, libraries, museums) decaying but, also, four generations of artists and writers were, often physically, eliminated, and finally culturelessness (*beskul'turnost'*) began to dominate society.[1] Soviet cultural policy had, however, also been fruitful: the classic Russian cultural tradition of the 19th century was preserved albeit selectively and as a surrogate for contemporary cultural production; an extensive network of cultural minimum services was instituted and made accessible for large population groups; compulsory school attendance was introduced; large sections of the populace joined mass organizations of various kinds which always had a certain, albeit unilateral, range of culture on offer; thanks to state subsidies, the price for participating in cultural manifestations or the entrance fees to cultural treasures were low; and finally the *reproductive* cultural elite (musicians, ballet dancers, actors) were successfully encouraged and trained to make the ideologically-approved cultural values accessible to a wide audience in the whole country as perfectly as possible, as proof of the quality of the socialist cultural polity. The *creative, productive* cultural elite, however, fell victim to cultural leveling and the absence of pluriformity of artistic expression.[2]

181. As under the rule of Brezhnev and his direct successors culture and art had not been subjects of any importance, it is hardly contentious to say that Gorbachev rediscovered the theme in his *glasnost'* rhetoric. In his search for a social basis for his policy of *perestroika*, he could well use the support of the artistic intelligentsia.[3] This is why culture and art—which beforehand had been treated as a residuary category[4]—were again granted an important place in society under Gorbachev because "without culture or outside culture there

1. Hübner 1991, 8-17.
2. Hübner 1991, 19.
3. See, *e.g.*, the opening speech by M.S. Gorbachev at the 19th Party Conference in 1988: "Perestroika, the renewal of socialism is unthinkable without the general activation of the intellectual, spiritual potential of society [...]." *Materialy XIX Vsesoiuznoi konferentsii Kommunisticheskoi partii Sovetskogo Soiuza, 28 iiunia—1 iiulia 1988*, M., Politizdat 1988, 22.
4. Gorbachev 1987, 21:
   > "The declining speed of growth and the economic stagnation had to influence other aspects of the Soviet society. In the social field negative tendencies had a harmful effect. This led to the origin of the so-called 'final entry principle', according to which the social and cultural programs received what was left of the budget, after the money for production had been assigned."

   See, also, Hübner 1991, 20-21.

will be no socialism".[5] Hence, Gorbachev was prepared to give artists and writers more freedom in their artistic quest and also to reverse past excesses.

182. The term *glasnost'* was, however, not at all a new concept in the political discourse of the communist leaders. It had already been used by Lenin and certainly not to denote freedom of expression. *Glasnost'* in the media meant, on the one hand, highlighting positive economic achievements and, on the other hand, producing criticism and self-criticism to ban negative economic and social phenomena from the world.[6]

183. In the Resolution of the 19th Party Conference of 1988, which was dedicated to *glasnost'*,[7] an initial evaluation of the "new" policy was made. From this, it appeared that *glasnost'* fitted into the old rhetoric under Gorbachev:

> The first three years of *perestroika* have convincingly shown that by means of *glasnost'* within the work of the Party, government, social organizations, and mass media, by means of more criticism and self-criticism, and by means of the encouragement of openness and truthfulness in politics, the Party and the people as a whole [...] the restraining factors could better be identified and strong patriotic forces be mobilized to work actively and purposefully for the welfare of the country and socialism.

And:

> *Glasnost'* is an effective safeguard against every distortion of socialism based on the people's control over the work of all social institutions and all instruments of authority and administration.

Defined in such a way, the *glasnost'* policy was no more than an elaboration of article 49 Constitution (1977) which acknowledged the right to criticize. *Glasnost'* was, for Gorbachev in the first place, a weapon in the struggle against bureaucracy: the populace had to point out where the administrative machinery was failing with, as the final aim, the strengthening of *perestroika* and especially the mobilization of the intelligentsia for this purpose. *Glasnost'* ended the moment it was used to harm the interests of the people and of socialism.[8]

In its early stages, *glasnost'* thus stood for a purposeful freedom. Artists and writers were repeatedly called upon to support *perestroika* policy.[9] Hence, Gorbachev did not doubt that "the new tasks, upon which we decide today, will find a worthy echo in the artistic creativity, which strengthens the truth of socialist life".[10]

5. Gorbachev on the Plenum of the CC CPSU on 18 February 1988 ("Revoliutsionnoi perestroike—ideologiiu obnovleniia", Gorbachev 1989b, VI, 70). Compare Gorbachev's speech of 2 November 1987 on the occasion of the 70th anniversary of the October Revolution: "Intellectual culture is not only a decoration of society, but is the atmosphere of its viability, the intellectual and cultural potential of society" ("Oktiabr' i perestroika: revoliutsiia prodolzhaetsia", Gorbachev 1989b, V, 416).
6. McNair 28-29.
7. Rezoliutsiia "O glasnosti", *KPSS v rezoliutsiiakh*, XV, 646-651; Gorbachev 1989a, 60-66.
8. Fedotov 87.

184.In his inaugural speech for the important 19th Party Conference in June 1988, Gorbachev described the most important direction for cultural polity as a "return to Leninist principles".[11] The meaning of this statement only becomes fully clear when one refers back to a speech of the party leader four months earlier in which he said, paraphrasing Lenin:[12] "There can be no question of letting the processes in this [spiritual, cultural] field run their course, of allowing phenomena here which are incompatible with our ideology and morals. Such an issue is unacceptable to us."[13] This was, however, not an easy task: "Directing intellectual, cultural life is not an easy matter; it demands tact, understanding of the nature of creativity and an absolute love for literature and art, respect for talent."[14] Gorbachev was, in other words, prepared to keep a certain distance from artistic creation, but at first the imposition of a true duty of non-interference on the part of the state and the Party with regard to the individual right to artistic freedom was not part of the Soviet leader's program.

185.In any case, it was a novelty that citizens not only had the right to express criticism of the functioning of instruments of authority and social organizations, criticism which yielded information useful to the administrators in better estimating the state of the country and its economy, but, also, had to be better informed to be able to substantiate their greater participation to the political life. The CPSU accepted that this citizens' right of being informed had to be included in the Constitution.[15]

As a practical consequence, this meant that the history of the Soviet Union had to be rewritten. Moreover, writers and artists who had been victims of the

9. Gorbachev, for example, said in an encounter with writers' deputies of the Supreme Soviet SSSR and a group of writers from the capital:

   "There is a strong need for works in which contemporary conflicts, the real collisions would be revealed in a highly artistic fashion, the heat of the battle for the realization of the tasks undertaken are tangible, for works which inspire trust in the victory of the ideas and thoughts of the 27th Congress of the CPSU, confirm the original human values."

   (*Pravda* 21 June 1986). Compare the appeal to artists of the then Minister of Culture of the USSR, Gubenko, to devote themselves to "contemporary themes" (A. Kisselgoff, "Goodbye to 'Sclerotic' Soviet Culture", *International Herald Tribune*, 2 January 1990). See also Mel'nikov/Silivanchik 60.
10. Speech to the Plenum of the Central Committee CPSU, 23 April 1985, Gorbachev 1989b, II, 167.
11. *Materialy XIX Vsesoiuznoi konferentsii Kommunisticheskoi partii Sovetskogo Soiuza, 28 iiunia—1 iiulia 1988*, M., Politizdat 1988, 27.
12. *Supra*, No.15.
13. Speech to the Plenum of the Central Committee CPSU, 18 February 1988, Gorbachev 1989b, VI, 71.
14. Political report of the Central Committee CPSU to the XXVII Congress CPSU, 25 February 1986, Gorbachev 1989b, III, 273.

Stalin repression, and had not or had only partially been rehabilitated under Khrushchev, now were given a chance in a second wave of rehabilitations.[16]

186. Because of the political choice for a greater freedom for the cultural cooperators, a redefinition of the role—and especially a de-bureaucratization of the cultural administrations and the creative unions—was necessary.[17] The creative unions came, at very different speeds, to the insight that reforms were necessary.[18] The extremes were here, on the one hand, the Film Directors' Union, which took the lead artistically as well as economically in the *perestroika* of the film sector and, on the other hand, the Composers' Union which only freed itself from its gerontocracy with the greatest of difficulty.

187. The artistic intelligentsia, in the meantime, was keen to make use of its increased freedom. The stagnation was broken in all areas of the cultural field. A

15. Point 6 Rezoliutsiia "O glasnosti", *KPSS v rezoliutsiiakh*, XV, 646-651; Gorbachev 1989a, 65. See also F.A. Erzhanova, "Gosudarstvenno-pravovye aspekty printsipa glasnosti", *SGiP*, 1988, No.10, 13-14. This new aspect of the *glasnost'* concept probably owed much to the nuclear disaster in Chernobyl' in 1986. The cult of secrecy, which had led the government to hide the incident from the outside world for ten days, was uncovered in a painful manner when the consequences of the disaster became clear far beyond the boundaries of the Soviet empire (McNair 2-3).
16. In fact, this was part of a large-scale rehabilitation movement which continues up to date. In the first decade of independence, some two million repression victims were rehabilitated in Russia (*RFE/RL Newsline*, Part I, 14 March 2001).
17. In 1986, he cautioned the creative unions that "the main result of their work is not measured by the number of resolutions and sittings, but by the talented, original, socially useful books, films, shows, paintings and musical works, which can enrich the intellectual life of the people" (Gorbachev 1989b, III, 272-273). During the Plenum of the CC on 18 February 1988 Gorbachev rejected in the cultural sector, more so than in the economy, the style of administrative command: "Democracy, trust in the people, tolerance towards the unusual and towards quests, competence, benevolence, encouragement of initiative and renewal, support of talents: these are the key principles of the party work in cultural affairs, in the intellectual sphere of perestroika." ("Revoliutsionnoi perestroike—ideologiiu obnovleniia", Gorbachev 1989b, III, 71). This declaration of principles in cultural policy was repeated in the 19th Party conference's Resolution on the struggle against bureaucracy: "A favorable climate has to be created for the free exchange of opinions and ideas, and scientific and cultural policy should definitively abandon petty patronizing and the remainders of the command style" (*KPSS v rezoliutsiiakh*, XV, 638; Gorbachev 1989a, 49).
18. Moreover, in the years 1985-1987, the Union of Soviet Artists and the Union of Architects found themselves still in the firm hold of the Joint Decrees of the Central Committee of the CPSU and the Council of Ministers, which—completely in line with past methods—first praised the achievements made and, then, criticized the shortcomings in the work of administration and creative unions: Postanovlenie TsK KPSS i SM SSSR "O merakh po dal'neishemu razvitiiu izobrazitel'nogo iskusstva i povysheniiu ego roli v kommunisticheskom vospitanii trudiashchikhsia", 21 August 1986, *SP SSSR*, 1986, No.32, item 166 (visual arts); Postanovlenie TsK KPSS i SM SSSR "O dal'neishem razvitii sovetskoi arkhitektury i gradostroitel'stva", 19 September 1987, *SP SSSR*, 1987, No.45, item 149 (architecture).

significant number of new newspapers and periodicals were founded,[19] former ideological taboos were freely discussed, the criticism of art was expanded, and new independent theaters were set up,[20] formerly banned or censored films were screened,[21] works by prohibited, marginalized, banished, emigrated, or liquidated writers (Solzhenitsyn, Pasternak, Akhmatova, Bulgakov, Mandel'shtam, etc.) were published,[22] books were taken from the *spetsfondy* (libraries' closed collections) and transferred to the normal collections,[23] and avant-garde works of visual art were dug out from the depositories of museums and shown to the curious public in retrospective exhibitions.[24] Music no longer had to be programmatic or be provided with "suitable texts".[25] In short, the media and the arts explored the limits of *glasnost'* further and further.[26] Interest in socialist realism ebbed away completely, without, however, leading to an iconoclastic reaction. Rapidly, artistic freedom became a goal in itself, with no allegiance to the policy of *perestroika*.

188. From March 1990 onwards, the Constitution confirmed what had already been acquired in reality: the CPSU lost its executive role in society including the arts.[27] And some months later, the 73-year-old promise of "the passing of the broadest and most progressive law"[28] with regard to the freedom of the press was finally redeemed when, on 12 June 1990, the Supreme Soviet

19. See, *e.g.*, O. Manaev, "Etablierte und alternative Presse in der Sowjetunion unter den Bedingungen der Perestroika", *Media Perspektiven*, 1991, No.2, 100.
20. M. Glenny, "Soviet Theater: *Glasnost'* in Action—with Difficulty", in Graffy/Hosking 78-87.
21. To this end, a Committee for the solution of creative conflicts was founded in the Union of Film Directors in 1986. This committee traced earlier banned films, watched them again and marketed them (I. Christie, "The Cinema", in Graffy/Hosking 47-48). This helped a lot of new talent to surface (*ibid.*, 49-59), but it also became clear that a lot of films of well-known directors had not been screened at all, or in a heavily edited state. For example, it appeared that there were three extant versions of Tarkovskii's 'Andrei Rublev' (1966), each of different length. It transpired that the original version was about 60 minutes longer than the distributed version of 186 minutes (*ibid.*, 61). The commission in total took approximately 250 films "off the shelves" (J. Graffy, "Stripping the well-stocked shelves", *Index on Censorship*, 1991, No.3, 23).
22. De Maegd-Soep 191.
23. J. Graffy, "The Literary Press", in Graffy/Hosking 127. In late 1988 3,000 titles were taken off the index in the Lenin library, and it was expected that in the end 10,000 titles would again reach the surface: "Moskauer Einblicke in die Glasnost'", *Neue Zürcher Zeitung*, 2 October 1988.
24. S. Hochfield, "Soviet Art. New Freedom, New Directions", *Art News*, October 1987, 102-107. Hence, Russia rediscovered its great visual artists such as Chagall, Kandinskii and Malevich: De Maegd-Soep 192.
25. G. Seaman, "Russian music", in Brown/Kaser/Smith 252-253.
26. De Maegd-Soep 188-193.
27. *Supra*, No.166.
28. *Supra*, No.60.

of the USSR passed a law "On the printing press and the other news media"[29] with, as its most important provision, the abolition of censorship.[30] In reality, part of the artistic intelligentsia had by then openly turned itself against communism, and the CPSU and its current and former leaders were the object of fierce criticism. *Glasnost'* had committed parricide.

189. In the final draft of the Communist Party program,[31] published a few weeks before the failed coup of August 1991, it was stated that a communist cultural policy should have special attention for the following themes: "The struggle against the complete commercialization of intellectual activity", "the protection of the citizen from the preaching of antihuman ideas, violence and amorality", and "the combination of the freedom of creation with the moral responsibility of the artist towards society".[32] It also pleaded for the increase of the budget for culture and the promotion of the social status of the intelligentsia.[33] These last points would, indeed, appear on the political agenda regularly, no longer of the highest party organs, nor even of the highest organs of state of the USSR, but of the new administrators in sovereign Russia.

Section 2. El'tsin

190. When the Russian President El'tsin took over from Soviet President Gorbachev, he could build on his predecessor's achievements with regard to the recognition of artistic freedom. In his first Presidential Message to the Federal Assembly (the Russian version of the "State of the Union"),[34] President El'tsin stated that the totalitarian state ideology had been replaced by an awareness "of natural and historical succession, an understanding of the realities of the present world and the place of Russia in it; the value of the human person and his dignity; the relationship of the state to the nature of man; a restoration of the natural proportions of society and individuality. But the upheaval, which shows the spiritual healing, has not yet been brought back to a system of social cultural norms". The result of all this—El'tsin continues—is the loss of moral points of reference and the dehumanization of culture.

29. Zakon SSSR "O pechati i drugikh sredstvakh massovoi informatsii", 12 June 1990, *VSND i VS SSSR*, 1990, No.26, item 492; *Izvestiia*, 20 June 1990; *BVS SSSR*, 1990, No.4, 37 ff. (extract). See *infra*, Nos.272.
30. This prohibition was later repeated in the media law and in Russia's Constitution: *Infra*, Nos.275 ff.
31. *Supra*, No.589.
32. "Proekt. Programma Kommunisticheskoi Partii Sovetskogo Soiuza", *Pravda*, 8 August 1991.
33. *Ibid*.
34. Poslanie Prezidenta RF Federal'nomu Sobraniiu "Ob ukreplenii Rossiiskogo Gosudarstva (Osnovnye napravleniia vnutrennei i vneshnei politiki)", 24 February 1994, *Rossiiskaia gazeta*, 25 February 1994.

President El'tsin found that at the precise moment that freedom of creation and political independence were greater in Russia than ever before; writers, artists, museum personnel, etc., and culture in general, could not survive without support by the state. The most important question was then, according to El'tsin, to determine the optimal relationship between state and culture. On the one hand, freedom in itself is no guarantee for creative growth; on the other hand, cultural activity will sooner or later seize up if subjected to pressure in any part. Creation and coercion do not go well together; no directive issued from above can truly elevate culture.[35]

Against this reality *and* the very limited budgetary possibilities in a period of slump, the administrative approach was not the appropriate way for cultural policy. Differentiation of the channels of finance for culture was the key word, and President El'tsin's concrete suggestions were to promote patronage through tax exemptions and to pass laws on charity funds, on non-commercial organizations, on museums, on the protection of the cultural heritage of the people of the RF,[36] as well as to bear in mind the specificities of the cultural sector in other laws (including the fiscal).

191.In his second "State of the Union" of 16 February 1995,[37] El'tsin kept his two-track policy aimed at consolidating and expanding the legal framework within which artists and cultural enterprises could exercise their artistic freedom,[38] and proposing measures to improve the economic position of artists as well as of the disseminators of art by means of direct subsidies, but especially by building a legal framework to make private investment in culture possible.

The work of the state in the cultural field was, thus, far from over. El'tsin emphasized that

> Russia cannot escape its economic and spiritual crisis as long as the development of culture, science, and education remains a matter of secondary importance to the state. The pluralism in culture—the freedom of choice of cultural valuables—became the ac-

35. In these statements, we see how much President El'tsin's political opinions have evolved. In the course of the 27th Party congress of February 1986, that same El'tsin—then head of the Moscow CP and new candidate-member of the Politburo—had *complained* that the influence of the party on the arts had diminished because of the policy of non-interference pursued by the Central Committee's department of culture: M. Frankland, "Gloomy Signal from the Party Congress", *Index on Censorship*, 1986, No.6, 13.
36. In this context, he suggested amending the Criminal Code, the Code of Criminal Procedure and the Code of administrative violations to increase the criminal and administrative-law liability for crimes against the cultural heritage of the country.
37. Poslanie Prezidenta RF Federal'nomu Sobraniiu RF "O deistvennosti Gosudarstvennoi vlasti v Rossii", *Rossiiskaia gazeta*, 17 February 1995.
38. Once again, in this context, El'tsin found to his satisfaction that "an end [has been] made of the practice of prohibitions and persecutions. The state policy in the cultural sphere is based on the existing diversity in artistic schools, national artistic schools, philosophical interests of the creators" (point 2.2. "Podderzhka kul'tury, nauki i obrazovaniia", *ibid.*).

> quisition of the last years. But society is not indifferent to the question of which culture its younger generation will form. The state is the guarantor of spiritual pluralism. But it does not have the right to be at equal distance (*zanimat' ravnoudalennuiu pozitsiiu*) of the different phenomena of cultural life. Those who form the rich spiritual world of man need a special patronage (*pokrovitel'stvo*) from the state. They should receive most-favored treatment including on radio and television. The problem is not merely a shortage of means. A well-founded cultural policy is necessary. Without such a policy, no single injection of money into culture will deliver the expected effect.[39]

192. In 1998, El'tsin again emphasized the need for improving tax legislation in order to encourage charity and patronage activities but stressed, also, that this did not take away the state's responsibility for guaranteeing the development of culture, the state remaining the main Maecenas. As the budgetary means remain restricted, it is important to concentrate on clear priorities and protectionist measures especially in relation to very valuable objects of the cultural heritage of the peoples of the Russian Federation and the dissemination of the best works of literature and art of the country. Special attention goes to libraries where real *podvizhniki* work and the modernization of which is due.[40]

193. The same double theme (attracting private means for the cultural sector, and stressing the continuing state role in maintaining and conserving Russia's cultural heritage) in El'tsin's 1999 State of the Union.[41] For the first time, the President announced in this context draft laws for the creation of effective mechanisms for the protection of author's rights and for the receipt of income from commercial use of objects of the cultural heritage. And he added that the dictatorship of ideology was now replaced by the no less severe *diktat* of money. He warned that the national and cultural identities of many countries were being threatened by mass culture, a threat which needed to be taken seriously in particular in Russia, where during decades the identity of its peoples was made subordinate to the principle of internationalism.

194. To summarize, throughout the 1990s President El'tsin proclaimed initiatives in order to attract private investment—apparently without success as the announcement was repeated annually—and emphasized the role of the state in conserving the cultural heritage and the main cultural state institutions (museums, libraries, theaters). These cultural policies seems to be directed towards conserving the existing cultural richness, not towards the stimulating of new creations. Moreover, protectionism in the cultural sphere—not only from the guillotine of the market, but especially from mass culture and import of foreign products—was taken for granted.

39. "Boris El'tsin: Net zadachi vazhnee, chem utverzhdenie v nashei strane avtoriteta prava", *Rossiiskaia gazeta*, 17 February 1995.
40. B. El'tsin, "Obshchimi silami—k pod"emu Rossii", *Rossiiskaia gazeta*, 24 February 1998.
41. B. El'tsin, "Rossiia na rubezhe epokh", *Rossiiskaia gazeta*, 31 March 1999.

195. The question of how the relationship between state and culture was given shape in independent Russia during the past decade and a half will be one of the most important issues to which will return repeatedly throughout the rest of this part. To develop an overall view of Russian cultural policy, we will have to examine three aspects separately: (1) the political revolution as it became clear in, among other things, the new, liberal-individualist view of the freedom of expression and the freedom of art; (2) the economic transition to a free market economy which offers the cultural sector new possibilities, but which can also put it in great financial difficulties; and (3) the transformation of the specific cultural policy, with special attention for the nature, contents, and extent of governmental support to the cultural sectors.

TITLE II
THE TRANSFORMATION OF THE POLITICAL AND LEGAL SYSTEM

Introduction

196. The idea of the construction of a socialist rule of law was one of the key concepts in Gorbachev's policy of transformation.[1] It was probably one of the most radical reforms he could have conceived; until then: (a) legal nihilism had set the general tone;[2] (b) the principle of concentration of the legislative, executive, and legal power in the Communist Party had prevailed; (c) the "law in a formal sense" had become virtually unimportant; and (d) the citizen had no rights which could be enforced against the state.

The principle of the rule of law meant that it was the law, and no longer the Party, which occupied the highest rung of the ladder. The mutual dependency of law and state was renounced and replaced by the subjection of the state to the law.[3] It also meant the acceptance of a completely new anthropology, a man who could use the law as a shield against the abuses of state and Party. A man who also would learn how to speak out in order to achieve the democratization implied in the concept of the rule of law.

197. In this Title, we will first examine the origin and the development of the idea of the rule of law in the Soviet Union and in Russia (Chapter I). Thereafter we will outline the new concept of human rights which was introduced by Gorbachev and was consolidated under El'tsin (Chapter II); finally, we will extensively discuss freedom of speech and the freedom of artistic creation which are so relevant to artists (Chapter III). Let us state at the beginning that the democratization of the institutions—as it is expressed in the Constitution and the electoral legislation—will be mentioned only in passing even though this is also naturally an essential element in the construction of the rule of law.

1. *Supra*, No.158.
2. On the changing opinions on the role of the law in the Soviet Union from 1917 until 1985, see Bourgeois 93-96; Gorlé *et al.* 212-223. The fact that in practice the law gradually grew to be an instrument in the hands of the CPSU for education and repression of the Soviet populace does not alter the fundamentally negative attitude towards the law during the pre-Gorbachev period.
3. Gorlé 1989, 3-4. A most interesting essay on the concepts of rule of law, rule by law and *Rechtsstaat*, and their application in Russia, was written by H.J. Berman, "The struggle for law in post-Soviet Russia", in A. Sajó (ed.), *Western Rights? Post-Communist Application*, The Hague, Kluwer Law International, 1996, 41-55

Chapter I. The Russian Rule of Law and the Revaluation of the Law

Section 1. The Origin of the Idea of the Rule of Law in the Soviet Union

§ 1. The Formal Rule of Law

198. Until the early years of the Gorbachev period, the rule of law was labeled a bourgeois concept, "a deceptive expression to screen the essence of capitalist society with its exploitation of man by man".[4] Its introduction in the Soviet system was definitely not planned for 1985,[5] but the *perestroika* policy raised the socialist *Rechtsstaat* (*sotsialisticheskoe pravovoe gosudarstvo*) to a "general human cause, which is completely in agreement with the ideals of socialism".[6] Crucial to the development of Soviet law were two Resolutions adopted at the 19th Party Conference (28 June—1 July 1988): the Resolution "On the democratization of Soviet society and the reform of the political system"[7] and the Resolution "On legal reform".[8]

Point 4 of the first of these resolutions ran:

> The Conference considers it a matter of prime importance that a socialist rule of law be formed as a method of organizing political power in complete agreement with socialism. The resolving of this issue is inextricably linked with the highest guarantee of the rights and liberties of the Soviet person, the responsibility of the state towards the citizen and of the citizen towards the state, with the increase of the authority of the law and its strict observance by all party and state organs and social organizations, collectives and citizens, and with the effective work of law enforcement agencies. A radical *perestroika* of the activity of these organs has to be the heart of the legal reform which the Conference plans to effectively introduce in a relatively short period of time.[9]

The main lines of this legal reform were listed in the second of these resolutions and can be summarized as follows:[10] (a) the acknowledgement of the supremacy of the law in all spheres of society, among other things by improving and democratizing the executive operations of the highest organs of state[11] and by the introduction of constitutional control by a Committee of Constitutional Supervision; (b) the cardinal revision, codification and systematization of legislation (with attention for the legal protection of the rights and

4. Bourgeois 97.
5. Luchterhandt 169-174.
6. Vladimir Kudriavtsev, then director of the Institute for State and Law of the Academy of Sciences, in an interview with V. Shevelev, in *Moskovskie Novosti*, 2 October 1988.
7. Rezoliutsiia "O demokratizatsii sovetskogo obshchestva i reforme politicheskoi sistemy", *KPSS v rezoliutsiiakh*, XV, 628-637.
8. Rezoliutsiia "O pravovoi reforme", *KPSS v rezoliutsiiakh*, XV, 651-654.
9. See note 8, 632.
10. See note 9. For a point by point discussion of this resolution, see Gorlé 1989, 3-25.
11. Brunner 1991, 286-289.

liberties of the citizen); (c) the revaluation of the judicial power; and (d) the review of the legal education of specialists as well as of the populace.

199. The legal reform which was considered necessary for the establishment of the rule of law led to the adoption of a whole range of legislation, the most significant of which we will briefly list:

— in order to enforce the hierarchy of norms,[12] a Committee of Constitutional Supervision was created.[13] Its main task was to monitor the legality and constitutionality of Decrees of the Council of Ministers;[14]
— The constitutional provision on appeal to the courts against illegal government action (art.58 para.2 Const.1977) was put into execution;[15]
— In a constitutional amendment, the organs, powers, election and appointment as well as the mutual relations of the legislative and executive branches of power were redefined;[16]
— Measures were taken to increase the independence of judges[17] and to criminalize the insulting of judges.[18]

200. Even though some of these measures and institutes acquired their own dynamics after a certain period of adjustment,[19] most of the measures taken in the first years of *perestroika* were half-hearted. The Constitutional Supervision

12. This hierarchy of norms had, in theory, already been set forth in art.173 (priority of the constitution) and art.133 (priority of the law) of the Constitution of 1977.
13. Art.125 Constitution, imported on 1 December 1988, *VVS SSSR*, 1988, No.49, item 727, *VSND i VS SSSR*, 1989, No.29, item 574, *Izvestiia*, 6 March 1990; Zakon SSSR "O konstitutsionnom nadzore v SSSR", 23 December 1989, *VSND i VS SSSR*, 1989, No.29, item 572.
14. Brunner 1991, 295-296; Hausmaninger 305-331; Malfliet 1989a, 1045-1046; Schmid 75-76; Schweisfurth 1989, 765-767.
15. Zakon SSSR "O poriadke obzhalovaniia v sud deistvii dolzhnostnykh lits, narushaiushchikh prava grazhdan", 30 June 1987, *VVS SSSR*, 1987, No.26, item 388, amended 20 October 1987, *VVS SSSR*, 1987, No.42, item 692. For its background and a discussion of this law, see H. Oda, "Judicial Review of Administration in the USSR", in *The Impact of Perestroika on Soviet Law*, A.J. Schmidt, (ed.), in *Law in Eastern Europe*, vol.41, Dordrecht, Martinus Nijhoff Publishers, 1990, 157-171. This law was replaced by a homonymic Law of 2 November 1989, *VSND i VS SSSR*, 1989, No.22, item 416. See Henderson 88-89; Schmid 74-75.
16. Zakon SSSR "Ob izmeneniiakh i dopolneniiakh Konstitutsii (osnovnogo Zakona) SSSR", 1 December 1988, *VVS SSSR*, 1988, No.49, item 727; Zakon SSSR "O vyborakh narodnykh deputatov SSSR", 1 December 1988, *VVS SSSR*, 1988, No.49, item 729. See Malfliet 1989a, 1041-1049; Luchterhandt 191-197; Schweisfurth 1989, 748-765.
17. Zakon SSSR "O statuse sudei v SSSR", 4 August 1989, *VSND i VS SSSR*, 1989, No.9, item 223. See Gorlé 1991, 148-151. In general, on the independence of the legal power in the USSR, see: Brunner 1991, 291-294; Gorlé 1987, 842-843 and 845-847; Luchterhandt (199-200) who(in note 126) refers to other normative acts in connection with the legal position of the judges. On this see, also, Gorlé 1991, 153-157; Malfliet 1989a, 1049; Oda 245-248; Savitskii 1990, 61-68; Schmid 72-74.
18. *VSND i VS SSSR*, 1989, No.22, item 418. See Gorlé 1991, 151-152.

Committee, for example, only had the authority to suspend and not to nullify, unless the disputed governmental act was in violation of human rights.[20] Many administrative acts remained outside the area of application of the law on appeal to the judge for unlawful government action, and such appeal was only admissible subject to a prior administrative complaint to the superior of the official against whose deeds action was brought.[21] The number of laws in a formal sense did indeed increase, but the legislature was itself still not democratically elected and the quality of the laws was not very high.[22] Judges were still not appointed for life and the people's assessors were still elected by the populace or appointed by the representative body of the administrative echelon which corresponded to their jurisdiction, unlike the professional judges who were appointed by the representative body of the immediately higher echelon.[23]

201. A major obstacle to giving credibility to the attempt to establish the rule of law was the preservation of the CPSU's monopoly of power.[24] Only when the Party's monopoly of power was struck from the Constitution[25] could one truly say that the Soviet Union had begun to establish the rule of law.[26]

222. The introduction and gradual implementation of ideas such as the independence of the judiciary, the democratization of the legal process and the separation of powers, the supremacy of the law, and so forth, moved the Soviet Union towards a *formal* rule of law. Central to this was the principle of legalization: the executive organs have to observe the laws in all their activities (= priority of the law) and could only interfere to regulate civil rights if they had been explicitly empowered to do so by a formal law, *i.e.*, the decision to

19. This was certainly the case of the Committee of Constitutional Supervision (Feldbrugge 1993, 68; C. Thorson, "Legacy of the USSR Constitutional Supervision Committee", *RFE/RL Research Report*, 1992, No.13, 55-59). For example, in a decree of 29 November 1990 it put an end to the practice of unpublished normative acts in the area of the human rights. See Zakliuchenie Komiteta Konstitutsionnogo Nadzora SSSR "O pravilakh, dopuskaiushchikh primenenie neopublikovannykh normativnykh aktov o pravakh, svobodakh i obiazannostiakh grazhdan", *Sov. Iust.*, 1991, No.3, 29-30. The secret law in other areas (*e.g.*, in the economic law) remained out of range: van den Berg 1991, 81.
20. Art.21 Zakon SSSR "O konstitutsionnom nadzore v SSSR", 23 December 1989, *VSND i VS SSSR*, 1989, No.29, item 572.
21. Henderson 89; Savitskii 1993, 656-658.
22. On this see, *inter alia*, the remarks of the head of the Institute for Legislation and the Comparative Study of Law, A.S. Pigolkin, at the round table conference organized by the journal *State and Law*: "Zakonodatel'stvo Rossiiskoi Federatsii: teoreticheskie voprosy, problemy i perspektivy. 'Kruglyi stol' zhurnala", *GiP*, 1992, No.10, 4-5.
23. Gorlé 1991, 158.
24. Gorlé 1989, 4; Luchterhandt 189-191.
25. *Supra*, No.166.
26. The qualification 'socialist' was soon dropped: Luchterhandt 226-229. It was, indeed, unclear how the socialist rule of law differed from the non-socialist: Gorlé 1989, 16-18; Fogelklou 24-25; van den Berg 1991, 284-285; van der Zweerde 187-188.

define restrictions to human rights is reserved to the legislator (= reservation to the law).[27]

This concept of the rule of law is formalistic, as the elements which are considered necessary for it regulate the form, the procedure of materialization, the mutual hierarchical relationships and the supervisory mechanisms, but do not touch the contents of the legal standards. The legislator is himself only bound to the law until he changes it. The legislator has to observe the procedure set out in the Constitution, but is not limited with regard to contents. On the basis of the reservation of the law, the legislature can restrict human rights to its heart's content. It is, thus, in fact a "Rule of legality".[28]

§ 2. The Material Rule of Law

203. In a *material* conceptualization of the rule of law, law is not equated with legal texts; rather, legislation is only legitimate if it is also just. With regard to contents the laws have to meet "den von allen vernünftigen Menschen anerkannten elementaren Grundsätzen der Gerechtigkeit".[29] The concept of a material rule of law thus presupposes respect for universally acknowledged human rights,[30] by the legislature as much as by anyone else.

The issue of human rights will be treated in the next Chapter, it will suffice here to indicate that, under Gorbachev, the Soviet Union was to effectively strive for the introduction of a *material* rule of law. The reformed view of human rights as a factor in *perestroika*'s attention for the human factor is proof that, from the start, the Soviet leaders sought to give strong impulses to the foundation of a material rule of law in which legislation had to meet certain criteria with regard to contents.[31]

This was also noticeable in Russian legal theory at the end of the eighties. This distanced itself from the legal positivism which had until then been dominant, in which legality and justice were considered equal. It was now emphasized that, under the rule of law, there was a need for a just legality (*pravovaia zakonnost'*), in which respect for the classic human rights and liberties was given absolute priority.[32]

Section 2. The Implementation of the Idea of the Rule of Law in the Russian Federation

204. When the Russian Federation gained its fullness of authority as a sovereign state, it essentially continued along the route plotted out in the latter days of the Soviet Union. In the new Constitution of the Russian Federation, which

27. Luchterhandt 161-162.
28. Luchterhandt 162.
29. Luchterhandt 162.
30. Fogelklou 17.
31. Brunner 1991, 296-297; Fogelklou 22.
32. Van der Zweerde 183-184.

was passed by referendum in a very turbulent episode in recent Russian history (at any rate unworthy of the rule of law) on 12 December 1993,[33] Russia declared itself a democratic federative state under the rule of law.[34]

205. The Russian Constitution itself contains a whole series of provisions which indeed justify this claim. Moreover, a great deal of legislation had already been enacted which further developed the idea of the rule of law. To name but the most important elements:

— In article 2 Constitution 1993 human beings, their rights and freedoms are called the highest values. The acknowledgement, observance, and defense of the rights and freedoms of man and the citizen are the duty of the state. The Constitution indeed also sums up a series of basic rights (arts.17-64), which we will later discuss separately.[35] The protection of the rights and freedoms of the citizen against unjustifiable governmental action was made more effective by a law of 27 April 1993[36] with a broader area of application and easier access to the courts of law than was the case under the Soviet legislation.[37]

— Article 3 Constitution 1993 called the multinational populace the bearer of sovereignty and the only source of power. The highest direct expressions of the power of the people are referenda[38] and free elections.[39]

— Article 4 (2) Constitution 1993 confirms that the Constitution and the federal laws enjoy preeminence throughout the territory of the Russian Federation, and that by virtue of article 15 (1) the Constitution has the highest legal power and is self-executing (insofar as it does not contain any norms of a purely referring nature),[40] and the laws and other legal acts ratified in the RF, cannot be inconsistent with it.[41] Supervision of the legality of an act of a state or other body[42] is entrusted to the ordinary

33. "Konstitutsiia Rossiiskoi Federatsii", *Rossiiskaia gazeta*, 25 December 1993.
34. Art.1 (1) Const.1993.
35. *Infra*, Nos.236 ff.
36. Zakon RF "Ob obzhalovanii v sud deistvii i reshenii, narushaiushchikh prava i svobody grazhdan", 27 April 1993, *VSND i VS RF*, 1993, No.19, item 685, *Rossiiskaia gazeta*, 12 May 1993, amended by Federal'nyi Zakon RF, 14 December 1995, *Rossiiskaia gazeta*, 26 December 1995. *Infra*, Nos.257 ff.
37. Savitskii 1993, 458-660.
38. See, also, Federal'nyi Konstitutsionnyi Zakon RF "O referendume Rossiiskoi Federatsii", 10 October 1995, *Rossiiskaia gazeta*, 19 October 1995.
39. On the elections of the President, see art.81 Const.1993; Federal'nyi Zakon RF "O vyborakh Prezidenta Rossiiskoi Federatsii", 17 May 1995, *Rossiiskaia gazeta*, 23 May 1995. On the election of the State *Duma*: arts.95, 96 and 97 Const.1993; Federal'nyi Zakon RF "O vyborakh deputatov Gosudarstvennoi Dumy Federal'nogo Sobraniia Rossiiskoi Federatsii", 21 June 1995, *Rossiiskaia gazeta*, 28 June 1995. On the citizens' passive and active right to vote: Federal'nyi Zakon RF "Ob osnovnykh garantiiakh izbiratel'nykh prav grazhdan Rossiiskoi Federatsii", 6 December 1994, *SZ RF*, 1994, No.33, item 3406, *Rossiiskaia gazeta*, 10 December 1994.

courts of law (art.120 (2) Const.) which can decide not to apply a lower norm if it is inconsistent with a higher norm.[43] The direct applicability of the Constitution also gives the ordinary courts of law the authority to test laws and other normative acts against the Constitution and to consider whether or not they should be applied.[44] In case of doubt concerning the constitutionality of laws the court of law has to direct a pre-judicial query to the Constitutional Court[45] which was founded and which functions by virtue of article 125 Constitution 1993 and a Law of 24 June 1994.[46,47]

40. Point 2 para.3 PPVS RF "O nekotorykh voprosakh primeneniia sudami Konstitutsii Rossiiskoi Federatsii pri osushchestvlenii pravosudiia", 31 October 1995, *Rossiiskaia gazeta*, 28 December 1995. The Supreme Court was encouraged to speak out on the question of the direct applicability of the Constitution by the courts of law by President El'tsin, who stated in his second Message to the Federal Assembly: "It is desirable that the Plenum of the Supreme Court of Law RF would in the near future investigate the possibility of giving clarification concerning the necessity of basing oneself on the Constitution RF as an act of direct applicability" (Point 2.4. "O deistvennosti gosudarstvennoi vlasti v Rossii", 16 February 1995, *Rossiiskaia gazeta*, 17 February 1995).
41. Schwarzer 825-826. See, also, arts.90 (3) and 115 Const.1993.
42. For a clarification, see point 7 para.2 PPVS RF "O nekotorykh voprosakh primeneniia sudami Konstitutsii Rossiiskoi Federatsii pri osushchestvlenii pravosudiia", 31 October 1995, *Rossiiskaia gazeta*, 28 December 1995.
43. Compare, also, PPVS RF No.5 "O nekotorykh voprosakh, voznikaiushchikh pri rassmotrenii del po zaiavleniiam prokurorov o priznanii pravovykh aktov protivorechashchimi zakonu", 27 April 1993, *BVS RF*, 1993, No.7, 8-10; *Sov. Iust.*, 1993, No.12, 31; *Zakonnost'*, 1993, No.9, 53-55.
44. Point 2 para.1 and 2 PPVS RF "O nekotorykh voprosakh primeneniia sudami Konstitutsii Rossiiskoi Federatsii pri osushchestvlenii pravosudiia", 31 October 1995, *Rossiiskaia gazeta*, 28 December 1995. According to Gadzhiev 1994b, 63, the ordinary courts can only apply art.34 Const.1993 (freedom of enterprise) if no laws exist or only laws from before the coming into force of Const.1993. If the court is of the opinion that a law (of a later date) is contrary to the Constitution, the court *must* put a prejudicial query to the Constitutional Court (Gadzhiev 1994b, 69).
45. Art.125 (4) Const.1993; art.101 Federal'nyi Konstitutsionnyi Zakon "O Konstitutsionnom Sude Rossiiskoi Federatsii", 24 June 1994, *SZ RF*, 1994, No.13, item 1447, *Rossiiskaia gazeta*, 23 July 1994; Point 3 PPVS RF "O nekotorykh voprosakh primeneniia sudami Konstitutsii Rossiiskoi Federatsii pri osushchestvlenii pravosudiia", 31 October 1995, *Rossiiskaia gazeta*, 28 December 1995.
46. Federal'nyi Konstitutsionnyi Zakon "O Konstitutsionnom Sude Rossiiskoi Federatsii", 24 June 1994, *SZ RF*, 1994, No.13, item 1447, *Rossiiskaia gazeta*, 23 July 1994. For a discussion, see Iu.L. Shul'zenko, "Zakon o konstitutsionnom sude Rossiiskoi Federatsii 1994 g.", *GiP*, 1995, No.7, 3-10. This Court had, in fact, been founded as early as 1991 (Zakon RSFSR "O Konstitutsionnom sude RSFSR", 12 July 1991, *VSND i VS RSFSR*, 1991, No.30, item 1017, *Sov. Iust.*, 1991, No.21-22, 37-53, English translation in *SD*, November-December 1994, 42-94. For a discussion of this law, see *inter alia* Gadzhiev/Kriazhkov 3-11; Schweisfurth 1993, 284-294; R. Sharlet, "The Russian Constitutional Court: The First Term", *Post Soviet Affairs*, 1993, 1-39), and initially gained some esteem through its judgments in the struggle between the executive and the legislative powers, but because

One of the most important powers of this Court is the testing (against the Constitution) of federal laws in a formal sense, but, also, of normative acts of the President, the Council of the Federation, the State *Duma*, and the Council of Ministers.[48]

— Article 10 Constitution 1993: State power is exercised on the basis of the separation of powers among the legislative, executive, and judicial power (branches), and the organs of these powers are independent.
— Article 13 Constitution 1993: the RF admits a plurality of beliefs.
— Article 15 (3) Constitution 1993 determines that unpublished laws may not be applied.[49]
— Article 15 (4) Constitution 1993 describes the generally accepted fundamentals and standards of international law[50] and proclaims the interna-

of the headstrong and purely politically inspired performance of its President V. Zor'kin inside, and especially outside, the Court, clearly contrary to the law (Barry 1993, 84-85), the Court lost much of its credit (See, *e.g.*, W. Slater, "Head of Russian Constitutional Court under Fire", *RFE/RL Research Report*, 1993, No.26, 1-5; J. Wishnevsky, "Russian Constitutional Court: A Third Branch of Government?", *RFE/RL Research Report*, 1993, No.7, 7-8). When, in the autumn of 1993, the conflict between El'tsin and the parliament got out of hand, President El'tsin temporarily suspended the activities of the Constitutional Court (Point 10 Ukaz Prezidenta RF "O poetapnoi konstitutsionnoi reforme v Rossiiskoi Federatsii", 21 September 1993, *Rossiiskaia gazeta*, 23 September 1993; Point 1 Ukaz Prezidenta RF "O Konstitutsionnom sude Rossiiskoi Federatsii", 7 October 1993, *SAPP RF*, 1993, No.41, item 3921; *Rossiiskaia gazeta*, 9 October 1993). Serious doubt was expressed about the legality of these *Ukazy* (A. Boikov, "Arbitr vne igry. Konstitutsionnyi sud sushchestvuet, no ne deistvuet", *Rossiiskaia gazeta*, 21 July 1994, 2). A few months later, El'tsin abrogated the old law on the Constitutional Court (Point 16 Appendix 2 Ukaz Prezidenta RF "O merakh po privedeniiu zakonodatel'stva Rossiiskoi Federatsii v sootvetsvie s Konstitutsiei Rossiiskoi Federatsii", 24 December 1993, *Rossiiskaia gazeta*, 14 January 1994 and 19 January 1994).

47. On the powers of the Constitutional Court and of the ordinary courts of law concerning constitutional controls, see Gadzhiev 1994a, 20-23.
48. Art.125 (2) a) Const.1993. On the Constitutional Court, see M. Hartwig, "Verfassungsgerichtsbarkeit in Russland. Der dritte Anlauf", EuGRZ, 1996, 171-191.
49. See also point 6 PPVS RF "O nekotorykh voprosakh primeneniia sudami Konstitutsii Rossiiskoi Federatsii pri osushchestvlenii pravosudiia", 31 October 1995, *Rossiiskaia gazeta*, 28 December 1995. Also *e.g.*, Federal'nyi Zakon RF "O poriadke opublikovaniia i vstupleniia v silu federal'nykh konstitutsionnykh zakonov, federal'nykh zakonov, aktov palat Federal'nogo sobraniia", 25 May 1994, *SZ RF*, 1994, No.8, item 801; Ukaz Prezidenta RF "O merakh po obespecheniiu otkrytosti i obshchedostupnosti normativnykh aktov", 24 November 1995, *Rossiiskaia gazeta*, 29 November 1995; Ukaz Prezidenta RF "O poriadke opublikovaniia i vstupleniia v silu aktov Prezidenta Rossiiskoi Federatsii, Pravitel'stva Rossiiskoi Federatsii i normativnykh pravovykh aktov federal'nykh organov ispolnitel'noi vlasti", 23 May 1996, *Rossiiskaia gazeta*, 28 May 1996, as amended (*SZ RF*, 1997, no.20, item 2242; *Rossiiskaia gazeta*, 18 August 1998). See, also, V. Malkov, "Opublikovanie i vstuplenie v silu federal'nykh zakonov, inykh normativnykh pravovykh aktov", *GiP*, 1995, No.5, 23-29.

tional treaties to which the Russian Federation is party as part of its legal system.[51] If an international treaty of the Russian Federation lays down other rules than have been provided by law, the rules of the international treaty are applied.[52] The general acknowledgement of the principle of the precedence of international law to internal law seems to set aside[53] the dualist theory which was honored during the Soviet period—albeit only moderately towards the end.[54]

50. According to the Supreme Court, this only concerns generally accepted principles and standards of international law *which have been specified in international pacts, conventions and other documents*, explicitly referring to the Universal Declaration of Human Rights, and the International Covenants on civil and political rights on the one hand, and on economic, social and cultural rights on the other hand (Point 5 PPVS RF "O nekotorykh voprosakh primeneniia sudami Konstitutsii Rossiiskoi Federatsii pri osushchestvlenii pravosudiia", 31 October 1995, *Rossiiskaia gazeta*, 28 December 1995).
51. Lukashuk 1995, 14.
52. The Constitution does not provide for a national standard to be tested against a "generally recognized principle of international law", although these principles and standards are considered a component of Russian law. Lukashuk 1995 (16) describes this distinction as groundless.

    The Const.1993 provides no mechanism for testing the conformity of national legislation against international standards which are applicable in Russia (Lukashuk 1995, 16). The former USSR Committee for Constitutional Supervision did have the power to check national law against international law (arts.18 and 21 Zakon SSSR "O konstitutsionnom nadzore v SSSR", 23 December 1989, *VSND i VS SSSR*, 1989, No.29, item 572). During its short-lived existence, the Committee frequently used this power, without—strangely—distinguishing between treaties with and treaties without direct applicability, see Ginsburgs 472-481). The Constitutional Court is charged with checking the constitutionality of international treaties which have not yet come into effect ((Arts.125 (2) d) and (6) Const.1993, see Lukashuk 1995, 16-17) but, thus, only executes a constitutionality test—not a test against international treaties (Ginsburgs 490-495; *contra*, with reference to the jurisprudence of the Constitutional Court: G.M. Danilenko, "Primenenie mezhdunarodnogo prava vo vnutrennei pravovoi sisteme Rossii, praktika konstitutsionnogo suda", *GiP*, 1995, No.11, 115-125). Ginsburgs (495) concludes from this that the testing of domestic law against international law is left to the ordinary courts of law.
53. Gorlé 1994, 9-10; A. Kolodkin, "Russia and international law: new approaches", *Revue belge de droit international*, 1993, 553. See also art.5 (3) Federal'nyi Zakon RF "O mezhdunarodnykh dogovorakh Rossiiskoi Federatsii", 15 July 1995, *SZ RF*, 1995, No.29, item 2757, *Rossiiskaia gazeta*, 21 July 1995: "Provisions of officially published international treaties to which the Russian Federation is a party, and which do not require the issuance of internal, national acts for their application, are immediately valid in the Russian Federation. For the execution of other provisions of international treaties to which the Russian Federation is a party, the suitable legal acts are adopted". See also Lukashuk 1995, 18-19.
54. The moderation meant that although the transformation of the international norm was still required in national law, it was accepted that by signing a treaty the state undertook to bring internal legislation into line with the international treaty (Schweisfurth 1990, 114). Legislation increasingly included the provision that, if by an international agreement of the Russian Federation, other rules are determined than are determined by law, the rules of the international treaty are applied (Ginsburgs 487 ff.).

— Article 120, 121 and 122 Constitution 1993: Judges are independent and subject only to the Constitution and federal law; they are irremovable and immune.[55]

206. The present constitutional and legal regulation of the Russian state bodies and their mutual relationship is certainly not perfect. For example, on the one hand, there are too many jurisdictional overlaps in the offices of President, Government, and Parliament;[56] on the other hand, the authors of the Constitution were too obsessed with the separation of powers, neglecting in this way the need for cooperation between the powers if a state is to be effectively governed. There is no real system of checks and balances.[57] The constitutional procedure for the appointment of the Head of Government (who is to be nominated by the President to the State *Duma*, which can refuse up to three nominated candidates, where after the President can appoint a premier unilaterally, dissolve the State *Duma* and decree new elections[58]) in particular is bound—in the event of dispute between President and State *Duma*—to lead to a serious political crisis, rather than to resolve it.[59]

55. See also Zakon RF "O statuse sudei v Rossiiskoi Federatsii", 26 June 1992, *VSND i VS RF*, 1992, No.30, item 1792-1793, amended 14 April 1993, *VSND i VS RF*, 1993, No.17, item 606, and amended 19 May 1995; PVS RF "O nekotorykh voprosakh, sviazannykh s primeneniem Zakona RF 'O statuse sudei v Rossiiskoi Federatsii'", 20 May 1993, *VSND i VS RF*, 1993, No.23, item 817; *Rossiiskaia gazeta*, 8 June 1993. See also Savitskii 1993, 641-649. The criminalization of Russian society of which also the judges are victim, has forced the legislator to issue protective measures for judges threatened with attacks on their life, health and property: Federal'nyi Zakon RF "O gosudarstvennoi zashchite sudei, dolzhnostnykh lits pravookranitel'nykh i kontroliruiushchikh organov", 20 April 1995, *Rossiiskaia gazeta*, 26 April 1995; Federal'nyi Zakon RF "O vnesenii izmenenii i dopolnenii v Ugolovnyi kodeks RSFSR i Ugolovno-protsessual'nyi kodeks RSFSR", 24 April 1995, *Rossiiskaia gazeta*, 27 April 1995; Ukaz Prezidenta RF "O dopolnitel'nykh merakh po obespecheniiu deiatel'nosti sudov v Rossiiskoi Federatsii", 20 March 1996, *Rossiiskaia gazeta*, 26 March 1996. On the judicial system, see Federal'nyi konstitutsionnyi zakon RF "O sudebnoi sisteme Rossiiskoi Federatsii", 31 December 1996. On the arbitration courts, see Federal'nyi konstitutsionnyi zakon RF "Ob arbitrazhnykh sudakh v Rossiiskoi Federatsii", 28 April 1995. On the procuracy, see Federal'nyi zakon RF "O prokurature Rossiiskoi Federatsii", 17 January 1992, amended 17 November 1995.
56. Bourgeois 105; Gorlé 1994, 11. This author, in our view, correctly points out that the power of the President is too one-sidedly based on the army, so that the armed forces could too easily be deployed against other state institutions in the event of an internal conflict.
57. Gorlé 1994, 12-13.
58. Art.111 Const.1993.
59. "The procedure written into the Constitution for dealing with a deadlock between president and parliament over the appointment of the chairman of the government does not guarantee that such a deadlock can indeed be resolved. It can, in fact, produce a sequence of dissolutions of parliament by the president and votes of no confidence by the parliament" (Löwenhardt 165-166).

With regard to the supervision of the hierarchy of legal standards, there is no instance which can decree the nullity of lower norms (acts of organs of local self-government, orders and instructions of ministries and departments, and such-like) due to illegality or unconstitutionality. The ordinary courts of law can decide not to apply such norms only in a particular case already before them, and may then in a special decision draw the attention of the state body or the functionary who issued the act in question to the necessity of bringing it into accordance with the law or nullifying it.[60] With regard to Presidential *Ukazy*, Decrees of the Chambers of the Federal Assembly and Governmental decrees, the ordinary courts of law as well as the Constitutional Court have the authority to implement a constitutionality test, but the ordinary courts of law do not have the option of putting a prejudicial question to the Constitutional Court on this.

207. This and other imperfections (*e.g.*, in the division of powers between the Federation and its constituent entities, the lack of a fixed term of office for the Council of the Federation) do not, however, alter the conclusion that in the five years or so between the Resolutions of the 19th Party Conference and the approval of the new Russian Constitution, enormous progress was made in the area of the independence of the judicial power, the acknowledgement of enforceable human rights and freedoms, the democratization of the institutions of state, the destruction of the monolithic state ideology, the supervision of the hierarchy of norms, the halting of the practice of secret legislation, the revaluation of the law in a formal sense,[61] etc. This laid the legal basis for a materially understood *Rechtsstaat* in the Russian Federation.

Section 3. Critical Considerations: Civil Society and Legal Consciousness

208. In spite of the declaration in article 1 Constitution 1993 that Russia *is* a state under the rule of law, lawyers and political scientists in the West and in Russia realize that, in reality, the establishment of the rule of law is a slow process. In the literature, two great hindrances to the speedy establishment of the rule of law recur: the absence of a civil society (*grazhdanskoe obshchestvo*) and the low level of legal culture in Russia.

60. Section 7 para.3 PPVS RF "O nekotorykh voprosakh primeneniia sudami Konstitutsii Rossiiskoi Federatsii pri osushchestvlenii pravosudiia", 31 October 1995, *Rossiiskaia gazeta*, 28 December 1995.

61. According to Ivan Rybkin, speaker of the State *Duma*, in the two years after the approval of the Const.1993 no less than 328 laws were passed, of which 236 were signed by the President (including laws which included a ratification of a treaty). Only a sixth of the bills were introduced by the authorities. Of all laws passed, less than one-quarter was introduced by the Government. The legislative organs of the 89 subjects (member entities) of the Federation were the originators of 12% of the bills, and only one of these became a law (I. Rybkin, "Sluzhenie zakonu ne terpit suety", *Rossiiskaia gazeta*, 1 November 1995).

§ 1. The Rule of Law and Civil Society

209. In the first Part of this work we have already pointed out that the communist regime strove to destroy every form of self-regulation of civil society outside the government.[62] This cut through the social fabric of society, and every citizen retreated into his atomized world without any form of initiative or self-motivation. The destruction of the self-organization of society led to an identification of state and society and automatically also to a glorification of the state.[63] The role of independent, self-regulating organizations (unions, political parties, cultural societies, scientific associations, family, church) in which citizens could develop themselves freely, was made subordinate to the interests of the state and, thus, reduced to a minimum.[64]

210. Gorbachev and his followers soon understood that the rule of law without such a 'civil society' independent of the state[65] was inconceivable as well as unachievable. The rule of law, indeed, not only presupposes a certain type of regulation for the mutual relations between the state institutions (separation of powers), and the relationship between the state and the citizens (acknowledgement of rights and liberties), but can only function if the state leaves room for the mutual relations among citizens (civil society).

Alekseev did not hesitate to call the movement in the direction of a "civil legal society" (*pravovoe grazhdanskoe obshchestvo*) "the essence of the *perestroika* concept".[66] According to him, this was not about copying a Western European model but about "a special historical and social phenomenon in contemporary society, shared by all humanity, which rejects totalitarianism and directs itself to universal human values".[67]

211. The building of a civil society in a country which has, in cultural-historical terms, an enormous amount of catching up to do in the spheres of politics (democracy) and economy (market economy, capitalism), does not happen from one day to the next and presupposes the radical disturbance of existing social structures.[68] Achieving this will largely depend on the independence of society *vis-à-vis* the state; in other words, society will have to be

62. *Supra*, Nos. 285 ff.
63. Van den Berg 1991, 110-111.
64. Karpov 24.
65. It was Friedrich Hegel who first used the concept of "die bürgerliche Gesellschaft", albeit negatively. According to him every individual only looks after himself, considers himself as the only goal. The state, on the other hand, brings civilization, morality and real freedom for the people. The Marxist A. Gramsci, on the other hand, defines civil society as an essential positive thing, a society which organizes itself independently of the state. The state only has to create the necessary conditions (such as the acknowledgement of human rights) for society to function well, see Bottomore 72-74. Compare Casier 166-169.
66. Alekseev 5.
67. Alekseev 5-6.
68. Alekseev 6.

"de-stated"—the state can no longer be the guardian, but must rather become a servant of society:[69] the interests of the state must become subordinate to the interests of society.[70]

212. In the Russian context, this means that the establishment of a civil society is only possible through the detachment of political power from property.[71] The enormous strength of the administrative command system lay in the very fact that the government dealt with the 'property of all the people' as, if it were, an unfettered private owner of all of the state property, over which it could dispose freely and as it thought fit in the interests of the bureaucratic system.[72]

213. The privatization of property is, however, only one part of this process towards independence. All of social life has to be 'privatized', in the sense of being put into the hands of the individual citizens and their organizations. One of the foundation stones of a civil society[73] is the principle—which has often been quoted since the beginning of the *perestroika* era—that for the citizen and his organizations everything which is not explicitly forbidden by law is permitted (the general *Erlaubtheitsgrundsatz*),[74] while for organs of state only that is permitted which is explicitly provided for in the law (a strict *Erlaubnisgrundsatz*).[75] This expresses the idea that man as bearer of basic rights disposes over a general, open, further unspecified freedom of action, which in principle legitimizes his relations with the state. On the contrary, state activity which limits the freedom of action of the citizen needs legitimization, and the basis for this legitimization can ultimately only be the law.

214. In this civil society pluriformity of values, ideas, interests, and opinions is articulated and structured so that they can influence the decision-making process in the organs of state. Moreover, the independence of civil society is only real if the separation between the private and public spheres is also achieved in economic terms. Civil society, democracy, and the free market are closely related, especially in a European context.[76] Starting from a communist system in which each of these three elements was missing, the simultaneous

69. V.O. Mushinskii, "Pravovoe gosudarstvo i pravoponimanie", *SGiP*, 1990, No.2, 21-27, quoted Luchterhandt 230.
70. Luchterhandt 230.
71. Alekseev 12.
72. Alekseev 16.
73. Luchterhandt 230-231.
74. Gorbachev 1987, 125. This principle was proclaimed the basis of the policy of the rule of law at the 19th Party conference (1988) (Point 2 Rezoliutsiia "O pravovoi reforme", *KPSS v rezoliiutsiiakh*, XV, 651-654), and a conceptual instrument used to attack the administrative order system, which was ruled by the opposite principle: N. Matuzov, "O printsipe 'vse, ne zapreshchennoe zakonom, dozvoleno'", *SGiP*, 1989, No.8, 3-9.
75. Alekseev 12-13; Kudriavtsev 4.
76. Löwenhardt 31.

transformation of the social, political, and economic systems, was, bound to be difficult.[77] One aspect of the system transformation can only succeed if the others also succeed; at the same time, the success of the one aspect presupposes the achievement of the other aspects.

215. The fact that in spite of this seemingly insoluble dilemma a system transformation is, in any case taking place, is wholly due to ... the state. The initiative and a great deal of the achievement of the democratization of the political system and the transition to a market economy was, indeed, that of the instance which—to make the system transformation possible—voluntarily relinquished its totalitarian power. The state gradually withdrew from several domains of social life and in the course of this withdrawal, in a series of different steps, each more successful than the last, defined the rules by which civil society was enabled to organize itself.[78]

216. The success of the creation of a civil society, however, is linked to political and economic stability;[79] as long as both—or either—are (is) missing, it is difficult to pass judgment on the chances of success of the operation as a whole.

Moreover, the fact that the establishment of a civil society in Russia is not the result of a slow historical process, but has been brusquely enforced from above by the state, contains the danger that the state will narrowly define the limits within which civil society can function freely. In other words, the state itself determines to what degree it withdraws itself from social life. And the absence of a historically grown civil society means that there is no instance independent of the state which can democratically legitimize the decision to implement a system transformation and determine its limits. Casier justly remarks that this is the reason why the burden of the system transformation largely remains on the shoulders of the state[80] and that this is why the state—although now within the regulation of a democratic constellation—retains a dominant position.[81] The state will, in other words, not die in the post-communist era

77. Casier 222-224; Löwenhardt 31-32.
78. Löwenhardt 72 and 152:
    > "The dilemma involved in a successful emancipation of civil society is a complicated one. To start with, the all-powerful party-state has to limit its own powers over society. But a passive 'go-ahead' attitude is not enough. Simultaneously the party-state must actively help civil society to free itself by providing for legislation that allows social organizations to throw off party-state tutelage. Emancipating social organizations (including, for example, the press) should have recourse to new laws and access to an independent judiciary to fight government departments and local administrations that try to sabotage the new course."
79. Löwenhardt 72-73.
80. Casier 225.
81. Casier 232 ("The state has to impose [...] a policy of radical destatization on itself in a situation in which it still has to create the conditions for this destatization. [...] The question is whether such a scenario of voluntary withdrawal of the state from the social sphere offers good chances for the development of a civil society.").

either: by contrast, according to Alekseev, truly competent and effective state authority is still required as a guarantee for the proper functioning of a civil society, "naturally subordinate to the principle of legality".[82]

As long as social and economic developments have not created another basis onto which economic transformation and democratization can graft themselves, there does not seem to be an alternative to the state's paternalist role.[83] It is, for that matter, questionable whether Russia's still fairly unstructured society of citizens sees this as a problem, now that it has historically-culturally become used to a paternalist state. The apparatus of state, therefore, retains a major role in the expectations of the Russian citizens.[84]

217. The successes in the area of civil society (economic pressure groups, the churches, the press, political parties, trade unions[85]) which have been marked up in the course of the last few years should therefore be approached with the necessary caution and should not seduce us to definite statements. We can only ascertain that the Russian state has effectively distanced itself from social life, that it has fixed legal criteria which are necessary for the regulation of the mutual relations between citizens, but, also, that the state does not limit itself to this regulatory role and sill actively intervenes, as a player, in the game for which it has itself determined the rules. We will return to this phenomenon when we discuss the issue of human rights, and especially the freedom of the press.

§ 2. The Rule of Law and Legal Consciousness

218. The autonomy of the individual placed in a market economy which thrives on private property is definitely a pillar of civil society, but this is not enough. There is also a subjective side to the case: the autonomous citizen should dare to adopt an independent position, should learn that in a free society subjective rights, based on the objective law, have to be enforced in the courts of law by one's own initiative and that these subjective rights are a guarantee for the freedom of the bearers of these rights only to the extent that these citizens themselves know how to make use of these legal instruments in social life.

This is perhaps the point of greatest vulnerability in the development of the rule of law in the RF: the far-reaching absence in broad layers of the populace of a developed legal consciousness, knowledge of the law, and trust in (and respect for) the law.[86]

82. Alekseev 14-15.
83. Casier 225.
84. Casier 231-232.
85. Löwenhardt 153-154.
86. Lukasheva 93; Van de Zweerde 185-186. Schmid 77 writes: "The way was […] made difficult from the beginning, because the Soviet Union has no tradition of a rule of laws, and also no legal culture corresponding to that developed in the West."

219. Although it may have been a radical break with the past that the political leadership of the country and the legislator put a definite end to legal nihilism,[87] this does not mean that success in the establishment of the rule of law is assured. The complete lack of a legal culture among common citizens, the administration and even the organs of law enforcement makes the construction of a rule of law considerably more difficult. In the autocratic czarist era, as well as under communism, the only source of law was the diktat of those in power, the highest expression of which was formally the law, which represented the will of the people but which, in fact, was the expression of the czar's (or Communist Party's) policy.[88] Also, the skills of legal scholars are not highly developed, even though the prestige of the legal professions is gradually rising. All this prompts us to the necessary sobriety and even skepticism in judging the real possibilities and conditions for the rapid establishment of the rule of law in Russia.[89]

220. Here too, the state's paternalist role is never far away: the citizen has to be "educated"[90] into an autonomous individual, who is conscious of his rights and duties and knows how to obtain them despite the relics of the old bureaucratic system. The law has to be cultivated. It is also remarkable that in the same Resolution of the 19th Party Conference in 1988 which placed the construction of the rule of law at the top of the political agenda,[91] not only was the importance of such a legal education of judges emphasized, but, also, the legal education of the whole populace.[92] The "legal illiteracy" (*iuridicheskaia bezgramotnost'*) of the populace was to be combated.[93] The question is whether this educational project now has more chances of success than did the communist educational project of the past.

221. The educative element is also expressed in the legislation itself, which by means of a list of definitions in one of the first articles of each piece of legislation seeks to familiarize the citizen, but certainly also the practicing lawyer, with the newer legal terms and institutes which have to be introduced

87. See, *e.g.*, President El'tsin's statement: "There is no task more important than the confirmation in our country of the authority of the law" ("Net zadachi vazhnee, chem utverzhdenie v nashei strane avtoriteta prava", *Rossiiskaia gazeta*, 17 February 1995).
88. Bourgeois 92.
89. Luchterhandt 234 (on the situation in the latter days of the Soviet Union). See, *e.g.*, also C. Thorson, "Russia", *RFE/RL Research Report*, 3 July 1992, 41-49.
90. V.A. Tumanov, "O pravovom nigilizme", *SGiP*, 1989, No.10, 24.
91. Rezoliutsiia 'O demokratizatsii sovetskogo obshchestva i reforme politicheskoi sistemy', *KPSS v rezoliiutsiiakh*, XV, 628-637.
92. See, *e.g.*, also the statements of the Chairman of the State *Duma*, Rybkin, who calls the development of a system of legal education, not only on all levels of education, but, also, for adults, "more topical than ever" in the construction of a rule of law: I. Rybkin, "Sluzhenie zakonu ne terpit suety", *Rossiiskaia gazeta*, 1 November 1995.
93. V. Maslennikov, "Znat' zakon—ne privilegiia", *Rossiiskaia gazeta*, 20 September 1995.

to Russian law due to the system transformation. It is, however, not impossible that the use of this legal technique, which was unknown in Soviet law, might increase the alienation of lawyer and citizen from the "new law".

222. The plain quantity of normative acts issued does nothing to improve the quality of these laws.[94] Very complex problems are regulated in extremely concise laws, which means that more questions remain unanswered than problems are solved. Clichés and over-blown declarations of intent thrive in recent Russian legislation. The published laws mirror in procedure, form, structure and contents the issues and the resistances which slow down the implementation of the rule of law: lack of legal precision and operationality, incomplete or lacking rules concerning procedure and sanctions, contradictory divisions of power, a large number of prohibitions, limitations and procedural obstacles at the expense of the citizen and citizens' organizations, poorly delineated government powers and blank references to standards of execution, etc.[95] Many laws are not at all (or only partially) executed.[96]

Barely any attention is paid to the compatibility of new standards to old standards, or to standards of a higher level. Laws (in a material sense) are put into action with no clear indication of the older legislation, which is consequently cancelled. On the whole, the standard-setting instance is content to announce that the (not further defined) older legislation remains in force insofar as it does not conflict with the new standard, or it orders the relevant state organs to bring the standards issued by them into agreement to the new standard. The federal state structure with 89 constituent entities[97] and a long list of shared powers for Federal and constituent bodies[98] create added conflicts between standards. And also the remaining validity of part of the Soviet law contributes to the complexity of the structure of sources of the Russian law.

223. The Russian government now realizes that this "chaotic situation" has to be ended,[99] and so it has started to prepare a publication (also in electronic form) of an official, systematized, complete collection of the valid normative

94. V. Rimskii, "Kakie zakony nam ne ukaz. Pochemu rossiiane ne veriat v zakony", *Rossiiskaia gazeta*, 8 September 1995.
95. Luchterhandt 233.
96. This was also admitted by President El'tsin in his third State of the Union: "Poslanie Prezidenta Rossiiskoi Federatsii Federal'nomu Sobraniiu" (Chapter 3), *Rossiiskaia gazeta*, 27 February 1996, 5. According to the presidential administration laws are executed for an average of 75%: V. Sivkova, "Pochemu ne vypolniaiutsia zakony", *Argumenty i Fakty*, 1995, No. 45. It is, however, unclear to which method the non-execution of laws was quantified. On the problems of non-execution of laws, see also V. Rimskii, "Kakie zakony nam ne ukaz. Pochemu rossiiane ne veriat v zakony", *Rossiiskaia gazeta*, 8 September 1995.
97. Art. 65 Const. 1993.
98. Art. 72 Const. 1993. The constituent entities also dispose over the residuary power: art. 73 Const. 1993. On the hierarchy of standards, see art. 76 Const. 1993.
99. After the words of the President of the State *Duma*, I. Rybkin, "Sluzhenie zakonu ne terpit suety", *Rossiiskaia gazeta*, 1 November 1995.

acts of the RF (*Svod zakonov Rossiiskoi Federatsii*), with at the same time the cancellation of obsolete, but formally still applicable legislation, as well as solving contradictions between different standards.[100] By this, the Russian government joins a long tradition dating back to the empire of the czars, but which had also led to an (imperfect and very incomplete) *Svod zakonov* under Brezhnev.[101] Whether the systematization of the legislation is in itself also sufficient to improve the quality of the legislation or to increase the legal consciousness of the citizens, will, however, remain to be seen.[102]

224. Finally, we would again like to emphasize that the educational measures which are to remedy the poor legal tradition and the weak legal consciousness not only concern legal educational program but, also, the function of law itself. Just as in the Soviet period, the law in today's Russia is not considered merely a system of standards which regulate social relations, but an educational tool, as well as an instrument to alter social relations. The law does not so much mirror the expectations and wishes of society, but imposes a model, a certain manner of behavior onto this society. A market economy and the rule of law do not grow as a natural, historical process, the way this happened in Western Europe,[103] but are imposed onto Russian society by the law.[104]

Section 4. Conclusion

225. In conclusion, it is clear that the development in Russia towards the rule of law shows a number of strange characteristics.

First of all, it is remarkable that the idea of establishing the rule of law originated in the inner counsels of the CPSU. Whereas the rule of law in Western Europe and America is the result of a long and complex historical process,

100. Ukaz Prezidenta RF "O podgotovke k izdaniiu Svoda zakonov Rossiiskoi Federatsii", 6 February 1995, *Rossiiskaia gazeta*, 9 February 1995. See also E. Babanin, "Kakim byt' svodu zakonov Rossiiskoi Federatsii", *Rossiiskaia gazeta*, 4 May 1995; E. Suvorov, "Polushagom daleko ne uidesh': Rossii nuzhen svoi natsional'nyi svod zakonov", *Rossiiskaia gazeta*, 9 November 1995. According to Minister of Justice V. Kovalev, at the beginning of the work on the *Svod zakonov* a special state commission was founded to determine which laws would remain valid (A. Lin'kov, "Ternistyi put' k pravovomu gosudarstvu", *Rossiiskaia gazeta*, 31 May 1995).

101. F. Gorlé, "Die Kodifizierung der Gesetzgebung in der Sowjetunion", *Jahrbuch für Ostrecht*, 1981, 9-35; V. Kozhurin, "O svodakh zakonov Rossiiskoi imperii, SSSR, RSFSR i Rossiiskoi Federatsii (k istorii voprosa)", *Ross. Iust.*, 1996, No.7, 8-12.

102. For other, generally formulated measures to strengthen the Russian *Staatlichkeit* (*gosudarstvennost'*) and the development of a concept of legal reform in Russia, see Ukaz Prezidenta RF "O razrabotke kontseptsii pravovoi reformy v Rossiiskoi Federatsii", 6 July 1995, *Rossiiskaia gazeta*, 12 July 1995.

103. Karpov 21.

104. Ajani (103) calls this the "strong sense of 'optimistic normativism' present in the Eastern European countries, that is to say a belief in the use of the law as an instrument of 'social engineering'" and sees in this a clear example of cultural continuity.

the rule of law became a political program in Russia,[105] a conscious choice at a certain moment in history, made by the party elite which nonetheless owes its existence to the absence of the rule of law.

Because the rule of law has become a political choice, and does not originate in a natural manner, society is neither socially nor legally ready for it. *Socially*, because the middle class which normally bears a rule of law and a capitalist system, does not yet exist, but has to be created by the broad movement of reform, and the citizens were never able to express their interests in a structured manner in a civil society. *Legally*, because Russia is a country with a weak legal tradition, and the available legal personnel were completely unprepared for the reform of the legal system, which was to be executed for the system transformation. In order to break this vicious circle, the only remedy seems to be the improvement of the training of all lawyers, but, also, the education of the Russian citizens into subjects of the law who are conscious of their rights and duties. And this is the second remarkable thing about the construction of the rule of law in Russia: faith in the old method of the education of the citizen to a new man, typical of the period of legal nihilism, has survived unimpaired.[106] Once again reliance is placed upon man's pliability, the engineering of society. And, once again, this could be a miscalculation.

This skepticism, however, does nothing to change the conclusion that—for the first time in the constitutional history of Russia—the rule of law as a basic option for government and society is accepted, and the achievements which have been made in this area in the last decade can be called historic.

105. Van der Zweerde 188-189.
106. Van der Zweerde 186.

Chapter II. A New Concept of Human Rights

Section 1. The Reversal

226. We have already seen how attention for the human factor was one of Gorbachev's basic strategies in his drive for *perestroika* in economy and society.[1] The citizen became the driving force in bringing about the economic reforms and the separation of state and society, against the will of the apparatus. This political option required, however, that the Soviet positivist and historicist view of human rights be discarded. The citizen needed absolute rights which were not granted, but were vested in him automatically as a man, *i.e.*, independently of the social-economic stage of development of the society of which man is part;[2] rights which were not made effective by material guarantees (which could easily be manipulated by the apparatchiks) but by legal guarantees which made these rights and freedoms real rights of defense, which could be thrown up against the state. Such a legal system of guarantees could only be built if it was framed in the movement towards the establishment of the rule of law, with more democratic institutions and an independent judicial power.[3]

227. In the first years of *perestroika*, human rights were still considered rights tied to a purpose, channeled towards the success of the policy of reform and this under the progressive leadership of the Communist Party.[4] There was a broader right of self-determination, but the intention was still that this greater individual freedom would motivate the citizen to take up greater social responsibility for reaching the intended goal.[5] The broader individual freedom still had its limits in the general interest pursued.[6]

Only after the fall of the Iron Curtain and the ensuing demolition of the CPSU's monopoly of power did the orientation and the link with social responsibility weaken and finally die. The individual who determines goals and means for himself, is emancipated from state nannying and its identification with a class (*soslovnost'*).[7]

228. The change of policy soon became clear in practice, too. When on 8 December 1987 the dissident Anatolii Marchenko died as a result of a hunger strike for the liberation of all political prisoners, and the USSR constantly received negative international publicity because of the prosecutions of dissidents,

1. *Supra*, No.158.
2. Van Genugten 1992a, 113.
3. See, *e.g.*, the Resolution of the 19th Party Conference (1988) on the democratization of the Soviet society: Rezoliutsiia "O demokratizatsii sovetskogo obshchestva i reforme politicheskoi sistemy", *KPSS v rezoliutsiiakh*, XV, 632-633.
4. By maintaining the leading role of the CPSU, Gorbachev remained in the line of the old Leninist distrust with regard to the spontaneity of the laborer, a spontaneity which only led to the subordination of the proletariat to the bourgeoisie, respectively the state bureaucracy, see Juviler 141-142.
5. Van Genugten 1990, 52.
6. Van Genugten 1990, 53-54.
7. Ametistov 21.

the party leaders understood that the moment had come to resolve this issue for good. This is the reason why the most important dissident, Andrei Sakharov, was released from his place of exile, Gorki (now Nizhnyi Novgorod), and why on 31 December 1987 the Politburo decided to free all political prisoners.[8] One can thus safely state that before the legislation with regard to human rights was altered, the practice had already improved considerably.[9]

229. From 1989 onwards, the step-by-step adjustment of the legal regulation of human rights began, in the framework of the so-called "war of laws",[10] at the level of the Union as well as at that of the Union Republics. First the political criminal law was altered. Article 190[1] CrC 1960 (spreading false statements which slander the Soviet system) was repealed[11] and in article 70 CrC 1960 (anti-Soviet propaganda and agitation) the constitutive, material element of the crime was reformulated as "public incitement to a violent alteration of the constitutional structure or to usurpation of power, or the large-scale distribution of documents which contain such incitement".[12]

Next came the classic political and civil rights. On 12 June 1990, for example, the Law of the USSR on the press and other mass media[13] was passed, followed a year and a half later, on 27 December 1991, by a Russian law on the mass media.[14] On 1 October 1990, the Soviet Parliament accepted a law on the freedom of conscience and on religious organizations,[15] and nine days later a law on social organizations.[16] On 25 October 1990, Russia also had its own law on the freedom of religion.[17] On 10 December 1990, a Soviet law on

8. At that moment, 401 citizens were incarcerated for political crimes on the basis of arts. 70 and 1901 CrC 1960, and another 23 were facing charges under them: S. Kovalyov, "The CPSU would have been inconceivable in a state governed by law", *Moscow News*, 1992, No.33, 13.
9. Brunner 1991, 299.
10. *Supra*, No.175.
11. UPVS RSFSR, 11 September 1989, *VVS RSFSR*, 1989, No.37, item 1074.
12. UPVS RSFSR, 11 September 1989, *VVS RSFSR*, 1989, No.37, item 1074; Zakon RF, 9 October 1992, *VSND i VS RF*, 1992, No.44, item 2470. See also Quigley 1991, 281-282.
13. Zakon SSSR "O pechati i drugikh sredstvakh massovoi informatsii", 12 June 1990, *VSND i VS SSSR*, 1990, No.26, item 492; *Izvestiia*, 20 June 1990.
14. Zakon RF "O sredstvakh massovoi informatsii", 27 December 1991, *VSND i VS RF*, 1992, No.7, item 300. For a discussion, *infra*, No. 275 ff.
15. Zakon SSSR "O svobode sovesti i religioznykh organizatsiiakh", 1 October 1990, *VSND i VS SSSR*, 1990, No.41, item 813. The bill of law was published in *Pravda*, 6 June 1990. On the difficult coming about of the law, see A. Boiter, "Drafting a Freedom of Conscience Law", *Col. J. Transnat'l L.*, 1990, 161-168. For an analysis of the freedom of conscience and religion in the Soviet Union prior to *perestroika*, see A. Boiter, "Law and Religion in the Soviet Union", *Am. J. Comp. L.*, 1987, 97-126.
16. Zakon SSSR "Ob obshchestvennykh ob"edineniiakh", 9 October 1990, *VSND i VS SSSR*, 1990, No.42, item 839.
17. Zakon RSFSR "O svobode religii", 25 October 1990, *VSND i VS RSFSR*, 1990, No.21, item 240.

unions followed.[18] When the USSR ceased to exist, interest in socio-cultural rights again grew, as is clear from the passing of the Law on education[19] and the Fundamentals of Legislation on Culture,[20] both by the Russian Federation.

230. These piecemeal reforms led to a revision of the contents, nature, and formulation of the catalogue of constitutional basic rights in two Declarations of the Rights and Liberties of the Citizen.[21] The first of these Declarations was passed in the USSR on 5 September 1991 by the last Congress of People's Deputies to assemble.[22] The second Declaration followed shortly after this (22 November 1991), but at the level of the Russian federal republic.[23] This last declaration was incorporated into Constitution of Russia on 21 April 1992 with no changes worth mentioning.[24] With the ratification of the new Con-

18. Zakon SSSR "O profsoiuzakh", 10 December 1990, *VSND I VS SSSR*, 1990, No.51, item 1107.
19. Zakon RF "Ob obrazovanii", 10 July 1992, *VSND i VS RF*, 1992, No.30, item 1797. For an English translation with an article by article discussion of this law, see J. de Groof, (ed.), *Comments on the Law on Education of the Russian Federation*, Leuven, Acco, 1993, 117-161.
20. "Osnovy zakonodatel'stva Rossiiskoi Federatsii o Kul'ture", *VSND i VS RF*, 1992, No.46, item 2615. For a discussion, *infra*, No. 336 ff.
21. On the legal character of such a 'Declaration' (*Deklaratsiia*), there was some unclearness. According to Schweisfurth, this concerned normative acts of a constitutional nature and direct application (Schweisfurth 1991, 412-413), a view which was clearly shared by the Constitutional Supervision Committee of the USSR, as in one of its conclusions on 11 October 1991 it based itself on the Declaration of the Rights and Freedoms of Man of 5 September 1991 (*Rossiiskaia gazeta*, 15 October 1991). van den Berg 1992, 200-202 (esp. note 15) is, however, of the opinion that it concerns purely political documents.
22. "Deklaratsiia prav i svobod cheloveka", 5 September 1991, *VSND i VS SSSR*, 1991, No.37, item 1083; *Pravda* and *Izvestiia*, 7 September 1991; *Vestnik Verkhovnogo Suda SSSR*, 1991, No.11, 2-3; *SGiP*, 1991, No.10, 4-6. The Institute for State and Right of the USSR had in 1990 already developed a model for such a Declaration, see *SGiP*, 1990, No.6, 3-7. The final Declaration of the rights and freedoms of man came in execution of the so-called Seven-point-program which was introduced as program for the expansion of the new Union less than two weeks after the failed coup of August 1991 (*Izvestiia*, 2 September 1991; *VSND i VS SSSR*, 1991, No.37, item 1081). Point 6 of this Seven-point-program said: "[the legally elected leaders of the country have agreed] to accept a Declaration which guarantees the rights and freedoms of the citizens irrespective of their nationality, place of residence, party membership and political convictions, as well as the rights of national minorities". See also Schweisfurth 1991, 411.
23. "Deklaratsiia prav i svobod cheloveka i grazhdanina", 22 November 1991, *VSND i VS RSFSR*, 1991, No.52, item 1865; *Rossiiskaia gazeta*, 25 December 1991. With regard to the procedural protection of accused in legal cases, the Declaration was further executed by alterations in the Code of Criminal Procedure, see Zakon RF "O vnesenii izmenenii i dopolnenii v Ugolovno-protsessual'nyi kodeks RSFSR", 23 May 1992, *VSND i VS RF*, 1992, No.25, item 1389.

    Chistyakova entirely missed (at 370-371) that there have been two Declarations of Human Rights, which leads her to a completely incorrect overview of the state of affairs after the foundation of the CIS.
24. *VSND i VS RF*, 1992, No.20, item 1084.

stitution of Russia on 12 December 1993, another new catalogue of human rights came into force, which is still valid today. We will examine this last point more closely in the following section.

Section 2. Human Rights in the Russian Federation's Constitution of 12 December 1993[25]

§ 1. General Remarks

231. By virtue of article 2 of the new Constitution of 12 December 1993 (hereafter Const.1993) man, his rights and liberties are the highest values. The state is obliged to acknowledge, observe, and defend the rights and liberties of man and of the citizen. This article sets the tone: the importance of the individual is pivotal; the state has to respect and defend this importance. By choosing this premise, the traditional principles of the Soviet concept of human rights perish one after the other.

232. This starts with the statement of article 17 (2) Constitution 1993 that human rights are to be considered inalienable rights, which every person enjoys by virtue of birth. Human rights, in other words, exist by nature, a view, which breaks radically with Marxist-Leninist ideology.[26] Human rights are thus not limited to those rights, which are proclaimed and guaranteed as such by the Constitution:[27] the rights listed in the Constitution are examples of the general, pre-existent freedom, which every individual enjoys.[28]

233. In spite of this natural-law view of human rights, not all people enjoy the same number of rights. In the Constitution, a remarkable difference is made between the rights and liberties of man ("everybody has the right to [...]"), and the rights and liberties which are reserved to the citizens of the Russian Federation. This last category included the right to meet peacefully and without weapons, to hold meetings, rallies, demonstrations and parades, and to set up pickets (art.31),[29] the right to hold land as private property (art.36), the right

25. For a comparison with other post-communist Constitutions, see A. Blankenagel, "New rights and old rights, new symbols and old meanings: re-designing liberties and freedoms in post-socialist and post-Soviet constitutions", in A. Sajó (ed.), *Western rights? Post-Communist Application*, The Hague, Kluwer Law International, 1996, 57-79.
26. Chistyakova 384.
27. Compare in the USSR: art.39 Const.1977.
28. Art.55 (1) Const.1993. By this, Russia agrees with the fundamental idea which is the basis of, *inter alia*, the Universal Declaration of Human Rights and the ECHR. This influence is also clear in the fundamental rights catalogue: A.E.D. Howard, "Constitutions and constitutionalism in Central and Eastern Europe", *Conference for Security and Cooperation in Europe. Office for Democratic Institutions and Human Rights. Bulletin*, 1994, No.1, 4.
29. On the right to assemble and demonstrate, see Federal'nyi Zakon RF "O vnesenii izmeneniia v Kodeks RSFSR ob administrativnykh pravonarusheniiakh", 18 July 1995, *SZ RF*, 1995, No.30, item 2861, *Rossiiskaia gazeta*, 25 July 1995; Federal'nyi Zakon RF "O vnesenii izmenenii i dopolnenii v Ugolovnyi Kodeks RSFSR", 18 July 1995, *SZ RF*, 1995, No.30, item 2862, *Rossiiskaia gazeta*, 25 July 1995.

to participate in the management of affairs of state, active and passive suffrage, equal access to state services (art.32) and the right to petition (art.33).[30]

234. The principle that constitutionally acknowledged rights could only be applied, if they were put into execution by a law, also seems to have perished. Article 18 Constitution 1993 provides that the rights and freedoms of man and the citizen are directly applicable.[31] Although a number of articles refer to the federal law, this reference, with regard to the political and civil rights, applies only to the limitations of the rights.[32] In principle the social, economic, and cultural rights have also become directly applicable.[33]

235. Finally, the regulation concerning human rights contained in Chapter II and partly also in Chapter I of Title I Constitution 1993 is particularly protected, because the revision of these two chapters is strongly impeded by a complicated procedure, necessitating the approval by a constitutional assembly and a referendum, both with large majorities.[34]

30. See, also, with the still to be discussed duty catalogue: the duty to defend the country (art.59) and the prohibition of extradition or banishment to foreign countries (art.60) are only applicable to the citizens of Russia. A comparable difference also existed with the USSR Declaration of the Rights and Freedoms of Man, in which *e.g.*, also the right to associations is reserved to the citizens (art.9). See also Pashin 4.
31. Schwarzer 830. The supremacy of these rights and freedoms is further expressed by art.18 Const.1993: "the sense, the contents and the application of the laws, the activities of the legislative and executive powers and of the bodies of local self-government and are guaranteed by law".
32. The cases in which there is no right of access to documents (art.24 (2)), for example, or in which a domicile may be entered against the will of the inhabitants (art.25) and the list of information which contains state secrets (art.29 (4)) are determined by a federal law. With the social rights references to a federal law do occur, to carry out the law itself, such as determining minimum wages or determining arbitration procedures for individual and collective labor disputes (art.37).
33. For example, in a decision of 16 October 1995, the Constitutional Court annulled an article from the pension law, which deferred the payment of workers' pensions for the period during which the pensioner, on the basis of a judicial decision, is deprived of his freedom, on the grounds of violation of, amongst others, art.39 (1) Const.1993 which determines: "Social security is guaranteed to everyone at the age of retirement, in the case of disease, [...] and in other cases stipulated by law." This exception to the right to a pension was not considered to fall under the grounds of legitimation for restrictions to human rights, as expressed in art.55 (3) Const.1993 (PKS RF po delu o proverke konstitutsionnosti stat'i 124 Zakona RSFSR ot 20 noiabria 1990 goda 'o gosudarstvennykh pensiiakh v RSFSR' v sviazi s zhalobami grazhdan G.G. Arderikhina, N.G. Polkova, G.A. Bobyreva, N.V. Kotsiubki, 16 October 1995, *SZ RF*, 1995, No.43, item 4110, *Rossiiskaia gazeta*, 21 October 1995. See, also, "Prava cheloveka—vyshe zakona", *Rossiiskaia gazeta*, 19 October 1995).
34. Art.135 Const.1993.

§ 2. The Catalogue of Human Rights

2.1. Division

236. In the listing of the rights and liberties of man and the citizen in Chapter 2 of Title I of the Constitution 1993, the Russian constitutional legislator supplied no subdivisions, even though it is clear that these rights and liberties are grouped in different categories. In our opinion, the following division can be made in the catalogue of human rights:

— rights of equality (art.19)
— personal rights (arts.20-26)
— civil rights (arts.27-31 and 61)
— political rights (arts.32-33 and 62-63)
— economic rights (arts.34-36)
— social rights (arts.37-42)
— cultural rights (arts.43-44)
— the right to legal protection with regard to human rights and procedural rights concerning criminal cases (arts.45-54).

237.In the first Chapter of the Constitution (The Fundamentals of the Constitutional Structure), other rights and freedoms are also mentioned. Freedom of conscience, for example, also appears in article 13 (1) which proclaims ideological pluralism (and thus excludes any state ideology) and in article 14 (1) which determines that there should be no state religion.The idea of equality also appears in article 13 (4) and 14 (2) which refer to social and religious associations as 'equal before the law'. Freedom of economic activity and the equality of all (including private) forms of property is acknowledged in article 8. Finally, in the Chapter on the judiciary, the public nature of court sessions and the right to appeal against the administration of justice are recognized (art.123).

2.2. Formal Comparison with Constitution 1977/1978

238. A formal comparison between the constitutional catalogues of Constitution 1977/1978 and Constitution 1993 brings out strikingly that the rights of equality in the Constitution of 1993 are no longer treated as a separate chapter that the political and civil rights are now placed before the social and cultural rights, and that personal rights have been moved forwards.

The altered order of treatment is indicative for the altered perspective on human rights.The notion of the priority of social and cultural rights has been abandoned, but not the view that such rights have to be protected.[35] The fact that the personal rights have been brought forwards indicates the increased importance attached to the protection of the different components of the personality of the individual.

2.3. Comparison with Constitution 1977/1978 with Respect to Contents

239. With respect to contents, one is first struck by the broadening of the catalogue of human rights, with the addition of economic rights, such as the freedom of enterprise[36] and the right to private ownership (including of land),[37] and a whole series of procedural rights.[38] Other striking new human rights are the internal and external freedom of movement[39] and the prohibition of the banishment or extradition of citizens of the Russian Federation from the country;[40] the right to life;[41] the protection of the dignity of the person, the prohibition of torture, violence, and cruel and inhuman treatment or punishment and of involuntary medical, scientific, and other experiments;[42] the prohibition of gathering, retaining, using, or distributing information about the personal

35. Now that many of the political and civil liberties have (more or less) been achieved in reality, attention again shifts, at least in the political discourse, to the "second-generation rights". President El'tsin, for example, treated in Chapter II of his second Message to the Federal Assembly the economic and social rights first, and very elaborately, before treating the general legal protection of the person much more briefly (with special attention for the direct application of the Constitution): "O deistvennosti gosudarstvennoi vlasti v Rossii", *Rossiiskaia gazeta*, 17 February 1995.
36. Art.8 (1) and 34 Const.1993.
37. Art.35 (1) and (2) and art.36 Const.1993. Furthermore, the following are acknowledged in Const.1993: the prohibition of forced expropriation which would not happen for the needs of the state or without foregoing and fair compensation (art.35 (3)), and the right to inheritance (art.35 (4)).
38. No one can be detained for more than 48 hours without a court order (art.22 (2)). No one can be robbed off the right to see his case treated by the relevant court of law and the right to trial by jury (art.47); the right to (possibly free) qualified legal assistance and the right to legal representation (art.48); the assumption of innocence, the benefit of doubt (art.49); the rule *non bis in idem*, the prohibition of using evidence which was gained in breach of a federal law, the right to appeal (art.50); the principle that no one is forced to testify against himself (art.51); the protection of the rights of victims of crimes and the misuse of power (art.52); the non-retroactivity of a law which penalizes certain actions or which increases the penalty for the crimes, and the retroactivity of a law which decreases or abolishes criminal liability (art.54). The Supreme Court of Law, moreover, deduces from art.18 *juncto* 46 (1), that the courts of law are obliged to guarantee sufficient protection of the rights and freedoms of man and citizen *by a timely and correct treatment of the case*: see Point 1 PPVS RF "O nekotorykh voprosakh primeneniia sudami Konstitutsii Rossiiskoi Federatsii pri osushchestvlenii pravosudiia", 31 October 1995, *Rossiiskaia gazeta*, 28 December 1995.
39. Art.27 Const.1993. See, also, Federal'nyi Zakon RF "O poriadke vyezda iz Rossiiskoi Federatsii i v"ezda v Rossiiskuiu Federatsiiu", 15 August 1996, *Rossiiskaia gazeta*, 22 August 1996.
40. Art.61 Const.1993. Nor could non-citizens be extradited to states in which they had been prosecuted for their political convictions, or for actions or the neglect of actions which are not considered crimes in the Russian Federation (art.63 (2) Const.1993).
41. Art.20 Const.1993.
42. Art.21 Const.1993.

life of a person without his permission;[43] the right to inspect government documents;[44] the freedom to choose one's nationality and have it registered, and the free choice of language.[45]

240. With regard to the rights and freedoms which already existed, the most striking change is naturally the abolition of the ideological reservation. Nowhere is a reference to the 'construction of communism' to be found. Article 13 (2) Constitution 1993, for that matter, offers explicit resistance to the institution or enforcement of philosophy by the state.

241. Secondly, the material guarantees have disappeared and been replaced by legal protection measures to guarantee effective enforcement of all human rights.[46] In many articles, the dual structure—so typical for the Soviet Constitution[47]—was retained, but received an entirely different content, bearing on the division between abstract right and concrete application (*e.g.*, protection of the dignity of the person/prohibition of inhumane treatment[48]), or between the positive and negative aspects, or *vice versa*, of one and the same right (right to association/right not to join an association[49]) or between the right and its limitation (*e.g.*, freedom of enterprise/prohibition of monopolization and unfair competition[50]). In some cases it simply concerns two different but related rights (choice of national belonging/choice of language[51]). With the other rights and freedoms, the two-fold structure was simply dropped and replaced by a single, triple, or multiple structure.

In relation to the social rights, a number of material guarantees have been kept but are now formulated much more carefully than in the Constitution of 1977; in other words, no longer as existing achievements of a communist system but as goals worth pursuing and stimulating. This does not prevent the announcing of concrete measures to establish a certain right, but it does ensure a greater sense of reality. Article 40 Constitution 1993 on the right to accommodation, for instance, provides that the organs of state power and of local self-government are to stimulate the construction of accommodation and

43. Art.24 (1) Const.1993.
44. Art.24 (2) Const.1993.
45. Art.26 Const.1993. Compare, also, Zakon RSFSR "O Iazykakh narodov RSFSR" (*VSND i VS RSFSR*, 1991, no.50, item 1740), as amended on 24 July 1998 (*Rossiiskaia gazeta*, 4 August 1998).
46. Art.46 (1) Const.1993, but, also, arts.18 and 45 Const.1993.
47. *Supra*, No.56.
48. Art.21 Const.1993. See, also, art.22 (inviolability of the person—limitations to arrest); art.23 (inviolability of personal life—protection of), art.48 (qualified legal assistance—moment from when an arrested or accused person can call in the assistance of a lawyer).
49. Art.30 Const.1993. See, also, art.24: prohibition to gain and distribute information on the life of a person—right to have inspection of official documents which concern the rights and freedoms of a person.
50. Art.34 Const.1993.
51. Art.26 Const.1993. See, also, art.27 (internal and external freedom of movement).

create the conditions to realize the right to accommodation. Accommodation from the state or local authority is being put to the disposal of needy and other people in need of accommodation, at no cost or at affordable rent, in agreement with the norms determined by law.[52]

242. A glance at the concrete formulation of the different rights reveals a number of changes from Constitution 1977/1978. In the social laws, the right to work has been replaced by the right to freely dispose of one's ability to work, freely choose the nature of activity and profession.[53] There is the guarantee that, if one works, this should take place in favorable working conditions (safety and hygiene standards, remuneration without discrimination, minimum pay). Furthermore, the right to protection from unemployment is provided.[54] Other eye-catchers are the stimulus to voluntary social insurance, additional forms of social provision and charity,[55] and the criminalization of the concealment of facts and conditions, which constitute a threat to life and health.[56]

243. The perspective of universal obligatory secondary education[57] has disappeared, so only universal primary education is now obligatory.[58] With regard to liberty of conscience and religion, there is no longer mention of propaganda for atheism, but the right not to confess any religion is expressly guaranteed. The separation of religion and education was abolished, making it possible for a church to develop its own educational system.[59] If anyone's convictions or religion prevent them from fulfilling their national service, that person has the right to serve in a civilian capacity.[60]

52. Compare, too, the social measures of protection which have to be taken by virtue of art.7 Const.1993 to develop Russia as a social state (protection of labor and health, minimum wages, state support of the family, invalids and the elderly, development of a system of social services, etc.).
53. Art.37 (1) Const.1993.
54. Art.37 (3) Const.1993.
55. Art.39 (3) Const.1993.
56. Art.41 (3) Const.1993.
57. Art.45 Const.1977.
58. Art.43 (4) Const.1993.
59. Art.28 Const.1993. Art.43 Const.1993, which regulates the right to education, does not explicitly express itself on the foundation of a private educational network, but in no way prohibits it. The guarantee that education is provided free is in any case only valid for state and local institutions. More on freedom of religion in K. Malfliet, "Vrijheid van religie in Rusland", in *Alternatieven voor het teloorgegane communisme*, K. Malfliet, (ed.), Leuven, Garant, 1994, 119-134. See, also, Federal'nyi zakon RF "O svobode sovesti i o religioznykh ob"edineniiakh", 26 September 1997, *Rossiiskaia gazeta*, 1 October 1997. According to the Russian "ombudsman", O. Mironov, this law contradicts existing international conventions in some respects; see his report to the State *Duma* Committee for social organizations and religious organizations, published in *Rossiiskaia gazeta*, 22 April 1999.
60. Art.59 (3) Const.1993.

244. The right to criticize the activity of organs of state and social associations[61] was replaced by an individual and collective right to petition the organs of state and the organs of regional self-government.[62]

245. In relation to unjust action by the government, the government can also be sued for failure to act,[63] and compensation can be claimed for any damages resulting from the government's unjust action (or failure to act).[64]

246. Also new is the principle of the equality of rights and liberties, irrespective of membership of social associations,[65] a clear reference to the privileges previously linked to membership of the Communist Party and its "transmission belts", the social organizations.

§ 3. The Restrictions upon Human Rights

247. The rights and liberties of the human being and the citizen can be limited by a federal law (in the formal sense) only to the extent that this is necessary to protect the foundations of the constitutional structure, or to protect the morals, the health, the rights, and the legitimate interests of other persons, or in the interests of national defense and national security.[66] The legitimate causes for a limitation of rights and liberties are, thus, much more precisely delineated than was the case in the Soviet period, when very general clauses were preferred, such as 'the citizens' enjoyment of their rights and liberties may cause no harm to society, to the state, or to the rights of other citizens'.[67] Furthermore, such limitations are now the sole prerogative of federal legislation.[68]

We can, thus, distinguish three conditions which limitations to the rights and liberties must meet in order to be in accordance with article 55 (3) Constitution 1993: (1) they must be provided by a federal law; (2) they must be

61. Art.49 Const.1977.
62. Art.33 Const.1993.
63. Art.46 (2) Const.1993.
64. Art.53 Const.1993.
65. Art.19 (2) Const.1993.
66. Art.55 (3) Const.1993.
67. Art.39 Const.1977 and art.37 Const.1978. See also van den Berg 1992, 210.
68. Art.55 (2) Const.1993 determines moreover that in Russia no laws can be issued which abolish or limit the rights and freedoms of man. This determination can be interpreted in two ways. According to the first view, the "laws" concerned refer to the acts accepted by the legislative organs of the 89 constituent entities ("subjects") of the Russian Federation (art.76 (2) and (4) Const.1993) and, thus, not to federal laws. According to a second view, defended by Schweisfurth 1994b, 486-487, art.55 (2) Const.1993 means that, to the extent that law cannot "curtail" the fundamental rights, no laws are allowed whose contents would not meet the conditions set by art.55 (3) Const.1993; and to the extent that laws cannot "abolish" the fundamental rights, art.55 (2) Const.1993 means that a kernel of the fundamental rights is guaranteed; in other words, the limitations which can be validly implemented by a law, cannot lead to the complete setting aside of fundamental rights. On the use of the terms "law", "legislation", "federal laws" etc. in the Const.1993, see Polenina 27-36.

necessary for certain purposes which are exhaustively listed in the Constitution; and (3) the limitations must be proportionate to the achievement of the said end.[69] In a pronouncement of 20 December 1995 the Constitutional Court applied these three conditions, which are primarily intended for the federal legislator, to limitations of human rights expressly provided for in the catalogue of human rights contained in the Constitution itself.[70]

248. Should a state of emergency be decreed for the security of the citizens and the protection of the constitutional structure, separate limitations can be enforced upon the rights and freedoms, but always subject to indication of the boundaries of this limit and its term of validity. In any case, a large section of personal rights, procedural rights, freedom of conscience, freedom of enterprise, and the right to accommodation remains unaffected.[71]

249. One of the most important limitations to human rights in the Soviet Constitution was the submission of the individual rights to the interests of society and the state, and the rights of other citizens.[72] This submission of individual rights to collective interests no longer appears in the Russian Constitution: only the rights and freedoms of other persons can bring about a limitation to the exercising of the rights and freedoms of man and the citizen.[73]

250. The inseparable link between rights and duties has disappeared. The Russian Constitution does still sum up a number of 'classical' (obligation to pay taxes[74] and military service[75]) and less 'classical' duties (such as the duty of those over 18 who are able to work to look after their parents if these are incapable of work,[76] or the duty to see to the preservation of the historical

69. Compare art.10 (2) ECHR:
> "The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

70. PKS RF "Po delu o proverke konstitutsionnosti riada polozhenii punkta "a" stat'i 64 Ugolovnogo kodeksa RSFSR v sviazi s zhaloboi grazhdanina V.A. Smirnova", 20 December 1995, *Rossiiskaia gazeta*, 18 January 1996 (application of the conditions of art.55 (3) Const.1993 on the limitation on the freedom of speech for the protection of state secrets, provided by art.29 (4) Const.1993).
71. Art.56 Const.1993.
72. Art.39 para.2 Const.1977.
73. Art.17 (3) Const.1993.
74. Art.57 Const.1993.
75. Art.59 Const.1993.
76. Art.38 (3) Const.1993.

and cultural heritage and to preserve historical and cultural monuments[77]), but non-observance of these in no way entails the limitation of human rights.

§ 4. Reference to International Human Rights Treaties

251. The supremacy of international law over national law was written into article 15 (4) Constitution 1993.[78] In Chapter 2 of the Constitution 1993, dealing with human rights, reference is made to acknowledging and guaranteeing the rights and freedoms of man and citizen, not only by virtue of the Constitution, but, also, by virtue of "the generally accepted fundamentals and standards of the international law".[79] Even though there is no explicit reference to the international treaties, one can presume that these fall under the term "standards of the international law".

252. The Russian Federation is, in the footsteps of the USSR, a signatory of the Universal Declaration of Human Rights[80] and a party to the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR),[81] and to the UN Convention of 20 November 1989 on the Rights of the Child.[82] On 25 January 1996 Russia was admitted, after repeated postponements due to the first Chechen crisis, as the 39th member of the Council of Europe.[83] As

77. Art.44 (3) Const.1993. Other obligations are the duty of the parents to see to it that their children attend the universal compulsory primary education (art.43 (4)) and the duty to protect nature and the environment and to be careful of the environment (art.58).
78. *Supra*, No.205.
79. Art.17 (1) Const.1993.
80. The Russian text of the Universal Declaration of Human Rights was published in *Rossiiskaia gazeta*, 5 April 1995 and again on 10 December 1998.
81. For the Russian text of both "UNO Pacts", see *BVS RF*, 1994, No.12, 1-11.
82. This Convention was signed by the USSR on 26 January 1990 and ratified on 13 June 1990: PVS SSSR "O ratifikatsii Konventsii o pravakh rebenka", *VSND i VS SSSR*, 1990, No.26, item 497 and No.45, item 955 (Russian text of the Convention).
83. On 23 February 1996, President El'tsin signed the Law on the joining to Russia to the Council of Europe: Federal'nyi Zakon RF "O prisoedinenii Rossii k Ustavu Soveta Evropy", 23 February 1996, *Rossiiskaia gazeta*, 24 February 1996. Russia's application to join the Council of Europe already dated from 7 May 1992 (Drzemczewski 244). Initially the country was granted in the Parliamentary Assembly the statute of "special guest" (van Genugten 1992b, 363). On the preparations for joining the Council of Europe, see also: Rasporiazhenie Prezidenta RF "O merakh po podgotovke k vstupleniiu Rossiiskoi Federatsii v Sovet Evropy", 26 June 1992, *VSND i VS RF*, 1992, No.28, item 1643; Postanovlenie Gosudarstvennoi dumy Federal'nogo Sobraniia RF "O zaiavlenii Gosudarstvennoi Dumy o sobliudenii Rossiiskoi Federatsiei standartov v oblasti prav cheloveka", 24 June 1994, *SZ RF*, 1994, No.13, item 1460; Rasporiazhenie Prezidenta RF "Ob utverzhdenii Polozheniia o Mezhvedomstvennoi komissii po podgotovke k vstupleniiu Rossiiskoi Federatsii v Sovet Evropy", 7 November 1995, *SZ RF*, 1995, No.46, item 4419; Rasporiazhenie Prezidenta RF "O merakh po obespecheniiu uchastiia Rossiiskoi Federatsii v Sovete Evropy", 13 April 1996, *Rossiiskaia gazeta*, 17 April 1996. More details on the legal and political background of the joining of Russia to the Council of Europe are found in K. Bodard, "De toetred-

a consequence, Russia ratified the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and Protocols 1 to 5 and 7 to 11 thereto, the European Convention for the Prevention of Torture and Inhumane or Degrading Treatment or Punishment and Protocols 1 and 2 thereto,[84] and the Framework Convention for the Protection of National Minorities. Russia acknowledged the individual right to complain to the (now abolished) European Commission and to the European Court of Human Rights.[85]

253. The Soviet Union and Russia also showed much more readiness to cooperate with the Conference—since 1994 reformed into a permanent Organization[86]—for Security and Cooperation in Europe with regard to human rights. Many of the previous agreements on the human dimension of the OSCE in cases such as the reuniting of families, entry and exit visas, freedom of information, etc., were given considerably more concrete contents.[87] The establishment of the rule of law is now openly announced in the OSCE's documents.[88] The documents accepted within the OSCE have, however, only political value; they are not binding international treaties, although their moral authority has increased in the past years, particularly in Eastern Europe.

254. Finally, also within the CIS the construction of one united humanitarian space (*edinoe gumanitarnoe prostranstvo*) has started. Already in a Declaration of 24 September 1993 the member states of the CIS had expressed their "hard intention" to work out and sign a CIS Convention on human rights in the near future.[89] On 26 May 1995 in Minsk a Convention of the Commonwealth of Independent States on the rights and fundamental freedoms

ing van Rusland tot de Raad van Europa in het licht van de conflicten in Tsjetsjenië en Tatarstan", in de Meyere *et al.*, 47-93. In early 2001, the Council of Europe had already 43 members.

84. The Russian text of both European Conventions was published in *Rossiiskaia gazeta*, 5 April 1995.
85. Federal'nyi zakon RF "O ratifikatsii Konventsii o zashchite prav cheloveka i osnovnykh svobod i Protokolov k nei", 30 March 1998, *Rossiiskaia gazeta*, 7 April 1998; Rasporiazhenie Prezidenta RF "O pervoocherednykh meropriiatiiakh, sviazannykh s vstupleniem Rossiiskoi Federatsii v Sovet Evropy", 13 February 1996, *Rossiiskaia gazeta*, 17 February 1996. See, also, Ukaz Prezidenta RF "Ob Upolnomochennom Rossiiskoi Federatsii pri Evropeiskom sude po pravam cheloveka", 29 March 1998, *Rossiiskaia gazeta*, 8 April 1998.
86. For the relevant texts, see *I.L.M.*, 1995, 764 ff.
87. Van Genugten 1992a, 119-120.
88. Van Genugten 1992b, 352-353.
89. "Deklaratsiia glav gosudarstv—uchastnikov Sodruzhestva Nezavisimykh Gosudarstv o mezhdunarodnykh obiazatel'stvakh v oblasti prav cheloveka i osnovnykh svobod" (Declaration of the Heads of State of the member states of the CIS on the international obligations in the area of human rights and the fundamental freedoms), 24 September 1993, *BMD*, 1994, No.10.

of man was effectively signed. This Convention was ratified by Russia on 4 November 1995.[90] As far as is known, the Convention has not yet come into force.[91] Previously, a Convention on safeguarding the rights of persons belonging to national minorities was signed in Moscow on 21 October 1994.[92] The Russian Federation has, however, not yet ratified this Convention. There were also plans to trust the monitoring of the observance of these Conventions, on the model of the Council of Europe, to a Commission of Human Rights[93] and a Eurasian Court of Human Rights.[94] They never materialized. Indeed, as more and more CIS-states seek accession to the Council of Europe they refrain from signing or ratifying any convention on human rights concluded within the CIS framework.

§ 5. The Judicial and Institutional Protection of Human Rights

5.1. The Judicial Protection of Human Rights

255. The effective realization of the human rights acknowledged by the Constitution in a non-exhaustive manner, naturally, depends greatly on the possibility for individual persons to have these rights enforced before a court of law. Article 18 Constitution 1993 determines: "The rights and freedoms of man have direct effect. As such [...] they are protected by the judiciary." Article 45 (2) Constitution 1993 adds to this that everyone has the right to defend his rights and freedoms by all legal means, and article 46 (1) Constitution 1993 concretizes this by guaranteeing everybody the right to defend his rights and freedoms in court. The judicial protection of human rights is, thus, strongly

90. Federal'nyi Zakon RF "O ratifikatsii Konventsii Sodruzhestva Nezavisimykh Gosudarstv o pravakh i osnovnykh svobodakh cheloveka", 4 November 1995, *SZ RF*, 1995, No.45, item 4239, *Rossiiskaia gazeta*, 11 November 1995. For an English translation of this Convention, see document H (95) 7 rev. of the Council of Europe, and *HRLJ*, 1996, 159-162. An analysis of the legal implications for States that intend to ratify both the European Convention on Human Rights and its protocols and the CIS Convention on Human Rights is made by A.A.C. Trindade, *HRLJ*, 1996, 164-180, and J.A. Frowein, *HRLJ*, 1996, 181-184.

91. Uzbekistan, Ukraine, Turkmenistan, Kazakhstan and Azerbaijan refused to sign this Convention: M. Shchipanov, "Minskie kompromissy", *Rossiiskaia gazeta*, 30 May 1995.

92. "Konventsiia ob obespechenii prav lits, prinadlezhashchikh k natsional'nym men'shinstvam", *Diplomaticheskii vestnik*, 1994, Nos.21-22, 43-46. Turkmenistan and Uzbekistan did not sign this Convention, and Azerbaijan and Ukraine signed with reservations. For a commentary, see M. Elst, "The protection of national minorities in the Council of Europe and the Commonwealth of Independent States: a comparison in standard-setting", in K. Malfliet and R. Laenen, *Minority Policy in Central and Eastern Europe: The Link between Domestic Policy, Foreign Policy and European Integration*, Leuven, Garant, 1998, 149-188.

93. Art.33 Charter of the CIS already provided the foundation of a Commission for Human Rights, without, however, determining its precise function. For the text of the internal Regulation of the Commission for Human Rights of the CIS, see document H (95) 7 rev. of the Council of Europe.

94. Lukasheva 93-94. The Convention of the CIS on the rights and fundamental freedoms of man, however, does not mention such a Court of Law.

anchored in the Constitution and entrusted to the Constitutional Court, the ordinary courts, and international courts of law.

5.1.1. The Constitutional Court

256. By virtue of article 125 (4) Constitution 1993, the Constitutional Court investigates the constitutionality of the law applied or to be applied in a concrete case on the basis of either a direct complaint on the violation of the human rights or a prejudicial question from a court of law.[95] The term "law" seems here to refer to the federal laws, the normative acts of the President RF, of the Federal Council, the State *Duma*, and the Government RF, and to certain normative acts of the constituent entities of the Federation.[96] The Constitutional Court has a power to nullify such laws or acts in both procedures.[97]

5.1.2. The Ordinary Courts of Law

257. The citizen now also has the possibility of turning to a court of law on the basis of article 1 of the Law of the Russian Federation of 27 April 1993[98] if he is of the opinion that his rights and freedoms were violated by unjust actions or decisions of state organs, organs of local self-government, institutions, enterprises, and their associations, social associations or civil servants.[99] This Law repeats, often literally, the last USSR Law of 2 November 1989 on the issue,[100] but the minor alterations introduced by the RF Law improve the

95. See, also, arts.96-104 Federal'nyi Zakon RF "O Konstitutsionnom sude Rossiiskoi Federatsii", 21 July 1994, *Rossiiskaia gazeta*, 23 July 1994.
96. Art.125 (2) Const.1993; art.3 Federal'nyi Zakon RF "O Konstitutsionnom sude Rossiiskoi Federatsii", 21 July 1994, *Rossiiskaia gazeta*, 23 July 1994.
97. Art.100 and 104 Federal'nyi Zakon RF "O Konstitutsionnom sude Rossiiskoi Federatsii", 21 July 1994, *Rossiiskaia gazeta*, 23 July 1994.
98. Zakon RF "Ob obzhalovanii v sud deistvii i reshenii, narushaiushchikh prava i svobody grazhdan", 27 April 1993, *VSND i VS RF*, 1993, No.19, item 685, amended Federal'nyi Zakon, 14 December 1995, *Rossiiskaia gazeta*, 26 December 1995. The Supreme Court of Law has already issued guidelines on the application of this law by the courts of law: PPVS RF No.10 "O rassmotrenii sudami zhalob na nepravomernye deistviia narushaiushchie prava i svobody grazhdan", 21 December 1993, *BVS RF*, 1994, No.3, 4-7, *Ross. Iust.*, 1994, No.3, 51-54; *Zakonnost'*, 1994, No.5. On the concrete application of this Law, see also Trubnikov 6-14.
99. See, also, art.46 (2) Const.1993. Art.46 (1) Const.1993 guarantees in general to everybody the right to legal protection of his rights and freedoms. On the basis of art.46 Const.1993 every person can, in other words, turn to the court of law to defend his rights, even if the law only provides the possibility of administrative appeal. For an application of this on the treatment of notices of objection against the registration of trade marks, see PPVS RF, 9 November 1994, *BVS RF*, 1995, No.1, 11, translated into German in *Grur Int.*, 1995, 427, with note T. Kowal-Wolk, translated into English in *IIC*, 1996, 111, with note T. Kowal-Wolk.
100. Zakon SSSR "O poriadke obzhalovaniia v sud deistvii dolzhnostnykh lits, narushaiushchikh prava grazhdan", 2 November 1989, *VSND i VS SSSR*, 1989, No.22, item 416. See also *supra*, No.199, note 15.

Russian citizen's legal protection from unjust government action to a considerable extent.[101]

258.The government's actions or decisions can be fought in a court of law if they violate the rights and freedoms of the citizen, interfere with the citizen's exercising of his rights and liberties, or illegally force the citizen to some duty or liability,[102] irrespective of whether these actions and decisions were taken collegially or individually, in an individual case or normatively.[103]

This is a monitoring of legality, not of opportuneness.[104] An administrative appeal to a hierarchically higher body also remains possible, but is no longer a preliminary condition for admissibility in court.[105] The monitoring of unjust government action is consequently taken from the administration and completely entrusted to the independent judicial power, *i.e.*, the ordinary courts of law and the Constitutional Court.[106]

If the court of law considers the complaint justified, it declares the action or decision illegal, it obliges the organ or organization concerned to fulfill the citizen's demand, to nullify the measures of liability taken with regard to him or to repair in some way the violated rights and freedoms.[107]

259.Through an alteration of the law on 14 December 1995, the legal means discussed above were also extended to the citizen to fight a failure of named instances to act (in execution of art.46 (2) Const.1993),[108] as well as in the case of refusal by civil servants to give access to documents and materials which directly concern his rights and freedoms (in execution of art.24 (2) Const.1993).[109]

101. "The changes between the previous Soviet law and the new Russian law are few in terms of number of words. However, they are extremely significant in potential effect." (Henderson 93)
102. Art.2 Law RF 27 April 1993.
103. Henderson 92; Khamaneva 6.
104. Henderson 93; Khamaneva 10.
105. Art.4 Law 27 April 1993. See, also, Henderson 92.
106. In Russia there is (as yet) no separate system of administrative courts of law (Khamaneva 7-9), although Art.118 (2) Const.1993 allows for their establishment. See also Lukasheva *et al.* in "'Kruglyi stol'—'Konstitutsiia Rossiiskoi Federatsii i sovershenstvovanie iuridicheskikh mekhanizmov zashchity prav cheloveka'", *GiP*, 1994, No.10, 3.
107. Art.7 Law 27 April 1993.The court of law also has the power to suspend (art.4 para.6). This can prevent the arising of damaging consequences which the citizen would be hard-put to remedy (Khamaneva 10).
108. According to Henderson (90), this was also already possible under the original version of the Law, namely by qualifying government negligence as "a decision".
109. Federal'nyi Zakon "O vnesenii izmenenii i dopolnenii v Zakon Rossiiskoi Federatsii 'Ob obzhalovanii v sud deistvii i reshenii, narushaiushchikh prava i svobody grazhdan'", 14 December 1995, *SZ RF*, 1995, No.51, item 4970, *Rossiiskaia gazeta*, 26 December 1995.

5.1.3. International Courts of Law[110]

260. With the altered views on human rights as expressed first in the separate laws, then in the Declarations on the rights of man, and finally in the Russian Constitution, there was no longer any reason to keep up the double attitude towards foreign countries which had been so typical for the period of real socialism.[111] Since Gorbachev started emphasizing the primacy of international law in international policy and the significance of universal human values, beneficial conditions were present not only to bring the internal and international legal order into line with one another,[112] but, also, to give the Russian citizens the possibility of bringing the violation of their human rights before international judicial or quasi-judicial instances. Also the idea of non-interference in foreign affairs by other states in the field of human rights gradually faded away.[113]

261. In 1989 the USSR revoked its former refusal to recognize the authority of the International Court in The Hague as arbiter in case of disagreement between two or more treaty parties on the interpretation and application of six treaties on human rights.[114] The next step was the ratification on 5 July 1991 of the Facultative Protocol to the ICCPR,[115] and the acknowledgement of the authority of the Committee for Human Rights in agreement with article 41 of the same Treaty,[116] *i.e.*, respecting the individual right to complain to the said Committee and the right of one state to complain against another.[117]

In the framework of the CSCE, considerable progress was made with regard to the monitoring of the observance of human rights although there was nothing like an individual right to complain. At the follow-up conference of Vienna in 1989, a mechanism was set up for the first time which provides

110. B. Manov, A. Manov and K. Moskalenko, "Obrashchenie v mezhdunarodno-pravovye organy kak sredstvo zashchity prav i svobod cheloveka", *Zak.*, 1996, No.6, 12-18.
111. *Supra*, No.58.
112. Brunner 1991, 297.
113. Van Genugten 1992b, 347-351.
114. UPVS, 10 February 1989, *VVS SSSR*, 1989, No.11, item 79. This considers the Treaty for the punishment of the crime of genocide of 9 December 1948; the Treaty for the suppression of trade in persons and of the exploitation of prostitution by others of 31 March 1950; the Treaty on the political rights of women of 21 March 1953; the Treaty on the elimination of all forms of racial discrimination of 7 March 1966; the Treaty on the elimination of discrimination against women of 18 December 1979; and the Treaty against tortures and other cruel, inhuman or degrading treatment or punishment of 10 December 1984. See, also, Schweisfurth 1990, 110-112. Also in 1989 the USSR and the USA signed an agreement that they differ in the interpretation of seven treaties on the hijacking of aircraft and drugs trade and acknowledged the authority of the International Court of Law: Ginsburgs 455.
115. PVS SSSR "O prisoedinenii SSSR k Fakul'tativnomu protokolu k Mezhdunarodnomu paktu o grazhdanskikh i politicheskikh pravakh", 5 July 1991, *VSND i VS SSSR*, 1991, No.29, item 842. For the Russian text: *BMD*, 1993, No.1, 1-4.
116. Juviler 146; van Genugten 1992a, 119.
117. Ginsburgs 456-457.

the possibility to call a state to account for violating human rights.[118] This mechanism was elaborated at a CSCE conference, which first met in Moscow,[119] almost symbolically barely two weeks after the failed coup of August 1991. From then onwards, the USSR acknowledged that the monitoring of the observance of human rights could not be called interference in internal affairs.[120] Since then, other monitoring mechanisms have been introduced, such as fact-finding committees.

262. The Constitution 1993 now expressly recognizes the right of everyone to turn to international bodies to protect human rights and liberties by virtue of the international treaties, to which the Russian Federation is a party, if all internal judicial procedures have been exhausted.[121] This is the case with the right of individual appeal to the UN Committee for Human Rights, but especially, since Russia's entry into the Council of Europe, the European Court of Human Rights,[122] and, if the relevant conventions will ever come into force, the CIS Commission for Human Rights and the Eurasian Court of Human Rights.[123]

5.2. The Institutional Protection of Human Rights

5.2.1. The President of the RF's Committee for Human Rights

263. Moreover, the attention of the government for the issue of human rights can be measured by the founding of independent bodies to monitor the observance of human rights. Human rights also get more attention at an institutional level. Thus, within the presidential apparatus, a *Presidential Committee for Human Rights of the Russian Federation*[124] was established, which carries out preparatory work for the initiatives of the President to do with human rights (such as the issuing of *Ukazy*, the introduction of legislation, the drawing up of an annual report to the President on the respecting of human rights, etc.[125]) and also complaints of citizens concerning suspected violations of human rights examined by state organs. If these complaints are found to have substance, this Commission directs a recommendation to the state body in question with the

118. Juviler 146; van Genugten 1992a, 119.
119. Van Genugten 1992b, 355-358.
120. At this conference, the USSR also raised the matter of the observance of human rights in exceptional circumstances, see "Chrezvychainoe polozhenie i prava cheloveka", *Izvestiia*, 19 September 1991.
121. Art.46 (3) Const.1993. See, also, B. Manov, A. Mamov, and K. Moskalenko, "Obrashchenie v mezhdunarodno-pravovye organy kak sredstvo zashchity prav i svobod cheloveka", *Zak.*, 1996, No.6, 12-18.
122. *Supra*, No.252. See, especially, the ratification act of the European Convention on Human Rights of 30 March 1998, *Rossiiskaia gazeta*, 7 April 1998. See, also, B. Manov, A. Mamov, and K. Moskalenko, "Obrashchenie v mezhdunarodno-pravovye organy kak sredstvo zashchity prav i svobod cheloveka", *Zakonnost'*, 1996, No.6, 12-18. See also Ametistov 23-24.
123. *Supra*, No.254.

request that the necessary measures for restitution be taken.[126] As part of the presidential administration, this Commission can perhaps gain important moral authority with regard to the rest of the government bodies at all levels; at the same time, one cannot escape the conclusion that the members of the Commission have not been accorded sufficient independence from the presidential apparatus (and the President himself) in adjudicating complaints.[127]

5.2.2. The Commissioner for Human Rights

264. Article 103 (1) e) Constitution 1993 grants the State *Duma* the power to appoint and dismiss a Commissioner for human rights (*Upolnomochennyi po pravam cheloveka*).[128] The Federal Constitutional Law, which had to regulate the status of this "ombudsman", was—after repeated postponement[129]—assented to by President El'tsin on 26 February 1997.[130] The Commissioner for human rights is appointed by the State *Duma* for a term of five years (renewable once). He is not subordinate to any state body and enjoys immunity comparable to that of members of Parliament. He examines complaints of Russians, or foreigners

124. Ukaz Prezidenta RF "Ob obespechenii deiatel'nosti Komissii po pravam cheloveka pri Prezidente Rossiiskoi Federatsii", 1 November 1993, *SAPP RF*, 1993, No.45, item 4325, *Rossiiskaia gazeta*, 4 November 1993; Ukaz Prezidenta RF "O Komissii po pravam cheloveka pri Prezidente Rossiiskoi Federatsii", 20 May 1996, *Rossiiskaia gazeta*, 24 May 1996, as amended on 12 February 1998, *Rossiiskaia gazeta*, 14 February 1998; Ukaz Prezidenta RF "Ob utverzhdenii Polozheniia o Komissii po pravam cheloveka pri Prezidente Rossiiskoi Federatsii", 18 October 1996, *SZ RF*, 1996, No.43, item 4886, *Rossiiskaia gazeta*, 24 October 1996, *Diplomaticheskii vestnik*, 1996, No.11, 3-5, as amended on 12 February 1998, *Rossiiskaia gazeta*, 14 February 1998, and on 30 January 1999, *Rossiiskaia gazeta*, 4 February 1999.
125. For the first report, see "Doklad o sobliudenii prav cheloveka i grazhdanina v Rossiiskoi Federatsii za 1993 god", *Rossiiskaia gazeta*, 25 August 1994, 3-7.
126. In the first six months in which the Presidential Commission for human rights RF was active, it received 3,000 complaints, of which 28% were complaints against a sentence in criminal or civil cases, one fifth concerned violations of human rights in labor relations, and a substantial proportion were complaints concerning living conditions in prisons: A. Batygin, "Pravo na prava cheloveka", *Rossiiskaia gazeta*, 28 July 1994.
127. See, *e.g.*, the criticism of human rights activists of the Moscow based Helsinki Group on this Presidential Commission: *OMRI Daily Digest*, Part I, No.57, 21 March 1997. It is, moreover, unclear how this Commission is related to the Main administration of the President RF with regard to the constitutional guarantees for the rights of the citizens, *i.e.*, part of the presidential administration which is also responsible for the realization of the powers of the President in his capacity of guarantor of the rights and freedoms of man and citizens: Ukaz Prezidenta RF "O Glavnom upravlenii Prezidenta Rossiiskoi Federatsii po voprosam konstitutsionnykh garantii prav grazhdan", 7 March 1996, *Rossiiskaia gazeta*, 19 March 1996.
128. Such a parliamentary Commissioner for human rights was first mentioned in the Russian Declaration of the rights and freedoms of man and citizen: art.40 "Deklaratsiia prav i svobod cheloveka i grazhdanina", 22 November 1991, *VSND i VS RSFSR*, 1991, No.52, item 1865; *Rossiiskaia gazeta*, 25 December 1991.

and stateless persons who find themselves in Russia, about decisions, actions or negligence by state bodies, organs of local self-government, functionaries, and civil servants. The Commissioner for human rights can only make non-binding recommendations; his most important weapon is publicity. He can, however, turn to the courts of law or the Constitutional Court if he concludes a violation of human rights has taken place.

Section 3. Some Critical Marginal Notes

265. Already at the end of the previous Chapter, we pointed out the fundamental problems for the introduction of a rule of law in Russia: civil society is only embryonic, so that the system transformation is entirely carried by the state, whereas the judicial power, the administration *and* all of the population lack the necessary legal consciousness to force through the separation of state and society by legal means. In the area of human rights, the consequent chasm between "the law in the books" and "the law in action" is very clear.[131] Two reports on the state of human rights in the Russian Federation illustrate this.

266. The first report comes from the Presidential Committee for human rights RF of 14 June 1994, with an analysis of the respecting of human rights in Russia in 1993.[132] This report names six problem areas in which "grave and

129. N. Bachurina, "Byl by zakon—chelovek naidetsia", *Rossiiskaia gazeta*, 21 February 1996. The reason for this was the sharp criticism expressed in the media by Sergei Kovalev—the person who was appointed directly in this function by the State *Duma* on the basis of the Constitution—on the violation of human rights in the (first) conflict in Chechnya (See, *e.g.*, "Kovalev obviniaet", *Argumenty i Fakty*, 1995, No.29). Conservatives and nationalists in the State *Duma* were thus no longer prepared to cooperate to pass this Law. Kovalev was dismissed from his function as Commissioner in March 1995. He remained, however, Chairman of the Presidential Commission for human rights. On 23 January 1996 he also resigned from this function because "President El'tsin has definitively suspended the policy of democratic reforms".

    During the period for which Kovalev also exercised the function of Commissioner for human rights, he could—for lack of a legal basis—only exercise such functions as he already exercised as Chairman of the Presidential Commission for Human Rights RF (Ukaz Prezidenta RF "O merakh po obespecheniiu konstitutsionnykh funktsii Upolnomochennogo po pravam cheloveka", 4 August 1994, *SZ RF*, 1994, No.15, item 1713; *Rossiiskaia gazeta*, 9 August 1994). The "ombudsman" therefore only existed on paper in that period.

130. Federal'nyi konstitutsionnyi zakon RF "Ob Upolnomochennom po pravam cheloveka v Rossiiskoi Federatsii", 26 February 1997, *Rossiiskaia gazeta*, 4 March 1997. For a discussion of an earlier draft, see A. Koreakivi, "The Russian Human Rights Commissioner", *PS JEEL*, 1995, 236-238.

131. "The progress in the texts is remarkable, but every lawyer knows the difference between *the law in the books* and *the law in action*, especially when the first does not really agree with the century-old traditions of those who have to substantiate them." (Gorlé 1994, 13)

132. "Doklad o sobliudenii prav cheloveka i grazhdanina v Rossiiskoi Federatsii za 1993 god", *Rossiiskaia gazeta*, 25 August 1994, 3-7.

frequent" violations of human rights occur: the rights of refugees, internal freedom of movement and the free choice of residence, the state of penal institutions, the observance of human rights in the army, labor rights, and the violation of human rights during the period of the state of emergency in Moscow in the autumn of 1993. In its conclusion this Committee, summarized the following causes for the violation of human rights: (1) the worsening of the material situation of broad layers of the populace; (2) the judicial basis for the regulation of the protection of human rights is insufficiently elaborated and the mechanism of direct application of the Constitution and the international treaties had not been integrated into the application of the law; (3) the slow and inconsistent implementation of the reform of the organs of law-enforcement; (4) the absence of a real monitoring mechanism for the observance of human rights in the framework of the CIS; (5) "the judicial nihilism and the judicial illiteracy apparent in the activity of the organs of state and civil servants", "the impunity with which the laws are violated and the indifference towards the needs and interests of the people", and "the decadent practice" of some institutions of not applying laws which have come into effect until after receiving administrative guidelines and orders from above; and (6) the absence throughout the country of a system of education concerning human rights.

267. The second report is just as negative, and was drawn up by a group of experts which the Parliamentary Assembly asked to investigate Russia's legal order's conformity with the basic standards of the Council of Europe (human rights, rule of law and pluralist democracy) in the context of Russia's application to join the Council of Europe. In this detailed report of 28 September 1994,[133] the group of experts, after examining the legal texts and carrying out investigations on-the-spot (*e.g.*, in prisons) came to the conclusion that there is a big gap between theory and practice, that the traditional authoritarian thinking still seems to be dominant in the field of public administration. According to the European experts, the courts can now be considered structurally independent from the executive, but the concept that it is in the first place the judiciary which should protect individuals has not yet become a reality in Russia. Among other things, this is the reason why the group of experts concludes that "the rule of law has not yet been established in the Russian Federation" and that "notwithstanding the considerable progress achieved to date, the Russian Federation does not (yet) fulfill the condition 'of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms'", in other words "the legal order of the Russian Federation does not, at the present moment, meet the standards of the Council of Europe". The fact that less than a year and a half later Russia was admitted to the Council of Europe, after all, can only be justified on the basis of geopolitical considerations.

133. Doc. AS/Bur/Russia (1994) 7, published in *HRLJ*, 1994, 249-295.

268. The conclusions of both reports run along much the same lines, and probably still apply seven years later. They could be supplemented by questions, not of a legal nature but by a sociologist of law, a political scientist or a cultural historian: is the judicial power in Russia prepared for its new task of testing executive acts against the Constitution or against international treaties?[134] Have the authorities, and in particular the head of state, the President of the Russian Federation, not consolidated rather than deconstructed their role as paternalistic protector by proclaiming a new Constitution?[135] And has the Russian population itself sufficiently shed the cultural and social traditions in which they and previous generations were raised, to accept the responsibility, which the natural law view of human rights entails, with regard to the self-development and autonomy of the individual? And is the transplantation of the western concept of human rights, with its emphasis on individual political and civil rights, adapted to post-communist Russia in crisis, with a population urging for respect for their economic and social rights, and with minority groups in want of collective, group rights?[136]

134. Ginsburgs (495) writes on the fact that the test of the internal law to international treaties is entrusted to the ordinary courts of law, and not to the Constitutional Court:
"If the choice falls—perhaps merely by default—on the array of ordinary courts, extensive steps will have to be taken to raise their personnel's talent and skills to where there will be reason to hope that those in charge of the job can do it right. Today, that is certainly not the case."

135. "The President of the Russian Federation is the guarantor of the Constitution RF, and of the rights and freedoms of man and citizen" (art.80 (2) Const.1993). Does this in advance exclude that also the President himself can violate the human rights, in other words that human rights could be used as defensive rights against Presidential action?

136. K. Malfliet, "Mensenrechten in post-communistisch perspectief", in J. De Tavernier and D. Pollefeyt (eds.), *Heeft de traditie van de mensenrechten toekomst?* Leuven, Acco, 1998, 63-70.

Chapter III. Freedom of Speech and of Artistic Creation

Section 1. The Freedom of Speech and Thought, of Gathering and Disseminating of Information and of Mass Information

§ 1. The Sedes Materiae

269. Up to the very moment of the disintegration of the Soviet Union, article 50 Constitution 1977—which linked freedom of speech and of the press to conformity with the system—remained unaltered. However, with the abolition of the CPSU's monopoly of power at the beginning of 1990, this provision lost much of its ideological rigidity.

270. The first textual changes appeared in the USSR and RSFSR Declarations of Human Rights.[1] Article 6 para. 1 of the USSR Declaration[2] stated that "every human being has the right to free expression, to the unhindered expression of opinions and convictions and their dissemination in oral or written form. The means of mass communication are free. Censorship is not permitted". Article 12 para. 1 moreover determined that "every human being has the right to receive complete and reliable information on the state of affairs in all spheres of the state, economic, social and international life, as well as concerning rights, freedoms and duties".

In the Russian Declaration of the rights and liberties of man and the citizen,[3] article 13 determined:

> (1) Everyone has the right to the freedom of thought and expression, and to the unhindered expression of his opinions and convictions. Nobody can be forced to express his opinions and convictions. (2) Everyone has the right to seek, receive and freely disseminate information. Limitations to this right can only be determined by law and with the purpose of the protection of personal, family, professional, commercial and state secrets, as well as good morals. A list of such information as constitutes a secret of state is provided by law.

This provision was incorporated, on 21 April 1992, as article 43 in the Constitution 1978,[4] omitting, however, the duty imposed on the legislator to refrain from introducing restrictions to the freedom to seek, receive, and disseminate information for other purposes than those enumerated in the Constitution.

271. Finally the following article 29 was incorporated into the Constitution 1993:

> 1. Everyone is guaranteed the freedom of thought and word.
>
> 2. Propaganda or agitation which gives rise to social, racial, national, or religious hatred and animosity, are not permitted. Propaganda for social, racial, national, religious, or linguistic superiority is prohibited.

1. *Supra*, No.230.
2. "Deklaratsiia prav i svobod cheloveka", 5 September 1991, *VSND i VS SSSR*, 1991, No.37, item 1083, *Pravda* and *Izvestiia*, 7 September 1991; *Vestnik Verkhovnogo Suda SSSR*, 1991, No.11, 2-3; *SGiP*, 1991, No.10, 4-6.
3. "Deklaratsiia prav i svobod cheloveka i grazhdanina", 22 November 1991, *VSND i VS RSFSR*, 1991, No.52, item 1865, *Rossiiskaia gazeta*, 25 December 1991.
4. *VSND i VS RF*, 1992, No.20, item 1084.

> 3. Nobody can be forced to express his thoughts and convictions, or to renounce them.
>
> 4. Everyone has the right freely to seek, receive, pass on, produce, and disseminate information in any lawful manner. A list of such information as constitutes a secret of state, is provided by a federal law.
>
> 5. The freedom of mass information is guaranteed. Censorship is prohibited.

272. At the time when the new Russian Constitution was adopted, more than three years had lapsed already since the Supreme Soviet of the USSR had adopted on 12 June 1990 the USSR Law on the Printed Press and the News Media (hereinafter: NMA USSR)[5], "the broadest and most progressive law" announced no earlier than in Lenin's Decree of 27 October/9 November 1917.[6] This Law was followed a year and a half later by the RF News Media Law of 27 December 1991 (hereinafter: NMA RF).[7] This latter law is the one now still in force in the Russian Federation and which we will, therefore, take as the starting point for our discussion.

273. Apart from the Constitution 1993 and the NMA RF, the legislation (in a material sense) which in one way or another affects the media, the expression of opinion, or the right to information, has grown into an impressive corpus;[8] moreover, it is continuously changing and repeatedly brings new aspects of the "freedom of the press" in the broadest sense under its regulation, such as publicity,[9] the right of the citizen to know what information the government holds concerning his person,[10] the legal status of foreign correspondents in Russia,[11]

5. Zakon SSSR, "O pechati i drugikh sredstvakh massovoi informatsii", 12 June 1990, *VSND i VS SSSR*, 1990, No.26, item 492; *Izvestiia*, 20 June 1990; *BVS SSSR*, 1990, No.4, 37 ff (abstract). On the establishment of this Law, see *inter alia*, Y.M. Baturin, V.L. Entin, and M.A. Fedotov, "The road to freedom for the Soviet press", *Media Law & Practice*, 1991, 43-47; R. Berton-Hogge, (ed.), *Le débat sur la liberté de l'information et URSS*, in *Problèmes politiques et sociaux*, La documentation française, 1990, 51; V.L. Entin, "Law-making and Soviet mass media in the period of restructuring", in *Schmidt* 75-84; M.A. Fedotov, "K razrabotke kontseptsii zakona o pechati i informatsii", *SGiP*, 1987, No.3, 82-90 (English translation in *Soviet Law and Government*, 1988, No.1, 6-21), with as reply M.K. Ivanov, "Kakim byt' zakonu o pechati i informatsii ?", *SGiP*, 1987, No.9 (English translation in *Soviet Law and Government*, 1988, No.1, 22-25); M. Fedotov, "Svoboda pechati: na puti k pravovomu priznaniiu", *Chelovek i zakon*, 1990, No.8, 40-48; D. Loeber, "Glasnost' as an issue of law: on the future USSR Law on Press and Information", in Schmidt 91-105. For an overview of the provisions of this law, see Quigley 269-278.

6. *Supra*, No.60.

7. Zakon RF, "O sredstvakh massovoi informatsii", 27 December 1991, *VSND i VS RF*, 1992, No.7, item 300, amending 13 January 1995, *SZ RF*, 1995, No.3, item 169, on 6 June 1995, *SZ RF*, 1995, No.24, item 2256, *Rossiiskaia gazeta*, 8 June 1995, on 19 July 1995, *SZ RF*, 1995, No.30, item 2870, *Rossiiskaia gazeta*, 26 July 1995, on 2 March 1998, *Rossiiskaia gazeta*, 5 March 1998, and on 20 June 2000.

8. See, *e.g.*, O. Iatsyk, "Information Technology and Law in Russia. Protecting Information under Russian Law", *The Journal of World Intellectual Property*, 2000, 51-63. For a collection of legislative acts on the news media, see Rikhter.

the electronic media,[12] financial support for the written press,[13] the international exchange of information,[14] the abortive attempt to establish a High Council on the protection of public morals of television and radio broadcasting,[15] the

9. Art.36 NMA RF, as amended on 2 March 1998, *Rossiiskaia gazeta*, 5 March 1998; art.182 CrC 1996 (punishment of dishonest advertising); Federal'nyi Zakon RF ,"O reklame", *SZ RF*, 1995, No.30, item 2864, *Rossiiskaia gazeta*, 25 July 1995 (fundamental law on advertising: for previous bills, see *Rossiiskaia gazeta*, 29 October 1994 and 24 November 1994). For a comment, see W.G. Frenkel, "Legal regulation of advertising in Russia", *PS JEEL*, 1997, 129-140. Before the coming into force of this act, the applicable legislation included Ukaz Prezidenta Rossiiskoi Federatsii "O zashchite potrebitelei ot nedobrosovestnoi reklamy", 10 June 1994, *Rossiiskaia gazeta*, 16 June 1994 (protection of the consumer from dishonest advertising); Prikaz Gosudarstvennogo komiteta RF po antimonopol'noi politike i podderzhke novykh ekonomicheskikh struktur, "Polozhenie o poriadke rassmotreniia del o narusheniiakh printsipov dobrosovestnoi konkurentsii i prav potrebitelei na dostovernuiu informatsiiu pri reklame", 14 July 1994, *BNA RF*, 1994, No.11, 11-15 (Anti-monopoly committee monitoring of the application of the rules on dishonest advertising); Rasporiazhenie Pravitel'stva RF, 2 September 1994, *SZ RF*, 1994, No.20, item 2296 and 2297 (prohibition of advertising on state television and in the state newspapers of the services of banks, insurance and investment enterprises and suchlike which attract the assets of the citizens and civil servants contrary to the current law, a measure taken following the collapse of the MMM empire; see also A.Vystorobets, "Kto u kogo v dolgu?", *Rossiiskaia gazeta*, 20 September 1994); Ukaz Prezidenta RF, "O garantiiakh prava grazhdan na okhranu zdorov'ia pri rasprostranenii reklamy", 17 February 1995, *SZ RF*, 1995, No.8, item 659, *Rossiiskaia gazeta*, 22 February 1995 (advertising for tobacco goods, alcohol and medicines).
10. Art.24 (2) Const.1993 ("The organs of state power, the organs of self-government and their civil servants are obliged to allow anyone to consult the documents and information which directly concern their rights and freedoms, except in such cases as the law determines to the contrary"); art.140 CrC 1996; Point 3 Ukaz Prezidenta Rossiiskoi Federatsii, "O dopolnitel'nykh garantiiakh prav grazhdan na informatsiiu", 31 December 1993, SAPP RF, 1994, No.2, item 74, *Rossiiskaia gazeta*, 10 January 1994 (the activity of state organs, organizations and enterprises, social associations and civil servants is carried out according to the principles of openness of information, which is expressed in (1) the access of the citizen to information which represents a social interest or which touches the personal interest of the citizen; (2) the systematic informing of the citizens of decisions which have been proposed and taken; (3) the exercise by the citizens of monitoring of the activity of the named instances, organizations and persons and decisions taken by them which are linked with the observance, the preservation and the protection of the rights and legal interests of the citizens). Regarding the connection with the protection of information from the personal sphere and the right of citizens and organizations to see and correct information which is kept on them, see also arts.11 and 14 Federal'nyi Zakon RF, "Ob informatsii, informatizatsii i zashchite informatsii", 20 February 1995, *SZ RF*, 1995, No.8, item 609, *Rossiiskaia gazeta*, 22 February 1995. For a more general discussion of a draft of this act, see A.B.Agapov, "Problemy pravovoi reglamentatsii informatsionnykh otnoshenii v Rossiiskoi Federatsii", *SGiP*, 1993, No.4, 125-130; I.L. Bachilo, "Pravovoe regulirovanie protsessov informatizatsii", *GiP*, 1994, No.12, 72-80. A specific Law on the right to information was only adopted in first reading: Proekt federal'nogo zakona RF O prave na informatsiiu, *Rossiiskaia gazeta*, 17 September 1997.

rules on the dissemination of periodical print media to subscribers,[16] and so forth. Moreover, there are a number of media laws at the level of the subjects of the Federation.[17] In our discussion, we will only refer in passing to these sections of the Russian media law and will concentrate on the Constitution 1993, the NMA RF, and the normative acts directly resulting from these.

§ 2. Contents of the Freedom of Speech

2.1. The Constitution

274. Article 29 Constitution 1993 recognizes four distinct but closely related rights, which can be brought together under the term "freedom of speech" (even though this term is not used in the Constitution itself):

11. See, *inter alia*, arts.48 and 55 NMA RF; PP RF "Ob utverzhdenii Pravil akkreditatsii i prebyvaniia korrespondentov inostrannykh sredstv massovoi informatsii na territorii Rossiiskoi Federatsii", 13 September 1994, *SZ RF*, 1994, No.21, item 2399, *Rossiiskaia gazeta*, 17 September 1994, as amended on 4 August 1999, *Rossiiskaia gazeta*, 12 August 1999 (regulation of accreditation and sojourn for correspondents of foreign news media); PP RF, "O podpisanii Soglasheniia mezhdu Pravitel'stvom Rossiiskoi Federatsii i Pravitel'stvom Turkmenistana o statuse korrespondentov sredstv massovoi informatsii Turkmenistana v Rossiiskoi Federatsii", 17 May 1995, *Rossiiskaia gazeta*, 31 May 1995 (agreement between Russia and Turkmenistan on the status of correspondents of Russian news media in Turkmenistan and *vice versa*); PP RF, "O zakliuchenii Soglasheniia mezhdu Pravitel'stvom Rossiiskoi Federatsii i Pravitel'stvom Respubliki Uzbekistan o statuse korrespondentov sredstv massovoi informatsii Rossiiskoi Federatsii v Respublike Uzbekistan i korrespondentov sredstv massovoi informatsii Respubliki Uzbekistan v Rossiiskoi Federatsii", 14 February 1997, *Rossiiskaia gazeta*, 16 April 1997; PP RF, "O podpisanii Soglasheniia mezhdu Pravitel'stvom Rossiiskoi Federatsii i Pravitel'stvom Respubliki Moldova o statuse korrespondentov sredstv massovoi informatsii Rossiiskoi Federatsii v Respublike Moldova i korrespondentov sredstv massovoi informatsii Respubliki Moldova v Rossiiskoi Federatsii", 22 April 1997, *Rossiiskaia gazeta*, 22 May 1997.
12. For a discussion of the evolution in the electronic media, see Autissier *et al.* 196-198; M.L. Bazyler and E. Sadovoy, *loc.cit.*, 293-351; O.I. Gryzunova, T.S. Kosova, and M.L. Nemirovskaia, "Televidenie i radioveshchanie v Rossii. Problemy i perspektivy", *Zakonodatel'stvo i Ekonomika*, 1995, No.9-10, 18-29; W. Hoffmann-Riem and V. Monachow, (ed.), *Rundfunkrecht in Russland. Auf dem Weg zu einer neuen Medienordnung*, Baden-Baden, Nomos, 1994; K. Jakubowicz, "Freedom vs. Equality", *East European Constitutional Review*, 1993, No.2, 42-48; L.P. Michel and J. Jankowski, "Radio and Television Systems in Russia", Hans-Bredow Institute for Radio and Television (ed.), *Radio and Television Systems in Central and Eastern Europe*, European Audiovisual Observatory, 1998, 62-81; Quigley 278-279).
13. *Infra*, Nos.499 ff.
14. Federal'nyi Zakon RF, "Ob uchastii v mezhdunarodnom informatsionnom obmene", 5 June 1996, *Rossiiskaia gazeta*, 11 July 1996.
15. Federal'nyi zakon RF, "O Vysshem sovete po zashchite nravstvennosti televizionnogo veshchaniia i radioveshchaniia v Rossiiskoi Federatsii, adopted by the State *Duma* on 10 March 1999, but vetoed by the President on 31 March 1999.
16. PP RF, "Ob utverzhdenii Pravil rasprostraneniia periodicheskikh pechatnykh izdanii po podpiske", 2 August 1997, *Rossiiskaia gazeta*, 12 August 1997.
17. A. Richter, "Local Media Legislation in Russian Provinces: An Old and Winding Road", *International Journal of Communications Law and Policy*, Winter 1998/99, (<www.ijclp.org>).

(1) The positive and negative freedom of the word. This right is limited to the verbal expression. However, opinions can also be expressed in another way (*e.g.*, photos and works of visual art). From the general prohibition of pressurizing a person into expressing his opinions (art.29 (3) Const.1993), we can possibly deduce that everyone has the right to decide for himself whether or not he will express his opinion, as well as the form in which he will do so. If this interpretation is followed, article 29 (1) and (3) Constitution 1993 not only guarantees the freedom of the word but, also, the freedom of any expression of opinion.
(2) Freedom of thought, *i.e.*, the freedom to hold an opinion.
(3) The right of all to acquire and disseminate information, which is together with the freedom of thought the essence of the freedom of speech, as described in the ECHR.[18]
(4) The freedom of mass information, *i.e.*, the freedom to pass on information to a large public. Apparently, this refers to the "freedom of the media", *i.e.*, what is classically called the freedom of the press: not limited to the printed press but, also, applicable to, for instance, electronic news media. The freedom of the media is a corollary of the freedom of speech, as the media are one of the means by which everyone can express an opinion, and it is also a special application of the right of everyone to acquire and disseminate information.

2.2. The Law on the News Media RF

2.2.1. General Remarks

275. The Law on the News Media RF of 27 December 1991 (NMA RF) is built up around the regulation of the "freedom of mass information", and defines it in a negative way: "In the RF—apart from the exceptions provided by the legislation of the RF on the news media—no limitations are permitted to the seeking, receiving, producing, or disseminating of mass information; to the founding, possessing, use, or disposal of news media; to the production, acquisition, maintenance, and exploitation of technical installations and equipment or raw materials intended for the creation and distribution of news media products".[19]

18. "Everyone has the right to freedom of speech. This right contains the freedom to hold an opinion and the freedom to receive or pass on information or ideas, without interference from the government and irrespective of borders" (art.10 (1) ECHR).
19. Art.1 NMA RF. Compare art.1 NMA USSR:
"The press and the news media are free. The freedom of the word and the freedom of the press, which are guaranteed to the citizens by the Constitution [art.51 Const.1977], contain the right to the expression of opinions and convictions, to the seeking, selecting, receiving and dissemination of information and ideas in every form. Censorship of mass information is not permitted."

The freedom of mass information is, thus, here used as an umbrella term for the freedom of the acquisition and distribution of information on the one hand and the freedom of mass information in a narrow sense (*i.e.*, media freedom) on the other. Consequently, only part of article 29 Constitution 1993 was developed by the NMA RF (which came into force earlier than did the Const.1993). Freedom of speech is only treated to the extent that opinions are uttered via the media. Moreover, the area of application of the NMA RF is limited to those media which appear on a periodic basis (newspapers, periodicals, radio and television broadcasts, cinema newsreels,[20] not books[21] or films). We will, henceforth, refer to these media as the 'news media'.

In the NMA RF most attention goes—apart from to other parts of the classic media law[22]—to the freedom to acquire and disseminate information, and the right to and the procedure for the establishment of news media.

2.2.2. Right to Acquire and Disseminate Information

276. The right to information contains the right to acquire information ("seek and receive"), as well as the right to disseminate information ("produce and disseminate").[23] Although this right is directly acknowledged by the Constitution as being vested in "everyone", the NMA RF assumes that the effectiveness of the people's right to information depends largely on the right of the news media and the journalists to acquire information, their right to check its reliability,[24] and their duty to monitor the accuracy of the information communicated by them.[25] The right of the citizen to information thus corresponds to the duty of the media to disseminate reliable information.[26,27]

20. Art.2 NMA RF.
21. In art.2 of the draft NMA USSR (*Izvestiia*, 4 December 1989), book production still fell within the area of application. The exclusion of books in the final version of the NMA USSR had to be compensated by the approval of the Fundamentals of legislation of the USSR and the Union Republics on publishing activity in the USSR, the provisions of which were largely to be a repetition of the NMA USSR (L. Fedorov, "Zakon i zakonnost' v knigoizdanii", *Sots. Zak.*, 1991, No.22, 8). A bill of Fundamentals was published (*Knizhnoe obozrenie*, 1990, No.47, 5), but this never became law. This unequal treatment between periodical and non-periodical publications is a cause of complaint in the legal theory, Fedorov arguing that the shift to the "rule of law, legal economy and a civilized market" requires one law for all publications (L. Fedorov, *l.c.*, 9).
22. *E.g.*, a regulation on compulsory deposit (art.29 NMA RF), governmental communications (art.35 paras 2 and 3), the confidentiality of journalistic sources (art.41 para.2), the right to reply and correct (arts.43-46), the rights and duties of journalists (arts.47 and 49) and the regulation of liability for the violation of the legislation on the news media (arts.56-62).
23. Art.29 (4) Const.1993 also mentions "the passing on of information".
24. Art.47 (8) NMA RF. Compare art.30 (5) NMA USSR: "A journalist has the right to turn to specialists to check facts and circumstances with regard to communications that have come in".
25. Art.49 (2) NMA RF. Compare art.32 (2) NMA USSR.
26. Korzunov 131.

277. Article 38 NMA RF determines that the citizens have the right to an effective reception via the media of reliable information on the activity of state organs and organizations, social associations and their functionaries. The latter are obliged to provide information on their activities at the request of the media,[28] a request which can only be rejected if the information requested contains data which comprise a secret of state, a commercial secret, or another secret specifically protected by law.[29] This refusal could be disputed in a court of law.[30]

As subsidiary aspects of this right to receive information, we must also mention the prohibition of the creation of artificial interference which would hinder the normal reception of radio and television broadcasts[31] and the right of the citizens to unhindered access to foreign news media.[32]

In the catalogue of the rights and duties of the journalist, the journalist is granted the general right to seek, request, receive, and disseminate information.[33] To this end he can, among other things, visit state organs, enterprises, or social associations, be given access to documents insofar as these do not contain state, commercial, or other secrets specifically protected by law, visit specially secured sites of natural disasters, accidents and catastrophes,[34] mass disorders, places where a state of emergency has been decreed, or meetings and demonstrations.[35]

278. With regard to the dissemination of information, citizens, associations of citizens, civil servants, enterprises, institutions, organizations, and state organs are prohibited from hinder the lawful dissemination of the product of news

27. This, obviously, does not exhaust the citizen's right to information under the rule of law: this right is not limited to acquisition via the media, but, also, covers access to documents and any kind of information held by the government. This aspect is, however, not regulated by the NMA RF, and falls outside our field of research.
28. Art.38 para.2 and art.39 NMA RF. Conversely, the news media the founder of which is a state organ, bears the duty to report on the activities of the state organs: Federal'nyi Zakon RF, "O poriadke osveshcheniia deiatel'nosti organov gosudarstvennoi vlasti v gosudarstvennykh sredstvakh massovoi informatsii", 13 January 1995, *SZ RF*, 1995, No.3, item 170, *Rossiiskaia gazeta*, 14 January 1995; Ukaz Prezidenta Rossiiskoi Federatsii, "O dopolnitel'nykh garantiiakh prav grazhdan na informatsiiu", 31 December 1993, *SAPP RF*, 1994, No.2, item 74; *Rossiiskaia gazeta*, 10 January 1994. The detailed obligations which are laid upon the state media concerning reporting on the activities of state organs, especially by the Federal Law of 13 January 1995, are a serious curtailment of the editorial independence of these media, see also "Report on the conformity of the legal order of the Russian Federation with Council of Europe Standards", Doc. AS/Bur/Russia (1994) 7 of 28 September 1994, *HRLJ*, 1994, 259.
29. Art.40 NMA RF. *Infra*, Nos.307 ff.
30. Art.61 NMA RF.
31. Art.33 NMA RF. This provision is a reaction to the practice in the USSR of jamming the broadcasts of foreign stations.
32. Art.54 NMA RF.
33. Art.47 point 1 NMA RF.

media.[36] Hindering the legitimate professional activity of journalists by pressurizing journalists into disseminating certain information or not disseminating certain information was made punishable by a new article 140[1] CrC 1960,[37] now article 144 CrC 1996.[38] The confiscation and destruction of a print run is only allowed in execution of a final and absolute finding of the court of law[39] although the law does not specify the cases in which a court of law can issue such an order for confiscation or destruction.[40]

2.2.3. The Right to Establish News Media

279. Every citizen, association of citizens, enterprise, institution, organization, or state organ has the right to establish a news medium.[41] This news medium can, however, only function "lawfully" once registered according to a fixed procedure.[42] For the transmission of electronic media through the air or by cable, a prior transmission license has to be obtained.[43] We will return to this

34. To be set against this is the duty of the government to pass on reliable information in the event of disasters: art.6 Federal'nyi Zakon R.F, "O zashchite naseleniia i territorii ot chrezvychainykh situatsii prirodnogo i tekhnogennogo kharaktera", 21 December 1994, *Rossiiskaia gazeta*, 24 December 1994:
    > "The information with regard to the protection of the populace and the territory from emergencies and to the activities of [the governmental organs] in this area is public and open, unless otherwise provided in the legislation of the R.F. [The governmental organs] have to inform the populace effectively and reliably via the news media and through other channels of the situation for the protection of the populace and the territory in the face of the emergencies and the measures taken for the assurance of their safety, of emergencies which are predictable and which have already originated, of the reception and the ways of protecting the populace against such emergencies. Hiding, communicating tardily or apparently misleading information by civil servants with regard to the protection of the populace and the territory against exceptional situations, entails liability in accordance with the legislation of the R.F."
35. Art.47 NMA R.F.
36. Art.25 para.1 NMA R.F. This is in principle also the case for retail sales of printed matter in public places (art.25 para.4 NMA R.F).
37. Zakon R.S.F.S.R, 21 March 1991, *Rossiiskaia gazeta*, 19 April 1991, amended 20 October 1992, *Rossiiskaia gazeta*, 20 November 1992.
38. For a critical comment on this article, see A. Malinovskii, "Novyi UK i svoboda pressy", *Zak.*, 1996, No.11, 16-18.
39. Art.28 para.2 NMA R.F. Compare art.22 para.3 NMA USSR.
40. Sherstiuk 9.
41. Art.7 para.1 NMA R.F. This is, however, not the case for minors, those serving a prison sentence for criminal convictions, the insane, prohibited associations of citizens, enterprises, institutions or organizations, or a citizen of another state or a person without citizenship not permanently resident in the R.F: art.7 para.2 NMA R.F.
42. Arts.8-15 NMA R.F. No registration is required for governmental news media insofar as they publish official documents, for periodical printed publications with a print run of less than 1000 copies, radio and television programs which are disseminated by means of a closed cable service (*e.g.*, in a hospital), audio and video programs which are disseminated in fewer than 10 copies (art.12 NMA R.F).
43. Arts.30-32 NMA R.F.

later.[44] In 2001, the Russian Parliament adopted an amendment to the NMA RF, prohibiting foreign investors from owning more than 50 percent of television and video organizations.[45] This has to be seen as a reaction to the abortive attempt by Ted Turner to take a major share in Russian NTV.[46]

The NMA RF furthermore regulates the status of the founder, the editorial staff, and the publisher of a news medium, and their mutual relationships (insofar as these positions are not combined in one or a few persons).[47]

§ 3. Limitations upon the Freedom of Speech

280. In a democracy, freedom of speech is one of the most important legal goods, but still not the only one. Other legal goods also deserve protection, such as the right of ownership, the private life of persons, the right to good name, etc. The prominent place of the right to the freedom of speech under the democratic rule of law shows that it is accepted that normally the other legal rights could *a posteriori* limit the freedom of speech, but that this freedom should first be able to take its course. Abuses can be tackled afterwards by means of criminal and civil legal liability; preventive measures are normally rejected because they also affect 'innocent' expressions of opinion and are often executed by the executive power without juridical action. Repressive measures, on the other hand, only take effect after the abuse of the freedom took place and their imposition always requires the intervention of an independent judge.[48]

3.1. The Constitutional Framework

281. Article 29 Constitution 1993 itself mentions a number of limitations to the freedom of speech. Paragraph 2 prohibits "propaganda or agitation which gives rise to social, racial, national, or religious hatred and animosity", as well as "the propaganda of social, racial, national, religious, or linguistic superiority". Paragraph 4 acknowledges the freedom to acquire and disseminate information "in any lawful fashion" (*liubym zakonnym sposobom*),[49] and adds that "the list of facts which are secrets of state is to be provided by a federal law". Paragraph 5 finally also states that "censorship is prohibited".

282. Freedom of speech can furthermore be limited in accordance with article 55 (3) Constitution 1993 which states for all human rights that they

44. *Infra*, Nos. 288 ff.
45. Federal'nyi zakon RF, 4 August 2001.
46. In May 2001, it was reported that of the 12000 Russian media outlets, foreign capital is present only in 66 print and 38 electronic ones (*RFE/RL Newsline*, Part I, 7 May 2001).
47. Arts. 18-22 NMA RF.
48. Velaers No. 117, 139.
49. According to the group of experts of the Council of Europe, it was not entirely clear "to which extent the words 'by any legal means', qualifying the exercise of the positive aspects of the freedom [of expression], provide a basis for introducing further legal restrictions" ("Report on the conformity of the legal order of the Russian Federation with Council of Europe Standards", Doc. AS/Bur/Russia (1994) 7, of 28 September 1994, *HRLJ*, 1994, 255).

can only be limited "by federal law, to the degree in which this is necessary to protect the fundamentals of the constitutional development, as well as for the protection of public morals, health, the rights and legal interests of other persons, or in the interests of national defense and state security".[50] According to the letter of the Constitution, the conditions which limitations to human rights have to fulfill namely the condition of proportionality, are not applicable to the limitations of human rights provided for in the Constitution itself,[51] such as, in the case of freedom of speech, the protection of state secrets, and certain forms of "hate speech".[52] Article 55 (3) Constitution 1993 is only aimed at the legislature, not at the constitution. The Constitutional Court of the Russian Federation has, however, in its decisions of 20 December 1995 and 27 March 1996 applied—without hesitation—the conditions of article 55 (3) Constitution to the protection of state secrets.[53]

283. If a state of emergency is proclaimed, and with the safety of the citizens in mind and for the protection of constitutional process, a number of rights and liberties—including freedom of speech—can be limited by virtue of a federal constitutional law upon condition that the extent and terms of its validity are specified.[54]

3.2. Preventive Measures

3.2.1. The Prohibition of Censorship

284. The constitutional prohibition of censorship was preceded by a similar prohibition in article 1 para.3 NMA USSR. Due to the limited area of application of the NMA USSR, books, films, works of visual art, etc. in theory remained subject to censorship; only the news media escaped. This was also the case under the NMA RF, in which censorship was explicitly prohibited. This

50. Art.17 (3) Const.1993 repeats incessantly that the rights and liberties of man and the citizen cannot be exercised so as to violate the rights and liberties of third parties.
51. See, also, the report of a group of experts for the Parliamentary Assembly of the Council of Europe: "Report on the conformity of the legal order of the Russian Federation with Council of Europe Standards", Doc. AS/Bur/Russia (1994) 7 of 28 September 1994, *HRLJ*, 1994, 255.
52. Art.29 (2) and (4) Const.1993.
53. PKS RF, "po delu o proverke konstitutsionnosti riada polozhenii punkta "a" stat'i 64 Ugolovnogo kodeksa RSFSR v sviazi s zhaloboi grazhdanina V.A. Smirnova", 20 December 1995, *Rossiiskaia gazeta*, 18 January 1996; PKS RF, "po delu o proverke konstitutsionnosti statei 1 i 21 Zakona Rossiiskoi Federatsii ot 21 iiulia 1993 goda 'O gosudarstvennoi taine' v sviazi s zhalobami grazhdan V.M. Gurdzhiiantsa, V.N. Sintsova, V.N. Bugrova i A.K. Nikitina", 27 March 1996, *Rossiiskaia gazeta*, 4 April 1996. This aside, the Constitutional Court has thus far, for various reasons, declared inadmissible all claims which have tended to test the constitutionality of the contents of certain provisions concerning the freedom of speech: A. Rakhmilovich, "The Constitutional Court of the Russian Federation: Recent Cases on Protecting the Freedom of Thought and Speech and Related Matters", *RCEEL*, 1996, 129-134.
54. Art.56 (1) Const.1993.

prohibition is made concrete by the provision, which prohibits the foundation and financing of organs of censorship.[55] The NMA RF defines the term "censorship" as "the demand placed upon the editorial staff of a news medium that civil servants, state organs, organizations, institutions, or social associations give prior consent to the communications and materials of that news medium (unless the civil servant is himself author or interviewee), or the enforcement of the prohibition of the dissemination of (separate parts of) communications and materials".[56] A general prohibition on the exercising of censorship with regard to all expressions of opinion was provided for the first time in the Declaration of the Rights and Freedoms of the citizen of the USSR,[57] and is now repeated in article 29 (5) Constitution 1993.

285. With the prohibition of censorship by the NMA USSR, the role of the censorship organ *Glavlit*[58] seemed—at least for the news media—to be at an end, but that is not what the Soviet leaders intended. On 24 August 1990, the Main administration for the protection of state secrets in the press and in other news media answerable to the Council of Ministers of the USSR (abbreviated as *GUOT*) was founded by the approval of the Temporary Statutes of this state organ;[59] this was to be a temporary measure "until laws are adopted which regulate the protection of state and other secrets, as well as the activity of divers news media" (preamble).

GUOT was given the task of implementing a uniform state policy concerning the prevention of the dissemination of state secrets via the press and other mass media in the USSR or abroad (which implied monitoring outgoing international dispatches and mail[60]). For monitoring military secrets, *GUOT* called in the help of specialists in the armed forces and in the separate minis-

55. Art.3 NMA RF. Liability with regard to the imposition of censorship is regulated by art.58 NMA RF.
56. Art.3 para.1 NMA RF. Compare the definition of Velaers No.88, 116: "Censorship is the prior inspection by the government of the contents of publications with the intention of prohibiting those which are unapproved, of confiscating them, or of allowing them on the condition of prior alterations".
57. Art.6 para.1 "Deklaratsiia prav i svobod cheloveka", 5 September 1991, *VSND i VS SSSR*, 1991, No.37, item 1083; *Pravda* and *Izvestiia*, 7 September 1991; *VVS SSSR*, 1991, No.11, 2-3; *SGiP*, 1991, No.10, 4-6.
58. *Supra*, No.69.
59. PSM SSSR, "Ob utverzhdeniiVremennogo polozheniia o Glavnom upravlenii po okhrane gosudarstvennykh tain v pechati i drugikh sredstvakh massovoi informatsii pri Sovete Ministrov SSSR", 24 August 1990, *SP SSSR*, 1990, No.24, item 115. It was, for the first time since 1966, that the existence of a "censorship organ" was openly admitted. In this Decree, a Decree of the Council Ministers of 19 November 1974 is abolished, *i.e.*, apparently the never published Decree which until 1990 regulated the activity of the previous censorship organ, *Glavlit*.
60. Incoming mail was checked for any unacceptable abuse of the freedom of the word, as defined by art.5 NMA USSR (pornography, war propaganda, etc.) then in force.

tries of the military branches of industry. Its most important function was to draw up (and keep up to date) a list of information the publication of which was prohibited, and to issue orders and instructions to this effect which were binding on the ministries, departments, organizations, press organs, and other mass media at the preparation of their materials for public dissemination, but, also, for their transfer abroad. As the leading role of the CPSU had by then already been struck from the Constitution, *GUOT* did not exercise any ideological monitoring, checking only that nothing containing state secrets was disseminated in the media.[61]

The on-the-spot monitoring of newspapers, periodicals, television etc. no longer took place automatically, but 'on a contractual basis',[62] *i.e.*, with the consent of the medium involved. Liability for the dissemination of documents passed by *GUOT*, which turned out to contain state secrets after all, was *GUOT*'s. If the media did not want to take advantage of this 'offer', they nevertheless had to stick to the 'Talmud of forbidden information'.[63]

286. Officially, *GUOT* was abolished on 1 July 1991, but it nevertheless continued its activities in expectation of the foundation of a new organ.[64] On 11 September 1991, the so-called "State Inspectorate for the protection of the freedom of the press and mass information" attached to the Ministry of press and mass information of the RSFSR (and, thus, no longer on the level of the Soviet Union) was established.[65]

This State Inspectorate was an organ of state regulation attached to the Ministry of the press and information of the RF, which was entrusted with three fundamental tasks: (1) control over the observance of the media legislation of the RF; (2) participation in the development of the processes of de-

61. Compare the double function of *Glavlit* in earlier times: *supra*, No.68.
62. According to a well-informed source (the head of *Glavlit* and *GUOT*, V.A. Boldyrev), many media made use of this 'service': "Tsenzury net, no tainy ostaiutsia", *Izvestiia*, 26 July 1990.
63. Hübner 1992, 79-80. In the first interview ever granted by the head of *Glavlit*, Boldyrev declared that the list of prohibited subjects had been reduced by one-third but that the streamlining was not yet complete: *Izvestiia*, 3 November 1988; *Index on censorship*, 1989, No.3, 22-23.
64. V. Tolz, "Recent Developments in the Soviet and Baltic Media", *Report on the USSR*, 1991, No.28, 12-13.
65. Ukaz RSFSR, "O merakh po zashchite svobody pechati v RSFSR", 11 September 1991, *VSND i VS RSFSR*, 1991, No.37, item 1199. For the Statutes, see PSMP RSFSR, "Voprosy Gosudarstvennoi inspektsii po zashchite svobody pechati i massovoi informatsii pri Ministerstve pechati i informatsii RSFSR", 25 October 1991, not published (but see "A new watchdog for the press", *Moscow News*, 1991, No.46, 2), and afterwards replaced by PSMP RF, "Voprosy Gosudarstvennoi inspektsii po zashchite svobody pechati i massovoi informatsii pri Ministerstve pechati i informatsii Rossiiskoi Federatsii", 9 September 1993, *SAPP RF*, 1993, No.38, item 3526. These last Statutes were accepted in execution of: Ukaz Prezidenta RF, "O zashchite svobody massovoi informatsii", 20 March 1993, *SAPP RF*, 1993, No.13, item 1100.

monopolization in this area, and to the realization of the professional rights and duties of the employees of the media and the publishing houses; (3) the formation of a media culture, the strengthening of the legal, professional, and moral fundamentals of the activity of the mass media. These three tasks became concrete in nine functions, two of which especially deserve our attention here. The State Inspectorate is, strangely enough, brought into the struggle against censorship, and "takes the measures provided by law in the case of intolerable censorship of mass information by civil servants, state organs, enterprises, institutions, and organizations and of social associations".[66] On the other hand, the State Inspectorate was charged with analyzing printed matter, audio and audiovisual works, and documents to test their contents against the requirements of the media legislation. Taking both functions together, the impression could arise that the Inspectorate had to arm itself against itself. In fact, the latter task was a case of mere *a posteriori* examination. As will soon become clear,[67] this does not mean that the State Inspectorate did not play a role in enforcing the preventive measures, but it did not carry out censorship in the sense of prior examination of the contents of publications with an eye to their confiscation or their approval for dissemination conditional on alterations.

287. As a consequence of an administrative redistribution of powers between the federal services at the end of 1993, the State Inspectorate was abolished on 6 July 1994 and its powers with regard to investigating the observance of the media legislation were transferred to the RF Committee for the press,[68] which had by then itself succeeded the earlier RF Ministry of the Press and Information [69] and which in 1996 was renamed State Committee for the press

66. See art.58 NMA RF.
67. *Infra*, Nos.288 ff.
68. PP RF, "O likvidatsii Gosudarstvennoi inspektsii po zashchite svobody pechati i massovoi informatsii pri byvshem Ministerstve pechati i informatsii Rossiiskoi Federatsii", 6 July 1994, *SZ RF*, 1994, No.12, item 1398, *Rossiiskaia gazeta*, 21 July 1994. The Decree of 9 September 1993 containing the last Statutes of the State inspectorate (*supra*, note 65) was abolished by this new Decree, but, also, the Decree containing the old Statutes of 25 October 1991 (*supra*, note 65), which was already abolished by the Decree of 9 September 1993, was again abolished by the Decree of 6 July 1994. Some bureaucratic bodies are indeed hard to exterminate. For the Statutes of the Committee RF for the press, see PP RF, "Voprosy Komiteta Rossiiskoi Federatsii po pechati", 3 March 1994, *SAPP RF*, 1994, No.10, item 796, replaced by PP RF "O vnesenii izmenenii i dopolnenii v Polozhenie o Komitete Rossiiskoi Federatsii po pechati", 1 November 1994, *SZ RF*, 1994, No.29, item 3031.
69. Ukaz Prezidenta Rossiiskoi Federatsii "O sovershenstvovanii gosudarstvennogo upravleniia v sfere massovoi informatsii", 22 December 1993, *SAPP RF*, 1993, No.52, item 5067, *Rossiiskaia gazeta*, 23 December 1993. The Statutes of the RF Ministry for press and information of 18 May 1993 were abolished in execution of this Ukaz: PP RF, "O priznanii utrativshimi silu nekotorykh normativnykh aktov po voprosam gosudarstvennogo upravleniia v sfere massovoi informatsii", 6 October 1994, *SZ RF*, 1994, No.25, item 2708.

of the RF (*Gosudarstvennyi Komitet RF po pechati*,[70] abbreviated *Goskompechat' Rossii*[71]). We will later see that yet other state organs are active in the area of the protection of state secrets.[72]

3.2.2. Other Preventive Measures

288. The prohibition of censorship in the Russian legislation is a remarkable break with the Czarist and Soviet past. This is also the case for the acknowledgement of the freedom to establish or run a news medium, including the equipment needed for this (*e.g.*, printing works), without the state's permission.

However, prior registration with first the Committee for the Press of the RF or its local sections,[73] later the Ministry for the press, broadcasting and means of mass communication,[74] and payment of a registration fee is still required.[75]

289. The competent body can only refuse registration in the cases, which are exhaustively listed in the law:[76]

— If the applicant is not authorized to establish a news medium (*e.g.*, minors or foreigners without permanent residence in the RF).[77]
— If the details given in the application are inaccurate. The exhaustive list with details to be mentioned in the application contains, among other things, an example of the subject matter and/or specialization of the medium.[78]
— If the name, the exemplary subject matter or the specialization of the medium entail abuse of the freedom of mass information.[79]

70. Point 1 Ukaz Prezidenta RF, "O strukture federal'nykh organov ispolnitel'noi vlasti", 14 August 1996, *Rossiiskaia gazeta*, 16 August 1996.
71. Rasporiazhenie Administratsii Prezidenta RF i Apparata Pravitel'stva RF, No.2868/1027, 10 December 1996, *Rossiiskaia gazeta*, 18 December 1996.
72. *Infra*, Nos.309 ff.
73. See, also, PP RF "O vnesenii izmenenii i dopolnenii v Polozhenie o Komitete Rossiiskoi Federatsii po pechati", 1 November 1994, *SZ RF*, 1994, No.29, item 3031. Formerly, the registration of the media fell under the remit of the Ministry of press and information of the Russian Federation, or for local media, of the local organs of the State inspectorate for the protection of the freedom of the press and mass information with the said Ministry.
74. *Infra*, No.457.
75. Arts.8 and 14 NMA RF. Only official publications and publications with a small print run are exempt from the registration fee (art.12 NMA RF). For further modalities of obligatory registration, see arts.9-15 NMA RF. Compare also arts.8-14 NMA USSR. The registration was regulated in detail by executive acts, *e.g.*, PP RF, "Polozhenie 'O poriadke vzimaniia registratsionnogo sbora pri registratsii sredstv massovoi informatsii'", 5 April 1992, *Zakonodatel'stvo i Ekonomika*, 1992, No.8-9, 156, amended 8 June 1993, *SAPP RF*, 1993, No.24, item 2239.
76. Art.13 para.1 NMA RF.
77. Art.7 para.2 NMA RF.
78. Art.10 paras1 and 3 NMA RF.
79. *Ibid.*

— If a medium with the same name and means of dissemination is already registered.

A decision to deny registration of a news medium, the violation by the registering organ of procedure and terms of registration, or other irregular actions on the part of the registering organ can be appealed to the ordinary courts of law.[80] Individuals guilty of the production or dissemination of a non-registered news medium can, in principle, be made liable under criminal law, administrative law, disciplinary law, or in any other manner in accordance with the Russian legislation.[81]

290. The duty of registration for the news media is deviously in tension with the right to free speech. Prior registration, which is constitutive for the freedom of the news media, is only acceptable if it concerns a mere formality. This, however, does not seem to be the case in the Russian Federation, since the registering state body has to ascertain whether the subject matter with which the medium intends to deal, or the specialization which it wishes to adopt, is an abuse of the freedom of mass information,[82] and since this registration is linked to a financial burden. We are (as yet) unaware of any complaints concerning the refusal of registration or the level of the registration fees, but the whole procedure has the potential to become a weapon in the hands of the government to limit (certain) media, *e.g.*, by enforcing a prohibitively high registration fee or a broad interpretation by the administration of what constitutes an abuse of the freedom of mass information.[83]

291. Furthermore, obligatory registration has already caused problems for the news media, but in connection with the identity of the applicant. This had to be the 'founder' of the medium,[84] but in many cases it was difficult to determine who would function as such: the publishing house, a parent organization, a journalists' collective, the state, or the CPSU. It was not uncommon for all of them individually to submit a registration application for the same

80. Art.61 para.1 point 1 NMA R.F.
81. Art.60 NMA R.F. See also art.1711 of the RSFSR Code on administrative infringements.
82. This does not therefore concern prior monitoring of every installment or broadcast of a news medium (which could beyond doubt be defined as censorship), but the monitoring of the contents according to the 'specimen subject' or 'specialization' which the potential founder of a news medium himself submitted in his application.
83. See, also, the report of the Group of experts for the Parliamentary Assembly of the Council of Europe: "Report on the conformity of the legal order of the Russian Federation with Council of Europe Standards", Doc. AS/Bur/Russia (1994) 7 of 28 September 1994, *HRLJ*, 1994, 256-257. One of the "authors" of the NMA R.F, Professor M. Fedotov, stresses, however, the fact that registration is not to be equated with licensing, *i.e.*, "authorization", and that in the past decade not a single case of abuse by the administration was detected: "A zakonna li litsenziia?", *Rossiiskaia gazeta*, 6 July 2000.
84. Arts.7-8 NMA R.F.

medium.[85] The Soviet regime (1990–1991) certainly turned this to its advantage by recognizing the most government-friendly organization as founder.

292. The freedom of mass information, as defined by article 1 NMA RF, also implied the unhindered production, purchase, and exploitation of technical installations, equipment, raw materials, and anything else necessary for the creation and dissemination of the product of the news media. In this regard, we can refer to the fact that printing companies are subjected to obligatory registration, albeit not on the basis of a federal law, but on the basis of a Government Decree.[86] Unlike the obligatory registration of the news media, there is no doubt that for printing works this is merely a formality. The permit ("license") can only be refused for reasons of fire safety, the sanitary situation within the company and environmental impact, or for formal reasons.[87]

293. For the distribution of foreign periodic printed matter in Russia, the consent of the Committee for the press of the RD is, in principle, required unless an international treaty stipulates the contrary.[88] Consequently, this goes even further than the duty of registration for the domestic media and grants the administration discretionary competence without any guarantee concerning the procedure or the motives of the decision. We doubt whether this limitation on the freedom of the reception of information is compatible with the basic foundations of a democracy. Moreover, citizens of foreign states who are not living permanently in Russia are not allowed to establish and register a news medium in Russia.[89] One may wonder whether this provision is in accordance with article 29 Constitution 1993, or article 10 ECHR.

294. A system of broadcasting licenses has been introduced for radio and television stations.[90] Strict government regulation of radio and television is not

85. Sheinin 26; Sherstiuk 8. See also "Komu byt' khoziainom?", *Pravda*, 14 November 1990; G. Alimov, "Bitva titanov. Pochemu voznik konflikt vokrug registratsii nekotorykh zhurnalov", *Izvestiia*, 23 August 1990.
86. Point 1 PP RF, "O regulirovanii poligraficheskoi deiatel'nosti v Rossiiskoi Federatsii", 22 September 1993, *SAPP RF*, 1993, No.40, item 3754, *Zakon*, 1994, No.6, 21-23. With this Decree, the Decrees "On the procedure for the opening of polygraph enterprises" ("Polozhenie o poriadke otkrytiia poligraficheskikh predpriiatii") and "On the manner of payment and the tariffs of the license fee for the issuance of a license for polygraph activity" ("Polozhenie o poriadke uplaty i razmerakh litsenzionnogo sbora za vydachu litsenzii na poligraficheskuiu deiatel'nost'") were approved. See also Federal'nyi zakon RF, "O litsenzirovanii otdel'nykh vidov deiatel'nosti", 25 September 1998, *SZ RF*, 1998, No.39, item 4857, *Rossiiskaia gazeta*, 3 October 1998.
87. Point 8 and 9 Decree on the procedure for the opening of polygraph enterprises.
88. Art.54 para.3 NMA RF.
89. Art.7 NMA RF. There seems to be no similar prohibition for foreign legal persons.
90. Arts.30-32 NMA RF; PP RF, "O litsenzirovanii televizionnogo veshchaniia, radioveshchaniia i deiatel'nosti po sviazi v oblasti televizionnogo i radioveshchaniia v Rossiiskoi Federatsii", 7 December 1994, *SZ RF*, 1994, No.34, item 3604; Art.17 Federal'nyi zakon RF "O litsenzirovanii otdel'nykh vidov deiatel'nosti", 25 September 1998, *SZ RF*, 1998, No.39, item 4857, *Rossiiskaia gazeta*, 3 October 1998. See, also, Parker 453-454.

unusual, not even in the West, due to the technical and economic threshold and the fact that the electronic media are considered public services.[91] The fact that everyone has the right to found a television or radio station, thus, does not necessarily mean that everyone also has the right to broadcast. To avoid chaos in the air, a station has to be granted a frequency by the government, and a system of licenses is thus acceptable.[92] It is, however, clear that in times of political instability the ruling group may consider control of the electronic media, due to their great range and their direct impact on public opinion, a powerful weapon in the struggle with the opposition.

295. Finally, we must refer to article 28 para.2 NMA RF dealing with the confiscation and destruction of a print run or part of it by order of a court of law. It is unclear whether this also allows the ordering of the confiscation or destruction of the full print run of a publication prior to its distribution. If this were to be the case, it would again be a very important preventive measure.

3.3. Repressive Restrictions upon the Freedom of Speech

3.3.1. General Remarks

296. Article 29 Constitution 1993 itself enumerates some restrictions to the freedom of speech (forms of "hate speech", and the dissemination of state secrets), but article 55 (3) Constitution 1993 also allows the federal legislator to introduce other limitations, albeit only in order to realize certain goals and proportionate to the achievement of these goals.

297. By virtue of article 4 NMA RF, the use of the news media with the following intentions is prohibited: the commission of criminal actions, the revealing of information which contain a secret of state or other secret specially protected by law, the instigation of a *coup d'état*, the violent overthrow of the constitutional order and the integrity of the state, the instigation of national, class, social, or religious intolerance, war propaganda; also for the distribution of broadcasts which propagate pornography or the cult of violence and cruelty. Moreover, the use of subliminal inserts in visual programming (television, video, film, computer files etc.) which work on the human subconscious and/or have a harmful influence on health, are prohibited.[93]

298. Anybody abusing the freedom of mass information is liable for prosecution under criminal law, administrative law, disciplinary law, or in any other way in accordance with the legislation of the RF.[94] Such abuse can even lead to the closing down of the news medium abused. Monitoring of the abuse of

91. Velaers No.532-536, 503-507.
92. Compare art.10 (1) ECHR *in fine*: "This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises".
93. Art.4 NMA RF, as amended by Federal Law of 19 July 1995, *SZ RF*, 1995, No.30, item 2870, *Rossiiskaia gazeta*, 26 July 1995; art.10 Federal'nyi Zakon RF "O reklame", 18 July 1995, *SZ RF*, 1995, No.30, item 2864, *Rossiiskaia gazeta*, 25 July 1995.
94. Art.59 para.1 NMA RF.

this freedom is carried out by the registering organs. If they identify an abuse, they issue the founder and/or the editorial staff (or principal editor-in-chief) of the medium with a written warning. If this happens twice in one year, the registering organ institutes proceedings in a court of law which may order the suspension of the activity of the news medium involved, automatically entailing the nullification of the certificate of registration.[95]

299. It is very much the question whether the rule of proportionality is respected here. The mere existence of the possibility of enforcing such a heavy sanction has direct repercussions for the internal relationships within each news medium, certainly now that the Russian law—unlike the law on press offenses in several countries in Western Europe[96]—has no general system of graduated liability.[97] With such a graduated system the publisher, printer, and distributor of the press are not held liable for any abuse of the freedom of press if the name of the author is known. Such a system ensures greater editorial autonomy. Because, if publisher, printer, and distributor were also liable for what is written in the printed matter by the author, they would be much more inclined to meddle with the author's work before proceeding to its publication and distribution.

Given the heavy sanction for abuse of the freedom of the media hanging over the founders of the media by virtue of the NMA RF, their pressure on the editorial staff will be unavoidably great, despite of all guarantees of editorial independence in the NMA RF.[98] Although according to the law, the founder of a medium cannot interfere with the activity of its editorial staff, the NMA RF has neglected to provide sanctions for this;[99] moreover, in the editorial statutes, interference from the founder can be allowed conditionally.[100] What is more, in many Russian newspaper companies the editor-in-chief, the founder (or one of the founders) and the major shareholder are one and the same person,

95. Art.16 NMA RF.
96. See, *e.g.*, art.25 para.2 Belgian Constitution ("When the writer is known and is resident in Belgium, the publisher, the printer or the distributor cannot be prosecuted").
97. See art.56 NMA RF. Nevertheless, according to the Supreme Court of Law of the RF with regard to publications which violate the honor or dignity of a citizen or organization, first the author is liable; if the article was unsigned, the editorial board; and if the editorial board has no legal personality, the founder of the medium in question is liable: Point 6 PPVS RF No.11 "O nekotorykh voprosakh, voznikshikh pri rassmotrenii sudami del o zashchite chesti i dostoinstva grazhdan i organizatsii", 18 August 1992, *BVS RF*, 1992, No.11, 7-8, *Sov. Iust.*, 1992, No.15-16, 38-39. Compare also Trubnikov 8.
98. Art.19 para.1 NMA RF.
99. Art.58 NMA RF does provide criminal, administrative, disciplinary or other liability for interference with the editorial independence by citizens, civil servants, state organs and state organizations and social associations, but naturally these persons and instances (with the exception of the civil servants) can themselves also be the founder of a medium (art.7 NMA RF).
100. Art.18 para.3 and art.58 NMA RF.

who ensures that there are guarantees safeguarding his position built into the editorial statutes signed with the journalists' collective.[101]

300. Under article 51 para.1 NMA RF, journalists can also be found to have abused their rights "with the intention of obscuring or of falsifying socially significant information, the dissemination of rumors as though they were reliable communications, collecting information on behalf of an unknown person or organization which is not a news medium". The journalist can also abuse his right to distribute information by libeling a citizen or various categories of citizens solely because of their sex, age, their racial or national affiliation, their language, attitude towards religion, profession, place of residence and work, as well as in relation to their political convictions.[102] Under article 59 para.2 NMA RF, these abuses of the rights of the journalist entail the criminal and disciplinary liability.

301. Finally, the duties of the journalist contain a number of important curtailments of the freedom of the media, through provisions concerning the confidentiality of information obtained or of journalistic sources, privacy, and the protection of the honor and dignity of citizens and organization.[103] Finally, the law recognizes every person's right to his image.[104] Here again, there is reference to the criminal and disciplinary liability provided for by the legislation of the RF, but such legislation does not seem to exist. That is why the civil-law aspect is much more important, including the possibility to sue for moral damages.[105]

302. The abovementioned possibility to have the registration of the news medium nullified for violations of article 4 NMA RF[106] does not exist as a sanction for violation of articles 49-51 NMA RF discussed in the previous two numbers.

3.3.2. The Criminal Restrictions upon the Freedom of Speech

303. The expression of an opinion can, in a number of cases, be criminal. Usually it is not important which medium is used to express this opinion. The criminal limitations are, in other words, usually not limited to the area of application of the NMA RF (periodical news media) but apply to all expressions of opinion. We give here a short overview of these limitations, divided according to the different categories referred to in article 4 NMA RF as abuses of the freedom of the media. We here refer to the articles from the Criminal Code of 1960,

101. E. Vartanova, "Corporate Transformation of the Russian Mass Media", in *Media in Transition*, M., 1996, No.1, 21.
102. Art.51 para.2 NMA RF.
103. Art.49 para.3 NMA RF. On the criminal-law protection of privacy, see art.137 CrC 1996.
104. Art.50 NMA RF.
105. Art.62 NMA RF.
106. *Supra*, No.298.

as amended in the period after 1985, as well as to the provisions of the new Criminal Code, ratified by President El'tsin on 13 June 1996, which came into force on 1 January 1997.[107]

a) Committing of Criminal Actions by the Media

304. Freedom of information cannot be used to commit a criminal action. This is in fact an umbrella limitation to the freedom of information, which also covers the other limitations—at least to the extent that their violation gives rise to criminal liability—but in an inexhaustive manner. The media can thus also be used to commit other crimes, such as the instigation of mass disorders or violence against citizens.[108]

305. More common are the crimes of slander (*kleveta*), *i.e.*, the dissemination of clearly untrue statements which detract from the honor and dignity of a third party or which undermine his reputation,[109] and defamation (*oskorblenie*), *i.e.*, the humiliation of the honor and dignity of a person, expressed in an indecent form.[110] If the dissemination of the untrue statements or the humiliation takes place during a public speech, in a publicly displayed work, or in the mass media, this is considered an aggravating circumstance.

The crime of libel (also *oskorblenie*) in the past only existed in the case of public humiliation of the honor and dignity of a representative of the power or the leading circles,[111] but was after 1985 extended to police officers, people's

107. Ugolovnyi kodeks Rossiiskoi Federatsii, *Rossiiskaia gazeta*, 18, 19, 20 and 25 June 1996.
108. Art.212 (3) CrC 1996.
109. Art.130 CrC 1960 (amending Zakon RSFSR, 21 March 1991, *VSND i VS RSFSR*, 1991, No.15, item 494; Zakon RF, 20 October 1992, *VSND i VS RF*, 1992, No.47, item 2664), later replaced by art.129 CrC 1996. To disseminate a communication concerning events which really took place but which were wrongly interpreted by a journalist, cannot be qualified as 'slander' (S.I. Nikulin, in Radchenko 240). About slander with regard to judges, members of the jury, the public prosecutor, etc., see art.298 CrC 1996.
110. Art.131 CrC 1960 (amending Zakon RSFSR, 21 March 1991, *VSND i VS RSFSR*, 1991, No.15, item 494; Zakon RF, 20 October 1992, *VSND i VS RF*, 1992, No.47, item 2664), later replaced by art.130 CrC 1996. This is thus not about the dissemination of inaccurate information about a person, but about the premeditated diminishing of a person's honor and dignity, by discrediting a person, by diminishing their reputation and moral prestige in the eyes of their surroundings as well as in the eyes of the disadvantaged person himself, because a negative judgment on that person is clearly cynical, and therefore is sharply in contradiction with the etiquette accepted in society). This particularly concerns uncensored expressions, comparisons with despicable historical and literary characters (S.I. Nikulin, in Radchenko 241). Art.143 para.2 CrC 1960 (amending Zakon RF, 27 August 1993, *Rossiiskaia gazeta*, 9 September 1993) also punished the denigration, through the news media or in another public form, of feelings and convictions of citizens with regard to their attitude towards religion. Such a provision no longer appears in CrC 1996.
111. Art.192 CrC 1960 (amending Zakon RF, 20 October 1992, *VSND i VS RF*, 1992, No.47, item 2664).

bodyguards, and those on national service,[112] as well as to interior ministry employees or civil servants responsible for some form of border control (customs, immigration, veterinary, and sanitary control).[113] In the new Criminal Code, only the public libel of a representative of the authorities or a national-serviceman in the course of the exercising of his functions are criminalized.[114]

306. Since 1991, the dissemination of documents contrary to the laws on the separation of church and state is no longer a criminal offense.[115]

b) Disseminating State Secrets

307. The criminal regulations concerning the revealing of state or military secrets have remained substantially unaltered.[116] On the other hand, the manner in which it is determined whether a piece of information is a state secret, and who can have access thereto, has changed thoroughly. Its emphasis is no longer on the prior monitoring of expressions of opinion but the criminal, *i.e.*, repressive, punishment of expressions of opinion which contain a state secret.

308. The RF State Secrets Law of 21 July 1993 (hereinafter: SSA)[117] defines a secret of state as "information protected by the state concerning its activities in the area of defense, foreign policy, the economy, espionage and counter-espionage, and the search for wanted criminals, the dissemination of which

112. Art.1921 CrC 1960 (amending UPVS RSFSR, 29 July 1988, *VVS RSFSR*, 1988, No.31, item 1005, and Zakon RF, 20 October 1992, *Rossiiskaia gazeta*, 20 November 1992).
113. Art.1922 CrC 1960, introduced by Federal'nyi Zakon RF, 18 May 1995, *Rossiiskaia gazeta*, 23 May 1995.
114. Arts.319 and 336 CrC 1996. In connection with contempt of court, see art.297 CrC 1996.
115. Zakon RSFSR, 18 October 1991, *VSND i VS RSFSR*, 1991, No.44, item 1430 (abolition of art.142 CrC 1960).
116. For the media and media workers, only arts.75 and 259 CrC 1960/art.283 CrC 1996 (the revealing of state and military secrets) are of any importance. Also art.76 CrC 1960/art.284 CrC 1996 (loss of documents which contain a state secret) remained essentially unaltered; in the articles on treason to the fatherland (art.64 CrC 1960) and espionage (art.65 CrC 1960) the possibility of exile was introduced (Zakon RF, 18 February 1993, *Rossiiskaia gazeta*, 6 March 1993), but this possibility was abolished again in the new Criminal Code (arts.275-276 CrC 1996). Art.64 a) CrC 1960 was partially nullified by the Constitutional Court, to the extent that under this article, flight abroad and the refusal to return to Russia were in themselves qualified as treason to the fatherland: PKS RF, "Po delu o proverke konstitutsionnosti riada polozhenii punkta "a" stat'i 64 Ugolovnogo kodeksa RSFSR v sviazi s zhaloboi grazhdanina V.A. Smirnova", 20 December 1995, *Rossiiskaia gazeta*, 18 January 1996.

    In connection with the competence of the civil and criminal courts of law in matters of the protection of state secrets, see Zakon RF, "O vnesenii izmenenii i dopolnenii v Ugolovno-protsessual'nyi kodeks RSFSR i Grazhdanskii protsessual'nyi kodeks RSFSR o poriadke rassmotreniia del, sviazannykh s gosudarstvennoi tainoi", 31 March 1993, *VSND i VS RF*, 1993, No.17, item 593; *Sov. Iust.*, 1993, No.10, 30.

can harm the safety of the Russian Federation".[118] By virtue of article 7 SSA, a number of data can never be classified: information on disasters, the state of environment and health,[119] demographic, educational, cultural, agricultural, and criminal statistics; privileges and advantages which the state accords to civil servants, enterprises, and citizens; violations of human rights; the gold reserves and currency reserves of the RF; the state of health of the highest functionaries of the RF; and on illegal acts committed by state bodies or their functionaries.

309. The decision to classify certain information as a secret of state lies with the leaders of those state bodies named on a list to be approved by the President.[120] The state bodies which they lead, have to draw up a detailed list of such information as is to be classified, and an interdepartmental committee for the protection of state secrets [121] draws up a general list, which is ratified by the President.[122] In deciding whether or not to classify information as a secret, the competent persons are to follow three principles: (1) the principle

117. Zakon RF, "O gosudarstvennoi taine", 21 July 1993, *Rossiiskaia gazeta*, 21 September 1993, as amended by Federal Law of 6 October 1997, *Rossiiskaia gazeta*, 9 October 1997. See also "V Prezidiume Verkhovnogo Soveta Rossiiskoi Federatsii", *VSND i VS RF*, 1992, No.52, 3865. For the executive decrees, see, apart from the Decrees referred to in the following footnotes, also: PP RF, "O poriadke i usloviiakh vyplaty protsentnykh nadbavok k dolzhnostnomu okladu (tarifnoi stavke) dolzhnostnykh lits i grazhdan, dopushchennykh k gosudarstvennoi taine", 14 October 1994, *Rossiiskaia gazeta*, 19 October 1994; PP RF, "O litsenzirovanii deiatel'nosti predpriiatii, uchrezhdenii i organizatsii po provedeniiu rabot, sviazannykh s ispol'zovaniem svedenii, sostavliaiushchikh gosudarstvennuiu tainu, sozdaniem sredstv zashchity informatsii, a takzhe s osushchestvleniem meropriiatii i (ili) okazaniem uslug po zashchite gosudarstvennoi tainy", 15 April 1995, *SZ RF*, 1995, No.17, item 1540, *Rossiiskaia gazeta*, 5 May 1995; PP RF, "O sertifikatsii sredstv zashchity informatsii", 26 June 1995, *SZ RF*, 1995, No.27, item 2579, *Rossiiskaia gazeta*, 28 July 1995; Ukaz Prezidenta RF, "O Gosudarstvennoi program obespecheniia zashchity gosudarstvennoi tainy v Rossiiskoi Federatsii na 1996-1997 gody", 9 March 1996, *Rossiiskaia gazeta*, 19 March 1996, prolonged for 1998 by Ukaz Prezidenta RF, 30 March 1998, *Rossiiskaia gazeta*, 3 April 1998; PP RF, "Ob utverzhdenii Polozheniia o podgotovke k peredache svedenii, sostavliaiushchikh gosudarstvennuiu tainu, drugim gosudarstvam", 2 August 1997, *Rossiiskaia gazeta*, 12 August 1997.

Immediately after the disintegration of the USSR, President El'tsin had issued a transitional measure concerning the protection of state secrets: Ukaz Prezidenta RF, "O zashchite gosudarstvennykh sekretov Rossiiskoi Federatsii", 14 January 1992, *VSND i VS RSFSR*, 1992, No.4, item 166; see, also, N. Ghevorkyan, "State Secrets", *Moscow News*, 1992, No.5.

118. Art.2 SSA. These areas are further specified in art.5 SSA, as amended by Federal Law of 6 October 1997. Also information which is in the possession of domestic enterprises, organizations, institutions and citizens can be declared state secret. The owner is compensated for the damages, to a degree determined in the agreement between the owner of the information and the state body which declares the information secret. In this agreement, the owner commits himself to the non-dissemination of this information (art.10 SSA).

119. See, also, art.237 CrC 1996.

of legality, in other words only that information which is classifiable under SSA, can be declared secret; (2) the principle of justification, *i.e.*, an expert analysis has to determine the justifiability of the classification of specific pieces of information, and the probable economic and other consequences of this decision have to be weighed, on the basis of the balance between the essential interests of the state, society, and the citizen; (3) and the principle of timeliness, which amounts to the establishment of a limitation on the dissemination of the information from the moment the information is received or, at the latest, is processed.[123] The information can be declared secret in three categories ("of special importance", "utterly secret", "secret"), in accordance with the degree of danger likely to arise to the security of the RF as a result of the dissemination of the information.[124]

310.Each department's list of state secrets is reviewed at least every five years, for justifiability and on the categories of secrecy. In principle, a secret of state cannot be classified as such for longer than 30 years.[125] The heads of the state bodies, enterprises, institutions, and organizations are responsible for the

120. Art.4 (2) and art.9 para.3 SSA. An initial list of leaders of state bodies was approved by the President on 11 February 1994 (Rasporiazhenie Prezidenta RF, 11 February 1994, *Izvestiia*, 26 February 1994), and on 27 June 1994 it was already extended (Rasporiazhenie Prezidenta RF, 27 June 1994, *Rossiiskaia gazeta*, 30 June 1994). It was replaced in 1997, 1998 and 1999 (*SZ RF*, 1997, No.22, item 2573, 1998, No.32, item 3869, and 1999, No.4, item 553), and at the present moment the list approved by the President on 17 January 2000 (*Rossiiskaia gazeta*, 25 January 2000; *SZ RF*, 2000, No.4, item 388), as extended on 26 September 2000 (*Rossiiskaia gazeta*, 2 October 2000) applies.
121. Ukaz Prezidenta RF, "O Mezhvedomstvennoi komissii po zashchite gosudarstvennoi tainy", 8 November 1995, *SZ RF*, 1995, No.46, item 4418, *Rossiiskaia* Gazeta, 18 November 1995; Ukaz Prezidenta RF, "Voprosy Mezhvedomstvennoi komissii po zashchite gosudarstvennoi tainy", 20 January 1996, *SZ RF*, 1996, No.4, item 268, *Rossiiskaia gazeta*, 1 February 1996; *SZ RF*, 1996, No.17, item 1982; *SZ RF*, 1997, No.25, item 2899, *Rossiiskaia gazeta*, 19 June 1997; *Rossiiskaia gazeta*, 13 January 1999; PP RF, "O personal'nom sostave Mezhvedomstvennoi komissii po zashchite gosudarstvennoi tainy", 28 February 1996, *SZ* RF, 1996, No.12, item 1106, No.28, item 3395, *Rossiiskaia gazeta*, 12 November 1996, frequently amended afterwards. Before the foundation of this Commission, the functions of this interdepartmental commission were temporarily exercised by the State technical committee attached to the President of the RF, see Ukaz Prezidenta RF, "Voprosy zashchity gosudarstvennoi tainy", 30 March 1994, *SAPP RF*, 1994, No.14, item 1050.
122. Art.9 para.4 SSA. See Ukaz Prezidenta RF, "Ob utverzhdenii perechnia svedenii, otnesennykh k gosudarstvennoi taine", 30 November 1995, *SZ RF*, 1995, No.49, item 4775, *Rossiiskaia gazeta*, 27 December 1995, replaced by Ukaz Prezidenta RF, "O perechne svedenii, otnesennykh k gosudarstvennoi taine", 24 January 1998, *Rossiiskaia gazeta*, 3 February 1998.
123. Art.6 SSA.
124. PP RF, "Ob utverzhdenii Pravil otneseniia svedenii, sostavliaiushchikh gosudarstvennuiu tainu, k razlichnym stepeniam sekretnosti", 4 September 1995, *SZ RF*, 1995, No.37, item 3619, *Rossiiskaia gazeta*, 14 September 1995. See, also, Severin 40-41.
125. Art.13 SSA.

protection of the state secrets, which they have in their possession. They have to set up special sections for this purpose.[126]

311. In order to be given access to state secrets, citizens can follow two routes; they either: (a) address a request for abolition of classification as a secret of state to the competent instance, which has to give a motivated answer within three months (a negative answer can be appealed in the court of law);[127] or (b) direct a request for access to documents which contain a state secret to the state body, enterprise, institution, or organization which holds the state secret concerned. This request can only be met, if the requesting party undertakes not to disseminate the information, if it agrees to the partial and temporary limitation of its external freedom of movement, of its right to the dissemination of information which contains a state secret, of its right to the use of discoveries and inventions which contain state secrets,[128] and of its right to the inviolability of its private life for the execution of screening measures for the granting of access to the documents.[129] These screening measures differ in extent in accordance with the category of classification of the document to which access was desired[130] and are intended to check whether one of the exhaustively listed grounds for refusal[131] apply to the applicant. The applicant can appeal to an administratively higher body or a court of law against a negative decision.[132]

126. Art.20 para.4 SSA. Civil servants are obliged to keep state secrets or other legally protected secrets: art.10 point 8 Federal'nyi Zakon RF, "Ob osnovakh gosudarstvennoi sluzhby Rossiiskoi Federatsii", 31 July 1995, *Rossiiskaia gazeta*, 3 August 1995. This is also the case for persons who cooperate with the Federal security services of Russia: art.19 para.2, i) Federal'nyi Zakon RF, "Ob organakh Federal'noi sluzhby bezopasnosti v Rossiiskoi Federatsii", 3 April 1995, *Rossiiskaia gazeta*, 12 April 1995.
127. Art.15 SSA.
128. See, *e.g.*, "Sekretnye izobreteniia", *I.S.*, 1993, Nos.7-8; "Die geheimen Innovationen der Russen", *Innovation & Management*, 1992, No.5, 44-46. On 8 December 1995, the State *Duma* approved a draft Law on secret inventions *(SZ RF*, 1995, No.51, item 5013), but it was never enacted. See art.2 (5) Patentnyi Zakon RF, 23 September 1992, *VSND i VS RF*, 1992, No.42, item 2319, and Point 11 b) PVS RF, "O vvedenie v deistvie Patentnogo zakona Rossiiskoi Federatsii", *VSND i VS RF*, 1992, No.42, item 2320.
129. Art.24 SSA.
130. Art.21 para.4 SSA.
131. These grounds are a legal declaration of incapacity or a criminal record including crimes of state or other major crimes; certain medical conditions; permanent residence of the applicant and/or his close relations abroad, or an emigration application by the applicant; the discovery that the person involved engages in activities which are a threat to the security of the RF; attempts on the part of the applicant to avoid screening measures or the providing of inaccurate information in the course of the screening process (art.22 para.1 SSA). The Federal security services take measures in connection with the access of citizens to classified information: art.12 j) Federal'nyi Zakon RF, "Ob organakh Federal'noi sluzhby bezopasnosti v Rossiiskoi Federatsii", 3 April 1995, *Rossiiskaia gazeta*, 12 April 1995.
132. Art.22 para.2 SSA.

For MP's, judges, and lawyers defending persons in a criminal case relating to state secrets, a simplified procedure for gaining access to state secrets was introduced in 1997.[133]

312. Finally, it is important that parliament can monitor the financing of the measures for the protection of state secrets because, as a whole, these form a separate entry in the budget.[134]

313. When we compare the current regulation with the past,[135] it is striking that, in contradiction to earlier times,[136] it is no longer the executive but, rather, the legislative power that determines which categories of information can be classified as secret (and this in an exhaustive manner). The persons who declare certain information to be secrets of state are now known by name, and are personally responsible for their actions, including illegal overclassification.[137] An appeal can be made to a court of law against each of the competent person's decisions. Also, the detailed description of the categories of classifiable information and the explicit exclusion of certain information from these categories are undoubtedly a good thing. The combination of all these elements gives the courts of law the power effectively to rule out arbitrariness in the classification of information as a secret of state. Parliamentary control over the financing of all measures concerning the protection of state secrets is also positive. The most important innovation is, however, the fact that the protection of state secrets can only lead to repressive measures: censorship, which in the Soviet period was legitimized on the grounds of the protection of secrets of state, is now constitutionally prohibited.[138]

All these points show that in Russia, as elsewhere, there is a growing awareness that information can be classified as a secret of state only in well-defined circumstances and according to well-described procedures.[139] This awareness should bring to an end the cult of secrecy, so typical for a totalitarian state.

133. Art. 211 SSA.
134. Arts. 4 (1) and 29 SSA. See, also, "V Prezidiume Verkhovnogo Soveta Rossiiskoi Federatsii", *VSND i VS RF*, 1992, No. 52, 3865.
135. *Supra*, Nos. 68 ff.
136. A. Duiven, "De nieuwe perswet in theorie en praktijk", *Rusland Monitor*, 1991, No. 3, 8.
137. The irresponsibility of the state functionaries and state bodies in the case of over classification led to an assumption of secrecy and thus caused a lot of damage to the needs of the economic and scientific and technical progress: V. Rubanov, "Ot kul'ta sekretnosti—k informatsionnoi kul'ture", *Kommunist*, 1988, No. 13, in English translation in *Soviet Law and Government*, 1989, No. 1, 17-18.
138. Art. 29 (5) Const. 1993.
139. Another sign of this altered policy was the decision of the state press agency TASS immediately after the failed coup in August 1991 to stop the production and distribution of special bulletins with secret information for top functionaries in the party and the state (*Pravda*, 14 September 1991; *CDSP*, 1991, No. 38, 38).

c) Secrets Specially Protected by Law

314. The freedom of information is also limited by the protection of "other secrets specially protected by law".[140] According to current legislation this concerns things such as: the confidentiality of adoption;[141] the confidentiality of telephone conversations, correspondence, telegrams, and other kinds of communication;[142] "personal and family confidentiality", *i.e.*, privacy[143]—in our view interpreted in much too broad and open-ended a fashion; commercial and bank secrets;[144] the secrecy of preliminary investigations;[145] and secret information concerning security measures with regard to judges and other participants in criminal proceedings,[146] or with regard to civil servants who are part of the law enforcement apparatus.[147] Since the end of 1994, the revealing of information covered by doctor-patient confidentiality is also criminally punishable,[148] whereas in the bills of a new law on the legal profession, breaches of confidentiality by a lawyer entail only disciplinary liability.[149]

140. Art.4 NMA R.F.
141. Art.1241 CrC 1960, art.155 CrC 1996. See, also, Maleina 85-87. See, moreover, art.139 Family Code R.F.
142. Art.135 CrC 1960, art.138 CrC 1996. See, also, art.23 (2) Const.1993; art.32 Federal'nyi Zakon R.F, "O sviazi", 16 February 1995, *Rossiiskaia gazeta*, 22 February 1995 (see also D. Herman, "Telecommunications Law in the Russian Federation: 1995 Reforms", *PS JEEL*, 1995, 256-260), replacing Point 15 of the Temporary Decree on the communication in the Russian Federation, approved by an Edict of 31 July 1992: Ukaz Prezidenta R.F, "O sviazi v Rossiiskoi Federatsii", 31 July 1992, *VSND i VS RF*, 1992, No.31, item 1857 (see also D.S. Downing, "Telecommunications Law in the Russian Federation", in *Telecommunications Laws in Europe*, J. Scherer, (ed.), Frankfurt, Baker & McKenzie, 1994, 157-162); art.22 Federal'nyi Zakon R.F, "O pochtovoi sviazi", 9 August 1995, *SZ RF*, 1995, No.33, item 3334, *Rossiiskaia gazeta*, 16 August 1995, replaced by Art.15 Federal'nyi Zakon R.F, "O pochtovoi sviazi", 17 July 1999, *Rossiiskaia gazeta*,22 July 1999 . See also Maleina *87-90*.
143. Art.137 CrC 1996. See, also, art.24 (1) Const.1993.
144. Art.183 CrC 1996.
145. Art.184 CrC 1960, art.310 CrC 1996 and art.139 Criminal Procedure Code (see also Sheinin 28). The confidentiality of preliminary investigations is also regulated by the Law on the public prosecutor's office: art.5 Zakon R.F, "O prokurature Rossiiskoi Federatsii", 17 January 1992, *VSND i VS RF*, 1992, No.7, item 366, amended Federal'nyi Zakon R.F, 17 November 1995, *Rossiiskaia gazeta*, 25 November 1995. See, also, art.14 (4) para.2 Bill of the Law on the legal profession: "Proekt. Federal'nyi Zakon R.F Ob advokature v Rossiiskoi Federatsii", *Rossiiskaia gazeta*, 23 November 1994.
146. Art.311 CrC 1996.
147. Art.320 CrC 1996.
148. Art.1281 CrC 1960, inserted by Federal'nyi Zakon R.F, 13 December 1994, *SZ RF*, 1994, No.34, item 3539, *Rossiiskaia gazeta*, 21 December 1994. In the CrC 1996, however, no such provision is included.
149. Art.12 "Proekt. Federal'nyi Zakon R.F Ob advokature v Rossiiskoi Federatsii", *Rossiiskaia gazeta*, 22 October 1994; art.16 "Proekt. Federal'nyi Zakon R.F Ob advokature v Rossiiskoi Federatsii", *Rossiiskaia gazeta*, 23 November 1994.

d) Instigation of a Coup d'État or the Violent Overthrow of the Constitutional Order

315. The public instigation to the violent overthrow of the constitutional structure or a *coup d'état* is criminally punishable, and the use of mass media is considered an aggravating circumstance.[150] We have already discussed the change of the political criminal law, probably the most important alteration in the area of the criminal-law limitations to the freedom of speech.[151]

e) Instigation of National, Class, Social, Religious Intolerance, or Dissension

316. It is striking here that, in comparison with article 5 NMA USSR, the instigation of racial intolerance or dissension in article 4 NMA RF is no longer mentioned as an abuse of the freedom of the media. However, article 282 CrC 1996 (previously art.74 CrC 1960[152]) does criminalize actions which are publicly or with the aid of the mass media aimed at the instigation of national, racial, or religious animosity, at the humiliation of national dignity, or at propaganda for the exclusion, superiority, or incapacity of citizens due to their attitude towards religion, or their national or racial characteristics.[153] The instigation of class or social intolerance *is*, on the other hand, an abuse of the freedom of the media under article 4 NMA RF (not in art.5 NMA USSR), but was not criminalized by article 282 CrC 1996.

150. Art.280 CrC 1996, replacing art.70 CrC 1960, amending UPVS RSFSR, 11 September 1989, *VVS RSFSR*, 1989, No.37, item 1074; Zakon RF, 9 October 1992, *VSND i VS RF*, 1992, No.44, item 2470. In the version of art.70 CrC 1960, which was in force from 1989 to 1992, incitement to the violent alteration of the structure of society was also criminalized, and in art.5 NMA USSR it was described as an abuse of the freedom of the word. The abolition of this prohibition seems to be purely editorial, since according to legal theory the state and social structure come under the term 'constitutional structure' in the Const. RF and the Constitution of the member states (A.E. Beliaev, in Radchenko 130).

151. *Supra*, No.229.

152. Amending UPVS RSFSR, 11 September 1989, *VVS RSFSR*, 1989, No.37, item 1074; Zakon RF, 20 October 1992, *VSND i VS RF*, 1992, No.47, item 1867; Zakon RF, 27 August 1993, *Rossiiskaia gazeta*, 9 September 1993. See, also, Luryi/Lyubechansky 224-226. According to Demidov only one person was convicted under art.74 CrC 1960 in the period 1988-1993: Iu.N. Demidov, "Ugolovnaia otvetstvennost' za narushenie natsional'nogo i rasovogo ravnopraviia", *GiP*, 1994, No.7, 92.

153. Before the introduction of the CrC 1996, the State *Duma* debated a bill of law of President El'tsin for the introduction of, among other things, an art.743 CrC 1960 for the punishing of propaganda for fascism in public speeches, or the production and distribution of printed, visual or audio material intended to propagate fascism. The use for this of mass media would be considered an aggravating circumstance. For the text of the bill, see *Rossiiskaia gazeta*, 21 June 1995.

f) War Propaganda

317. War propaganda was initially punishable under article 71 CrC 1960.[154] In the new Criminal Code of 1996, the crime is defined differently, namely as publicly calling for the unleashing of an aggressive war.[155] Publicly arguing for a defensive war is, consequently, no longer punishable.

g) Pornography and Propaganda for Violence and Cruelty

318. Article 242 CrC 1996 criminalizes the illegal production (with the intention of distribution and publication), the distribution of or the production of pornographic materials or objects, as well as the illegal trade in printed matter, film and video materials, images, or other objects of a pornographic nature.[156] Erotic publications or broadcasts are not prohibited, but their registration and distribution is subject to special rules.[157] The NMA RF defines those media specialized in communication and documents of an erotic nature[158] as periodical publications and programs which—as a whole and systematically—exploit interest in sex,[159] but does not say how this differs from pornography.[160]

In response to the importation of foreign violent videos[161] an article 228[1] was incorporated into the Criminal Code of 1960 on 1 August 1986,[162] which

154. The option of sentencing the guilty party to internal exile was abolished by Zakon RF, 18 February 1993, *Rossiiskaia gazeta*, 6 March 1993.
155. Art.354 CrC 1996.
156. Compare Art.228 CrC 1960. According to the Supreme Court, the production of pornographic objects with no intention of distributing them is not punishable *(BVS RSFSR*, 1991, No.6, 11), nor is the keeping of pornographic photographs without the intention of distribution *(BVS SSSR*, 1990, No.3, 26). For a general commentary, see S. Shishkov, "Ob otvetstvennosti za nezakonnye deistviia s pornograficheskimi predmetami", *Ross.Iust.*, 1996, No.5, 29-30.
157. They are subject to a higher registration fee (art.14 NMA RF) and a special print tax (art.28 para.3 NMA RF), for retail sale erotic publications must be sealed in transparent packaging, and can only be sold in places specified for that purpose by the local administration (see, *e.g.*, on an order of the mayor of Moscow on that matter: V. Tereshchenko, "Erotika pod kontrolem", *Rossiiskaia gazeta*, 7 June 1994), and the distribution of unencoded erotic radio and television programs is only permitted between 11 p.m. and 4 a.m. (art.37 paras 3 and 2 NMA RF).

    The distinction between prohibited pornography and permitted, but highly regulated, erotica was first made in a Decree of the Supreme Soviet of the USSR of 12 April 1991: PVS SSSR, "O neotlozhnykh merakh po presecheniiu propagandy pornografii, kul'ta nasiliia i zhestokosti", 12 April 1991, *Pravda*, 16 April 1991, *Izvestiia*, 15 April 1991.
158. Art.2 NMA RF.
159. Art.37 para.1 NMA RF.
160. According to Nikulin—in a comment on art.228—pornography is the indecent, crudely naturalistic, cynical representation of human sexual life, which in any way through the arrangement of persons, the poses or the drawing indicate a particular attempt to encourage feelings of lust and stimulate depraved thoughts. Erotica on the other hand, although it is also related to the representation of the sexual sides of human life, does not especially aim at arousing unhealthy sexual desires and puts the emphasis on the physiological essence of the sexual life (S.I. Nikulin, in Radchenko 441).

prohibited the production, distribution, screening, or storing with the intention of distributing or screening, of cinema or video films, or of other works which propagate the cult of violence and cruelty.[163] Such a provision no longer found in the CrC 1996.

3.3.2. Restrictions upon the Freedom of Speech through Tort Law

319. Restrictions upon the freedom of speech are not always made through criminal law. In practice freedom of speech is more often restricted through the law of torts. It is not our intention here to examine whether the doctrine of civil liability in the Soviet Union and the Russian Federation also contains a duty of care, which everyone has to take into account when exercising their right to free speech. We will limit ourselves here, on the one hand, to indicating (a selection of) rights and legal goods acknowledged by law, the violation of which during the expression and dissemination of an opinion may bring about a mistake, and, on the other hand, to referring to some interesting developments in the area of redress.

320. The Russian legislator has recognized a number of personal rights which limit the exercise of the right to free speech, such as the honor and dignity of citizens and organizations,[164] the right to one's image,[165] and the protection of the private life of citizens.[166]

321. Certain confidential information—which is obtained by certain professional groups in the practice of their professional activity—cannot be disseminated by these persons (civil servants and organs of the federal security service,[167] doctors, lawyers, notaries, bankers[168]). New is, however, that apart form this general duty of confidentiality, there is also a special duty of confidentiality, namely if information is communicated to a person not otherwise subject to such confidentiality on condition of strict secrecy. The journalist, for example, is obliged to take into account his informant's desire to be identified (or not) as the source of that information, or as to whether the information provided should be disseminated.[169] Nevertheless, when ordered to do so by a court of law, editors can be forced to divulge their sources.[170]

161. "Otrava s ekrana", *Pravda*, 1 March 1987.
162. UPVS RSFSR, 1 August 1986, *VVS RSFSR*, 1986, No.32, item 904; Zakon RF, 20 October 1992, *VSND i VS RF*, 1992, No.47, item 2664.
163. This means that the fundamental contents of these works are subordinate to the idea of making crude violence attractive as a special social value. In it violence is presented as a normal condition of human existence, and cruelty as an inalienable quality in the mutual relationships between people, social groups, races and nations (K. Fetisenko and A. Bantyshev, "Izgotovlenie i rasprostranenie proizvedenii, propagandiruiushchikh kul't nasiliia i zhestokosti", *Sots. Zak.*, 1987, No.7, 35-36; S.I. Nikulin, in Radchenko 442). This aim is reached by means of explicit naturalistic representations of scenes of torture, the showing of sadistic actions, the killing of people and animals (S.I. Nikulin, in Radchenko 442).

322.In the field of legal redress, a first novelty is the right of citizens and organizations to demand the publication of a retraction or of a reply in the news media if information is disseminated in the same news media which does not accord with the truth and their honor and dignity, or which attacks their rights and legal interests.[171]

164. In the civil law in general and subsequently regulated by: art.7 Fundamentals 1961, as amended for the last time on 12 June 1990 (*VSND i VS SSSR*, 1990, No.26, item 494); art.7 CC RSFSR, as amended on 24 June 1992 (*VSND i VS* RF, 1992, No.29, item 1689); art.7 Fundamentals 1991, in which there is no longer mention of the honor and dignity of 'organizations', but rather of 'legal persons', and in which moreover the business reputation of citizens and legal persons is protected; art.150 and 152 CC RF in which the protection for legal persons is limited to their business reputation (see also V. Plotnikov, "Delovaia reputatsiia kak ob"ekt grazhdansko-pravovoi zashchity", *Khoziaistvo i Pravo*, 1995, No.11, 94-99).The constitutionality of the regulation contained in art.7 CC RSFSR was accepted by the Constitutional Court on 27 September 1995:"Opredelenie Konstitutsionnogo Suda Rossiiskoi Federatsii 'Ob otkaze v priniatii k rassmotreniiu zhaloby grazhdanina Kozyreva Andreia Vladimirovicha'", 27 September 1995, *Rossiiskaia gazeta*, 22 November 1995. See, also, S. Poliakov,"Svoboda mneniia i zashchita chesti", *Ross. Iust*., 1997, No.4, 47-49. For the journalists the respect for the honor and dignity of citizens and organizations is considered a professional duty: art.49 para.3 NMA RF. For an overview of the jurisprudence: N. Sharylo and L. Prokudina,"Grazhdansko-pravovaia zashchita chesti i dostoinstva grazhdan: problemy, problemy...", *Vestnik Verkhovnogo Suda SSSR*, 1991, No.2, 22-24;"Rassmotrenie grazhdanskikh del o zashchite chesti i dostoinstva", *BVS SSSR*, 1989, No.4, 33-40. In 1989 there were 3,143 cases relating to the protection of the honor and dignity, in 1990 already 51,164, 1,853 of which were related to reporting in the media: Trubnikov 7.

165. By virtue of art.514 CC RSFSR, the publication, reproduction and distribution of a work of visual art in which another person is depicted, is not permitted without the agreement of the portrayed person (or after his or her death, the agreement of his or her spouse and children). Such permission was not required if the actions were done in the interest of the State or society, or if the portrayed person posed for a fee.

    Specifically, for the periodical news media, art.50 NMA RF now also permits the distribution of communications and materials, prepared with the use of secret audio and visual recording, film and photo-recording, if this does not violate the constitutional human rights and freedoms; if this is necessary for the protection of social interests and measures are taken against the possible identification of unknown persons; if the showing of the recordings happens through a decision of a court of law. Moreover, it is one of the duties of the journalist to inform citizens and functionaries, when receiving of information, when he or she is making audio, visual, film or photographic recordings (art.49 para.1 point 6 NMA RF).

166. Art.49 para.1 (5) NMA RF. See also art.24 para.1 Const.1993 and art.150 (1) CC RF.Art.5 para.2 NMA USSR reads: "The use of the news media for interference in the personal life of the citizens [...] is prohibited and will be prosecuted in accordance with the law". Neither the NMA RF nor the Const.1993 give any indication which would show that information from the private life of intrinsically or occasionally public figures has to be treated differently than the private life of normal citizens. It is, however, not impossible that the courts of law will, in weighing two equal, constitutionally anchored rights against each other, take into account the social position of the person of whose private life reports are being disseminated in the news media.

323. A second novelty relates to material compensation for moral damage. With the greater attention for the category of personal rights in post-communist Russian law,[172] the term "moral compensation" (*kompensatsiia moral'nogo vreda*) appeared in legal texts. The possibility of demanding monetary compensation for moral damages was first introduced into the media legislation in connection with the dissemination by a news medium of inaccurate information which infringes the honor and dignity of the citizen, or in connection with other non-material damage done to him.[173] Later, this possibility was anchored in more general phrases in civil law so that any moral damage (physical or moral suffering) caused to the citizen by actions which damage his personal, non-economic rights, or which are an attack on other immaterial goods belonging to the citizen, as well as in other cases provided for by law, have to be compensated monetarily.[174] Because the courts of law have no experience in determining the degree of moral compensation the Supreme Court has issued guidelines to this effect,[175] while the legislator too has since given attention to the problem.[176]

167. Art.10 point 8 Federal'nyi Zakon RF, "Ob osnovakh gosudarstvennoi sluzhby Rossiiskoi Federatsii", 31 July 1995, *Rossiiskaia gazeta*, 3 August 1995; art.6 para.5 Federal'nyi Zakon RF, "Ob organakh Federal'noi sluzhby bezopasnosti v Rossiiskoi Federatsii", 3 April 1995, *Rossiiskaia gazeta*, 12 April 1995.
168. Maleina 78-79. On the civil-law protection of banking confidentiality, see M.N. Maleina, "Bankovskaia taina", *Zakonodatel'stvo i Ekonomika*, 1994, No.5-6, 15-17.
169. Art.49 para.1 (3) and (4) and art.41 NMA RF.
170. Art.41 para.2 NMA RF.
171. Arts.43-46 NMA RF; arts.26-27 NMA USSR; art.7 Fundamentals 1961, as amended for the last time on 12 June 1990 (*VSND i VS SSSR*, 1990, No.26, item 494); art.7 (2), (3) and (4) Fundamentals 1991 (extended to the violation of the business reputation of citizens and legal persons); art.152 (2), (3) and (7) CC RF (for the protection of the honor and dignity and the business reputation of citizens, and of the business reputation of legal persons). Losses inflicted by the torts of calumny and defamation are only recovered when liability is found, whereas moral damages are recovered even in the absence of liability (see art.1100 CC RF), a contradiction criticized by V.A. Rakhmilovich, "Some Gaps and Contradictions in the Civil Code of the Russian Federation", *P.S. J.E.E.L.*, 1997, 474. If a journalist or the editorial staff to which s/he belongs disseminate information which does not accord with the truth and which violates the honor and dignity of the organization to which the journalist is accredited, the journalist's accreditation (which gives her/him mainly logistic benefits) may be withdrawn (art.48 para.5 NMA RF). In relation to advertising which damages the honor and dignity or the business reputation of a person, see art.8 (2) Federal'nyi Zakon RF "O reklame", 18 July 1995, *SZ RF*, 1995, No.30, item 2864, *Rossiiskaia gazeta*, 25 July 1995.
172. *Supra*, No.238.
173. Art.39 NMA USSR; art.62 NMA RF.

§4. The President as Guarantor of the Freedom of Information

324. The balance between different interests and rights which is expressed in the NMA RF would hardly lead one to suspect that in reality, since the end of the eighties, control over written and electronic news media has been one of the key points in the constant political struggle around the Kremlin. Especially in moments of crisis or elections, the restriction of the freedom of information is a means in the hands of the rulers to curtail 'dissident' news media or

174. Arts.12 and 151 (1) CC RF. See, previously, art.131 Fundamentals 1991 ("moral damages are compensated in a monetary or other material form"). The right to moral compensation was also included in environmental legislation (art.89 Zakon RF "Ob okhrane okruzhaiushchei prirodnoi sredy", 19 December 1991, *Rossiiskaia gazeta*, 3 March 1992), legislation on consumer protection (art.15 Zakon RF, "O zashchite prav potrebitelei", 7 February 1992, *VSND i VS RF*, 1992, No.15, item 766, as amended 9 January 1996 and (in amended version again published in its entirety) in *Rossiiskaia gazeta*, 16 January 1996), legislation concerning the protection of labor (PVS RF, arts.8, 25 and 30 "Pravila vozmeshcheniia rabotodateliami vreda, prichinennogo rabotnikam uvech'em, professional'nym zabolevaniem libo inym povrezhdeniem zdorov'ia, sviazannym s ispolneniem imi trudovykh obiazannostei", 24 December 1992, *VSND i VS RF*, 1993, No.2, item 71; point 36 PPVS, No.3 "O sudebnoi praktike po delam o vozmeshchenii vreda, prichinennogo povrezhdeniem zdorov'ia", 28 April 1994, *Rossiiskaia gazeta*, 14 July 1994) and the status of national servicemen (art.18 para.5 Zakon RF, "O statuse voennosluzhashchikh", 22 January 1993, *VSND i VS RF*, 1993, No.6, item 188). For a general discussion, see M. Braginskii, E. Sukhanov, and K. Iaroshenko, "Ob"ekty grazhdanskikh prav", *Khoziaistvo i Pravo*, 1995, No.5, 20-23; A. Efimov and A. Popovchenko, "Moral'nyi vred", *Khoziaistvo i Pravo*, 1995, No.1, 152-158; A. Erdekevskii, "O razmere vozmeshcheniia moral'nogo vreda", *Ross. Iust.*, 1994, No.10, 17-19; M. Maleina, "Nematerial'nye blaga i perspektivy ikh razvitiia", *Zakon*, 1995, No.10, 103-104; A.V. Shichanin, "Vozmeshchenie moral'nogo vreda", *Zakonodatel'stva i Ekonomika*, 1994, No.15-16, 18-26; A.V. Shichanin, "Tendentsiia razvitiia instituta vozmeshcheniia moral'nogo vreda. Kratkii obzor sudebnoi praktiki i deistvuiushchego zakonodatel'stva", *Zakonodatel'stvo i Ekonomika*, 1995, No.5-6, 64-69; V. Zhuikov, "Vozmeshchenie moral'nogo vreda", *BVS RF*, 1994, No.11, 6-16; "O nekotorykh voprosakh sudebnoi praktiki v vozmeshchenii moral'nogo vreda", *Khoziaistvo i Pravo*, 1994, No.8, 71-80. See, also, the guidelines of the Supreme Court of Law in this matter: PPVS RF, No.10 "Nekotorye voprosy primeneniia zakonodatel'stva o kompensatsii moral'nogo vreda", 20 December 1994, *Rossiiskaia gazeta*, 8 Feb. 1995.

175. The RF Supreme Court issued a guideline to the lower courts that—when determining the extent of the moral damages in the case of dissemination of information which attacks the honor and dignity of persons and organizations—they had to take into account the nature and contents of the publication in the wrong, the extent of distribution and also other circumstances which deserve attention in connection with the distribution of such information: Point 11 PPVS RF, No.11 "O nekotorykh voprosakh, voznikshikh pri rassmotrenii sudami del o zashchite chesti i dostoinstva grazhdan i organizatsii", 18 August 1992, *BVS RF*, 1992, No.11, 7-8, *Sov. Iust.*, 1992, No.15-16, 38-39.

176. Art.151 para.2 CC RF names the degree of guilt, the degree of physical and moral suffering, linked with the individual characteristics of the person in question, and "other circumstances which deserve attention" as elements which the court of law ought to take into account when determining the level of compensation for moral damages.

to punish them afterwards for having supported defeated political opponents. The reinstitution of censorship was repeatedly threatened (*e.g.*, after the media's unsympathetic reporting of the attempts of the central Soviet government in January 1991 to keep the Baltic States within the Soviet empire by force of arms)[177] or newspapers were temporarily shut down (in the course of and/or immediately after the failed coup of August 1991[178] and the disorders in Moscow in October 1993[179]). This aside, there was a heated struggle concerning the rights of ownership and the rights of control over the news media as a consequence of the nationalization of all goods of the CPSU after the failed coup of August 1991, the split of a number social associations having the authority to publish magazines and newspapers,[180] and the struggle between the legislative and executive powers in the new Russia for control over the state media.[181,182] With regard to the electronic media, a long struggle for control over NTV, the sole independent, nation-wide broadcasting organization was finally won in 2000-2001 by the pro-Kremlin Gazprom Company.

325. The constitutional acknowledgement of an inalienable right to free speech did not, however, lead to a more distant attitude to the media on the part of the government, in the first place because the organs of state themselves own different news media or still control them via the maintenance of majority participation after privatization. This is, for example, the case for the biggest press agency, ITAR-TASS,[183] and for a number of electronic media.

326. If all this can still be considered a result of the stirring transformations of the past decade, a phenomenon which will perhaps gradually disappear, then the government's claim to be the "protector" of the media is in any case enduring. President El'tsin, for example, provided in an *Ukaz* that the media were "under the protection of the law and of the President as highest civil servant

177. V. Tolz, "Recent Attempts to Curb Glasnost'", *Report on the USSR*, No.9, 1 March 1991, 2.

178. Point 3 PVS RSFSR, "O politicheskoi situatsii v respublike, slozhivsheisia v rezul'tate antikonstitutsionnogo gosudarstvennogo perevorota v SSSR", 22 August 1991, *VSND i VS RSFSR*, 1991, No.34, item 1126; Point 1 Ukaz Prezidenta RSFSR, "O deiatel'nosti TASS, Informatsionnogo agentstva 'Novosti' i riada gazet po dezinformatsii naseleniia i mirovoi obshchestvennosti o sobytiiakh v strane", 22 August 1991, unpublished, afterwards repealed by Point 1 Ukaz Prezidenta RSFSR, "O merakh po zashchite svobody pechati v RSFSR", 11 September 1991, *VSND i VS RSFSR*, 1991, No.37, item 1199.

179. Hübner 1994.

180. *Infra*, No.369.

181. See, *e.g.*, the struggle for *Izvestiia* between the Supreme Soviet of Russia and the journalists' collective (K. Brown, "The Russian Media Defend Their Independence", *RFE/RL Research Report*, 1992, No.35, 45-51) and *Rossiiskaia Gazeta* between the Supreme Soviet and the Government, finally won by the latter.

182. For an overview of the temporary result of this struggle for control of the most important news media, see Skorov 31-35.

of the state".[184] Article 80 (2) Constitution 1993 states that the President is the guarantor (*garant*) of the rights and freedoms of man and citizen.

This provision could be interpreted as meaning that the President himself *per definition* never violates human rights and, as it were, stands above the law like a czar. The constitutionally established hierarchy of standards, with a subordination, that can be enforced even by the courts of law and the Constitutional Court, of Presidential *Ukazy* to legislation and the Constitution, falsify any such interpretation. However, the very idea shows the continuing strength of a paternalist model in Russian legal thought.

327. Article 80 (2) Constitution 1993 does establish the existence of other than judicial guarantees for the observance of human rights. We refer to the previously discussed Committee for Human Rights with the President RF.[185] Specifically in connection with the freedom of the press, however, we should pause briefly at President El'tsin's creation, on 31 December 1993, of the Ju-

183. When, at the beginning of 1992, Russia legally succeeded to ownership of the former Soviet agency TASS (*Telegrafnoe agentstvo Sovetskogo Soiuza*) besides its own RIA 'Novosti' (*Rossiiskoe Informatsionnoe agentstvo 'Novosti'*), the two were, for financial reasons, merged under the name ITAR (*Informatsionnoe telegrafnoe agentstvo Rossii*) (Ukaz Prezidenta RF, "Ob informatsionnom telegrafnom agentstve Rossii (ITAR)", 22 January 1992, *VSND i VS RSFSR*, 1992, No.5, item 223. See, also, "Ministr upolnomochen zaiavit'", *Literaturnaia gazeta*, 29 January 1992). The partnership was not a success, and thus one and a half years later RIA 'Novosti' was reborn as an independent press agency (Ukaz Prezidenta RF, "O Rossiiskom informatsionnom agentstve 'Novosti'", 15 September 1993, *SAPP RF*, 1993, No.38, item 3515), so that the legal position of ITAR again had to be clarified (PSMP RF, "Voprosy Informatsionnogo telegrafnogo agentstva Rossii", 16 September 1993, *SAPP RF*, 1993, No.38, item 3578). Both agencies were granted much-needed fiscal and currency benefits to relieve their financial difficulties (Ukaz Prezidenta RF, "Ob informatsionnom telegrafnom agentstve Rossii", 22 December 1993, *SAPP RF*, 1993, No.52, item 5126, *Rossiiskaia gazeta*, 23 December 1993; Ukaz Prezidenta RF "Ob obespechenii deiatel'nosti Rossiiskogo informatsionnogo agentstva 'Novosti'", 23 December 1993, *Rossiiskaia gazeta*, 30 January 1993). Both agencies remained under state ownership, with the Government of the Russian Federation their only founder. They are (for now) not eligible for privatization (PVS RF, "O nedopushchenii reorganizatsii, likvidatsii i privatizatsii gosudarstvenykh teleradiokompanii i gosudarstvennykh informatsionnykh agentstv", 8 July 1993, *VSND i VS RF*, 1993, No.29, item 1125). For the Statutes of both agencies, see: PP RF, "Ob utverzhdenii Ustava Rossiiskogo informatsionnogo agentstva 'Novosti'", 3 May 1994, *SZ RF*, 1994, No.3, item 218, *Rossiiskaia gazeta*, 19 May 1994; PP RF, "Ob utverzhdenii Ustava Informatsionnogo telegrafnogo agentstva Rossii", 4 May 1994, *SZ RF*, 1994, No.3, item 228. In 1998 the news agency Novosti was renamed "RIA Vesti" and transformed into a daughter company of the All-Russian State Radio and Television Broadcasting Company VGTRK (PP RF, "Voprosy Rossiiskogo informatsionnogo agentstva 'Novosti'", 18 May 1998, *Rossiiskaia gazeta*, 27 May 1998). On VGTRK, see PP RF, "O formirovanii edinogo proizvodstvenno-tekhnologicheskogo kompleksa gosudarstvennykh elektronnykh sredstv massovoi informatsii", 27 July 1998, *Rossiiskaia gazeta*, 8 August 1998.

184. Ukaz Prezidenta Rossiiskoi Federatsii, "O zashchite svobody massovoi informatsii", 20 March 1993, *SAPP RF*, 1993, No.13, item 1100; *Rossiiskaia gazeta*, 24 March 1993.

185. *Supra*, No.263.

dicial Chamber for Information Disputes with the President of the Russian Federation (*Sudebnaia palata po informatsionnym sporam pri Prezidente Rossiiskoi Federatsii*) (hereafter: JCID).[186] This Judicial Chamber was abolished by Presidential Edict of 3 June 2000.[187]

328. The JCID was not part of the system of federal courts of law of the RF,[188] but rather of the presidential administration and was even explicitly *not empowered* to adjudicate in such disputes as are reserved by law to the jurisdiction of the courts of law.[189] The founding Decree of the JCID described the functions of the JCID in very broad terms, such as: (a) assisting the President in the protection of rights and freedoms in the area of mass information; (b) safeguarding the objectivity and trustworthiness of communications, as well as of the principle of equal opportunities in the area of mass information and of the principle of pluralism in informative and socio-political television and radio programs; (c) correcting mistakes in those reports disseminated by the news media which touch on social interests; (d) expressing warnings to mass media in agreement with article 16 NMA RF if the Committee for the Press of the RF itself does not take action.[190]

186. Ukaz Prezidenta RF, "O Sudebnoi palate po informatsionnym sporam pri Prezidente Rossiiskoi Federatsii", 31 December 1993, *SAPP RF*, 1994, No.2, item 75, *Rossiiskaia gazeta*, 10 January 1994. For the Statutes of the JCID, see: Ukaz Prezidenta RF, "Ob utverzhdenii Polozheniia o Sudebnoi palate po informatsionnym sporam pri Prezidente Rossiiskoi Federatsii", 31 January 1994, *SAPP RF*, 1994, No.6, item 434, *Rossiiskaia gazeta*, 3 February 1994. For a discussion, see F.H. Foster, "Freedom with Problems: The Russian Judicial Chamber on Mass Media", *Parker Sch. J.E. Eur. L.*, 1996, 140-174; A. Malinovskii, "Sudebnaia palata po informatsionnym sporam: struktura i polnomochiia", *Ross. Iust.*, 1994, No.10, 12-13. The JCID is, in reality, the transformation of the Information Arbitration Court (*Treteiskii informatsionnyi sud*), which had already been founded two months previously, and which had been founded especially after the violent disintegration of the Supreme Soviet (beginning of October 1993) to safeguard, on the one hand, that all candidates for a mandate in the new parliament would be given a chance to explain their point of view and political program in the media and, on the other hand, that there would be no interference in the course of the election period in the activities of the editorial boards of the news media (Ukaz Prezidenta RF, "Ob informatsionnykh garantiiakh dlia uchastnikov izbiratel'noi kampanii 1993 goda", 29 October 1993, *Rossiiskaia gazeta*, 2 November 1993. The internal regulation was approved of by the arbitration court itself: "Reglament treteiskogo informatsionnogo suda", 3 November 1993, *Rossiiskaia gazeta*, 9 November 1993). This power was taken over by the JCID: see, *e.g.*, point 4.6. Instruction of the Central Electoral Commission RF of 5 April 1996 on granting the presidential candidates broadcast time on the channels of state-owned broadcasting companies and the publication of electoral propaganda in the periodical printed press, *Rossiiskaia gazeta*, 17 April 1996.

187. Ukaz Prezidenta RF, No.1013 "O formirovaniia Administratsii Prezidenta Rossiiskoi Federatsii", 3 June 2000.

188. Point 2 Founding Decree JCID.

189. Point 8 Statutes JCID.

190. Point 3 Founding Decree JCID.

The Statutes of the JCID were, however, less brash in their function description of the JCID. For example, it was—according to the Statutes—the task of the JCID: (a) *to contribute* to the safeguarding of the objectivity and trustworthiness *in the mass media* of reports *which touch on social interests*; (b) to guarantee *the observance* of the principle of equality; (c) *to promote the realization* of the principle of *political* pluralism in television and radio programs; and (d) *to promulgate guidelines* for the correction of factual mistakes in the reports which touch on social interests.[191] Furthermore, the JCID helped draw up presidential bills of law and draft *Ukazy* concerning the news media and the right of citizens to information, for the exercising of the presidential right to initiate legislation.[192] The disputes, which could be presented to the JCID could, furthermore, concern the protection (or curtailment) of rights and freedoms in the area of mass information.[193] In the course of the election period, the JCID had to ensure that all candidates have equal access to the media.[194]

329. A case could be brought before the chamber by concerned parties or at the initiative of the JCID itself.[195] In the former case, the JCID's conclusion took the form of a 'decision' (*reshenie*), against which no appeal was possible:[196] in the latter case, the JCID issued a 'recommendation' (*rekomendatsiia*).

The contents of a sentence of the JCID could be:

— a recommendation to the authorized organs to issue a written warning to the founder and/or editorial board (editor-in-chief) of a news medium in agreement with article 16 NMA RF,[197] or a decision of the JCID itself to institute proceedings before a court of law to halt the activity of a medium, if repeated cautions had been ignored;[198]
— A reprimand to a journalist, who violated "generally accepted ethical standards", or a question posed to the authorized organs to call to account the journalist who violates the media legislation;[199]

191. Point 4 Statutes JCID.
192. Point 5 Statutes JCID.
193. Point 9 Statutes JCID.
194. Point 15 Statutes JCID. Another *Ukaz* of President El'tsin charged the JCID with monitoring the objectivity of reporting on the activities of the legislative, executive and judicial powers (Point 6 Ukaz Prezidenta RF, "O dopolnitel'nykh garantiiakh prav grazhdan na informatsiiu", 31 December 1993, *SAPP RF*, 1994, No.2, item 74, *Rossiiskaia gazeta*, 10 January 1994).
195. Point 20 Statutes JCID.
196. Point 10 Statutes JCID.
197. Contrary to point 3 of the Founding Decree, the JCID cannot itself issue such warnings.
198. Point 11 Statutes JCID.
199. Point 12 Statutes JCID. This is also the case for civil servants who systematically violate the information rights of the citizens, journalists and editorial boards (point 13 Statutes JCID).

— a decision to forward all relevant documents to the organs of public prosecution, if it was certain that there had been an abuse of the freedom of the media with the intention of carrying out criminal actions, or of the sale by civil servants of information which should legally be provided to journalists for free.[200]

330. All this shows the hybrid status of the JCID, which—as part of the presidential administration, but still 'independent' and 'neutral'[201]—could reprimand journalists on ethical grounds, urge state organs to caution media,[202] institute proceedings before a court of law, or transmit documents to the prokuratura after identifying a crime. The JCID's status floated among those of a court of law, a committee of ethics and a policing body.

If the journalists not only have to keep to the legal standards, but, also, to certain ethical rules, this presupposes that these ethical rules are clearly codified and that, in the first instance, it is the committee of ethics within the journalistic profession itself which is to ensure their observance. If such a monitoring of—moreover, very vague—standards ('generally accepted ethical standards') is entrusted to an organ, which is part of the executive power, this in our view is a serious threat to the freedom of speech and the freedom of the media.

Section 2. The Freedom of Artistic Creation and Other Cultural Rights

§ 1. The Right to Create

331. In the Soviet Union prior to 1985 the Communist Party—on the basis of its claim to truth—saw itself and the state as fulfilling a role of active participation in artistic life, not only with regard to taking measures to increase the accessibility of cultural goods (cultural consumption), but, also, with regard to the creation of artistic goods (cultural production). The government's duty to refrain from interference, which could have given some meaning to the individual right to artistic freedom, was in contradiction to the cultural-educational function of the socialist state. After 1985, the view on artistic freedom changed with the abolition of the ideological monopoly of the CPSU and the acceptance of a new concept of human rights.

332. Remarkably enough, the freedom of artistic creation disappeared from the constitutional standards first. The USSR's Declaration of the Human

200. Point 14 Statutes JCID.

201. Point 28 Statutes JCID.

202. In a report on the state of affairs with regard to the observance of the freedom of speech in the RF in 1994, addressed to the President, the JCID asked to be granted the power to issue warnings to the news media independently of the Russian State committee for the press (*Roskompechat'*), to increase the efficacy of the statements of the JCID: quoted by V. Klimov, "Reshenie okonchatel'noe. Obzhalovaniiu ne podlezhit", *Rossiiskaia gazeta*, 13 May 1995.

Rights and Freedoms[203] no longer contained an explicit acknowledgement of this right, but did state in the preamble that "everyone is guaranteed the realization [...] of his creative potential [...]", and in article 6 para.2 this is called "cultural freedom".

The 1978 Constitution, as amended after the approval of the Russian Declaration of the Rights and Freedoms of Man[204] in April 1992,[205] again dealt with cultural rights. Article 60 provided that: "The freedom of artistic, scientific and technical creation, of research and education and of intellectual property are protected by law. Everybody's right to participate in cultural life and to make use of the institutions of culture is recognized." And a new article 67[7] reads: "Everyone is obliged to care for the maintenance of the historical and cultural heritage and to treat with care monuments of history, culture and nature."[206]

333. In article 44 (1) Constitution 1993, the rights and duties with regard to culture were brought together in a single article:

> 1. Everyone is guaranteed the freedom of literary, artistic, scientific, technical and other kinds of creation and education. Intellectual property is protected by law.
>
> 2. Everyone has the right to participate in cultural life, make use of the cultural institutions and have access to cultural treasures.
>
> 3. Everyone is obliged to care for the maintenance of the historical and cultural heritage and to preserve the monuments of history and culture."

334. In comparison with the Soviet Constitution of 1977 (arts.46, 47 and 68) and the Constitution of the RSFSR of 1978 (arts.44, 45 and 66), the following dissimilarities are striking: (1) the ideological reservation has disappeared; (2) literary freedom was not explicitly mentioned in the Constitution 1977/78; (3) the material guarantees have disappeared; (4) not only are the rights of authors, inventors, and rationalizers protected, but "intellectual property" as a whole, and this protection is no longer guaranteed by the state but by law; (5) in the past, access to the cultural treasures in state and social collections were a material guarantee for the right to the enjoyment of the realizations of culture—now the right to admission to the cultural treasures is a right alongside the right to participate in cultural life and to use cultural institutions; and (6) the duty to preserve the monuments of history and culture is new.

203. "Deklaratsiia prav i svobod cheloveka", 5 September 1991, *VSND i VS SSSR*, 1991, No.37, item 1083, *Pravda* and *Izvestiia*, 7 September 1991, *Vestnik Verkhovnogo Suda SSSR*, 1991, No.11, 2-3; *SGiP*, 1991, No.10, 4-6.

204. "Deklaratsiia prav i svobod cheloveka i grazhdanina", 22 November 1991, *VSND i VS RSFSR*, 1991, No.52, item 1865, *Rossiiskaia gazeta*, 25 December 1991.

205. *VSND i VS RF*, 1992, No.20, item 1084.

206. Compare the similar arts.42 and 52 of two drafts for a new Constitution: "Konstitutsiia Rossiiskoi Federatsii (proekt)", *Argumenty i fakty*, March 1992, No.12; "Proekt. Konstitutsiia Rossiiskoi Federatsii", *Rossiiskaia gazeta*, 8 May 1993.

335. Of all these differences, the first is undoubtedly the most important. Henceforth, the imposition of a particular style, movement, theme, form of artistic expression etc. by the state is prohibited in the Russian Federation. The freedom of art is now also in Russia in the first place an individual right against an all-too-interfering government, in the sense of article 15 para.3 of the ICESCR, ratified by the Soviet Union and continued by Russia.[207] This provision imposes negative commitments on the government, namely not to do anything which can impede the freedom of artistic creation.

336. The Constitution is not the only source of cultural rights in the Russian Federation. Indeed, the cultural rights are further developed by the Russian Federation's Fundamentals of legislation on culture of 9 October 1992 (hereafter: Fundamentals on Culture).[208] This programmatic[209] law, according to its preamble, serves as a legal basis for the preservation and development of culture in Russia. As "tasks" for the legislation on culture are mentioned, among other things, "the determination of the principles of the state's cultural policy, of the judicial norms of state support for culture and of the guarantees of non-interference of the state in the creative processes".[210] The term "cultural policy" itself is defined as the whole of principles and norms according to which the state is led in its activity with regard to the preservation, development, and dissemination of culture, as well as the activity itself of the state with respect to culture.[211] The "cultural policy" of the Fundamentals on culture hence comprises the general cultural policy which regulates the relationship between citizen and government, as well as the specific cultural policy aimed at support of the cultural field. The Fundamentals on culture, however, sketch a framework for the rights and duties of the government and of those who are active in the cultural sectors, but do not themselves determine priorities between the multitudes of targets.

337. The Fundamentals on Culture consist of ten parts[212] and are pretty much intended to be the basis for future legislative and executive initiatives concerning culture. The Fundamentals themselves are a blend of *fundamental legislation* (acknowledgement of individual and collective cultural fundamen-

207. "The States which are party with this Treaty commit themselves to respecting the freedom which is necessary for the foundation of scientific research and creative work."
208. Zakon RF, "Osnovy zakonodatel'stva Rossiiskoi Federatsii o kul'ture", 9 October 1992, *VSND i VS RF*, 1992, No.46, item 2615. A draft of Fundamentals on culture was worked out by four lawyers, and published jointly with an introductory article: Renov *et al.* 96-106.
209. The Fundamentals on culture are in the words of the then Minister of Culture, E. Sidorov, "a protocol on intentions", a "declaration of independence": I. Medovoi, "Evgenii Sidorov: '... Prodolzhaem srazhat'sia'", *Kul'tura*, 27 Feb. 1993.
210. Art.1 *in fine* Fundamentals on culture.
211. Art.3 *in fine* Fundamentals on culture.

tal rights),[213] *administrative legislation* in the sense that the principal care of the government for culture is given its procedural and organizational form (division of competence in federal Russia with regard to culture; procedure for the acknowledgement of goods as cultural heritage; state programs for the preservation and development of culture; state duties regarding culture), *legislation on cultural facilities* with rules on the organization of government support for the cultural 'civil society', *i.e.*, cultural producers and cultural institutions (regulation of the economic activity and the financing of cultural organizations, material-technical facilities for culture), *legislation concerning professional practitioners* in the cultural field, not only in the sense of safeguarding rights, but here in the sense of positive rights and duties of citizens in their role of cultural producers (status of creative workers), as well as *legislation concerning the cultural consumer* (preservation of and access to cultural heritage).

338. Cultural activity is defined by the Fundamentals on culture as activity relating to the preservation, the creation, the dissemination, and the assimilation of cultural treasures,[214] and is proclaimed an inalienable right of every citizen, irrespective of national and social origin, language, sex, political, religious and other convictions, place of residence, material situation, education, profession and other circumstances.[215]

The Fundamentals on culture furthermore recognize the right of every human being to creative activity,[216] to the free choice of moral, aesthetic, and other values, to the protection by the state of his cultural difference,[217] and the right to be introduced to cultural treasures.[218] For the realization and the modalities of other rights, the specific legislation is referred to: the right to a humane and artistic education;[219] the right to ownership of cultural objects;[220]

212. I. General Provisions; II. The Rights and Freedoms of Man with Regard to Culture; III. Rights and Freedoms of the Peoples and of Other Ethnic Communities with Regard to Culture; IV. The National Cultural Property and the Cultural Heritage of the Peoples of the Russian Federation; V. The Status of Creative Workers; VI. Obligations of the State with Regard to Culture; VII. The Division of Powers with Regard to Culture between the Federal Authorities, the Authorities of the 89 Subjects of the Federation, and the Authorities of Local Self-government; VIII. Economic Regulation with Regard to Culture; IX. Cultural Exchanges between the Russian Federation and Foreign States; X. Liability for Violation of the Legislation on Culture.
213. Indeed, in the Fundamentals on Culture "culture" means artistic endeavor as well as being a broad, anthropological term ("the culture of peoples"). In this work, we have chosen not to deal with the collective cultural rights.
214. Art.3 Fundamentals on culture.
215. Art.8 Fundamentals on culture.
216. Art.10 Fundamentals on culture.
217. Art.11 Fundamentals on culture.
218. Art.12 Fundamentals on culture.
219. Art.13 Fundamentals on culture.
220. Art.14 Fundamentals on culture.

the right to found cultural organizations, institutions, and enterprises[221] and cultural associations;[222] and the right to export the results of one's creative activity.[223]

Finally, citizens of the Russian Federation have the right to carry out a cultural activity and to set up cultural organizations abroad.[224]

339.Concerning the right to 'cultural production', it is striking that the right to the creation and distribution of cultural works is subsumed in a much broader right to cultural activity, which includes activities such as preservation[225] and the appreciation of cultural treasures is part. This right to cultural activity thus also includes the consumption of culture.

The right to creation is described by article 10 Fundamentals on culture as the right of every human being to all sorts of creative activity in agreement with his interests and his capacities. Article 11 adds to the right to creative activity also the right to personal cultural originality. By virtue of this article, every human being has the right to free choice of moral, aesthetic, and other values and to the protection by the state of his cultural originality.[226] This apparently shows that it is part of the essence of the freedom of artistic creation and expression that the artist himself determines what is moral and what is not, etc. and that he expresses this in his works of art. The state may not interfere in these artistic choices of the individual artist. In other words, freedom of artistic creation imposes on the state a duty of non-interfere in creative processes.[227]

340.By western standards, freedom of art not only means the freedom to create but, also, the freedom to disseminate art, to make it public. This necessarily entails that not only the artist himself, but, also, the art mediators (publishers, record companies, gallery owners, theater managers, museum directors, etc.) enjoy the freedom of art.[228] In other words, the government has to abstain from every preventive measure, which could possibly hinder the art mediator's activity.[229]

221. Art.15 Fundamentals on culture.
222. Art.16 Fundamentals on culture.
223. Art.17 Fundamentals on culture.
224. Art.18 Fundamentals on culture.
225. Whereas Const.1993 mentions every person's duty to care for the preservation of the cultural heritage, the Fundamentals on culture recognize a universal *right* to the preservation of cultural heritage, and the state is charged with this duty.
226. It is remarkable that the right to cultural originality is not only an individual but, also, a collective right which is recognized in peoples and ethnic communities in the Russian Federation (arts.20-22 Fundamentals on culture). The issue of collective cultural rights, however, will not be considered here. We would only like to indicate that the individual rights under art.9 Fundamentals on culture always have priority over collective ones: an Eskimo can experiment with Pop Art, regardless of the general right of Eskimos to national-cultural uniqueness.
227. Art.31 para.2 Fundamentals on culture. See, also, art.1.
228. Hempel 55-56.

341. Article 44 Constitution 1993 gives no clear guidance as to whether freedom of literary and artistic creation is also applicable to persons who do not carry out any creative activity themselves, but who do disseminate the results of such creative activity to the public. The Russian term *tvorchestvo* (which we have translated in approximation as "creation") refers to an activity, namely the creation of cultural or material valuables, which are new as idea.[230] This could indicate that only the process of creation itself falls under the freedom of artistic creation, while the distribution of the creations does not.

342. The Fundamentals on culture also seem to confirm this. Article 10, under the title "the right to creation [*tvorchestvo*]", recognizes the right of man to all sorts of creative activity. The right to the distribution of the result of that creative activity is recognized by the Fundamentals on culture as a separate right, which is, *alongside* the right to creation, part of the general right to cultural activity.[231] Under Russian law, the freedom of art mediation cannot, in consequence, be deduced from the right to creation, but from the right to the distribution of "cultural treasures".[232]

343. The difference between the right to creation and the right to distribution of cultural treasures turns out not to be coincidental. Article 31 para.2 Fundamentals on culture provides that the administrative and executive organs of state and the organs of local self-government are not to interfere *with the creative activity* of the citizens and their associations and of state and non-state cultural organizations. There is no similar provision concerning the distribution of works of art.

The formulation of article 31 Fundamentals on culture is in this respect very striking. The title and the first and the third paragraphs of this article mention "(the subjects of) cultural activity" (consequently including the right to distribution), while para.2—which provides the prohibition of state interference—mentions the more limited "creative activity".

229. The organization of exhibitions and the keeping of an art gallery, for example, cannot be subjected to a system of permits (Rimanque/Reyntjens 7-8; Velaers No.48, 73). All this, of course, does not keep the government from taking purely regulatory measures which only concern the economic activity of art mediation, without any real consequence for the possibility of disseminating works of art.

230. See the explanatory lexicon in S.I. Ozhegov, *Slovar' russkogo iazyka*, M., Russkii iazyk, 1991, 789. In a secondary meaning the term *tvorchestvo* refers to the complete oeuvre of a writer, but this meaning seems of little relevance here (the freedom of artistic "oeuvre").

231. Art.3 Fundamentals on culture (definition "cultural activity").

232. This term is defined very broadly by the Fundamentals on culture as including not only works of culture and art, but, also, moral and aesthetic ideals, standards and forms of behavior, languages, dialects and intonations, national traditions and customs, historic toponyms, folklore, artistic manufactures and handicrafts, results and methods of scientific research into cultural activities, historically-culturally significant buildings, constructions, objects and technology, and historically-culturally unique areas and objects (art.3 Fundamentals on culture).

This might simply be a mistake, and this reading is strengthened by the fact that it is in any case hard to understand what is meant by "the creative activity of a cultural organization". Does this perhaps refer to an extensive view on what the creative process is, which takes the production of copies of a work to be part of the creation of a work? In any case, art mediation to some degree remains outside the area of application of this provision, to wit the field of the visual arts, where gallery owners and museum directors do not participate in the production process.

It might, however, mean that the dissemination of cultural works was deliberately excluded from the prohibition of state interference. This latter interpretation is, in any case, the one, which is followed in practice, by the institution of a system of permits for different sorts of art mediators. The creation of art hardly lends itself to such methods, given its private nature, unless one considers the creation of works in public (*e.g.*, chalk drawings on the pavement, street theater, street musicians).[233] Art mediation, on the other hand, which is of crucial importance for the dissemination of art and without which a vigorous artistic life is not possible, can be controlled by a system of governmental permits. We will return to this later.[234]

§ 2. The Relationship between Freedom of Artistic Creation and Freedom of Speech

344. In the discussion of the Constitution 1977, we noted an overlap between the freedom of the word and artistic freedom, namely with regard to literary creations.[235] This overlap was not eliminated in the Constitution 1993, but on the contrary was made even more explicit. On the one hand, the freedom of the word was expanded with a right to "information", and information can take any form, also an artistic one;[236] on the other hand, literary freedom is now explicitly mentioned alongside artistic freedom, and the right of access to cultural heritage is also a form of the right to acquire information.

233. It is virtually impossible to find out whether preventive measures with regard to the said creative activities also occur in practice, as their regulation comes under the competence of local governments.
234. *Infra*, Nos.349 ff. See, also, in connection with the news media, *supra*, Nos.288 ff.
235. *Supra*, No.76.
236. Compare art.19 para.2 ICCPR: "Everyone has the right to the freedom of speech; this right includes the freedom to seek, receive and pass on information and concepts of any nature irrespective of boundaries, whether orally, in a written or printed from, *in the form of art*, or with the aid of other media of his choice". Art.10 ECHR does not explicitly express itself on artistic freedom, but in an arrest of 24 May 1988 in the Müller case, the European Court for Human Rights declared art.10 para.1 applicable to fine arts (EComHR, 13 October 1983, No.9870/82, *Dec. Rapp.*, 34, 208; ECtHR, 24 May 1988, case of Müller *et al.*, *Publ. Cour*, Série A, No.133, para.27. See, also, Hempel 111-115 and 302-304; Velaers, No.40, 60-62).

Still, a separate acknowledgement of the freedom of artistic creation has some sense, now that it seems "artificial" to subsume every form of art under categories such as "opinion", "conviction", "information", or "word".[237] Nowhere in the Russian legislation can any criticism be detected of the parallel existence of the freedom of speech and the freedom of artistic creation, which may show that the difference or the fact that they are complementary is considered obvious.

With regard to contents, freedom of speech seems broader than artistic freedom, considering it also covers the distribution of information, whereas it is uncertain whether also the distribution of art falls under artistic freedom.[238]

§ 3. The Limitations upon Artistic Freedom

345. Limits to artistic creation have to meet the same three conditions for any limitation to human rights: (i) only a federal law can introduce them, (ii) they have to aim for the achievement of a specific purpose, and (iii) they have to be proportional to that purpose.[239]

3.1. Preventive Measures

346. In the constitutional article on the freedom of art prior monitoring of the contents of works of art for possible prohibition, confiscation, or alterations prior to their distribution is not prohibited. This could give the impression that the prohibition of censorship does not concern works of art (insofar as these are not covered by the protection of freedom of speech). Nevertheless, it can be argued that the condition of proportionality in article 55 (3) Constitution 1993, prevents measures of censorship with respect to works of art, as these are not "proportional to the purpose", in other words, censorship measures also affect "innocent" works of art and are therefore forbidden, disproportionate limitations of the freedom of art.

347. With regard to other preventive measures, such as an obligation of registration or licensing for art mediators, things are more difficult. If it is so that the freedom of artistic creation does *not* include the freedom of dissemination of works of art, as we considered a possible interpretation above,[240] then such an obligation of registration or permit is *not* a limitation of artistic freedom and, hence, it escapes the test of proportionality and the need to enact limitations by federal law. The great overlap between artistic freedom and freedom of speech largely remedies this. One could possibly consider such an obligation of

237. Velaers 61.
238. *Supra*, Nos.341 ff.
239. Art.55 (3) Const.1993. *Supra*, No.247.
240. *Supra*, Nos.341 ff. If the freedom of artistic creation *is* interpreted as including the freedom of dissemination of artistic creations, the obligation of registration is for a number of the art mediators indeed a limitation on this freedom and it will have to be tested against the three conditions of art.55 (3) Const.1993.

registration or permit for art mediators a limitation to the general freedom of action, which is comprised in the non-exhaustive nature of the constitutional catalogue in the Constitution 1993.[241] Testing against the three conditions of article 55 (3) Constitution 1993 is, hence, possible.

348. The obligation of registration or licensing is, however, a limitation of the right to cultural activity, which was *legally* acknowledged by the Fundamentals on culture,[242] but this limitation is allowed by the Fundamentals on culture themselves.[243]

It is of course not impossible that in future the courts of law, strengthened by the constitutional acknowledgement of the supremacy of the international law, will test the registration obligation of art mediators or news media against the human rights treaties of which Russia is a cosignatory.[244]

349. Due to their economic activity, many cultural enterprises and institutions are subject to obligatory registration.[245] This raises few questions, as the commercial aspect of the mediating function can be regulated, as long as the mediation itself does not depend on prior government approval. In Russia, however, aside from and independently of obligatory registration, an additional obligation of registration or licensing as a cultural organization is required of most cultural organizations.[246] A cultural organization cannot, in other words, function without prior registration or acquiring a license (*litsenziia*), irrespective of whether this organization carries out business activities. Even though the intention of founding a cultural organization cannot be cited as a condition for registration,[247] this is clearly a preventive measure which limits artistic freedom as understood in the West (namely as including not only the creation of works of art, but, also, art mediation). We should, however, keep in mind that

241. Art.55 (1) Const.1993.
242. Art.8 *juncto* 3 Fundamentals on culture.
243. Art.41 para.3 Fundamentals on culture. This obviously fits with the logic which does *not* provide a prohibition of state interference with regard to the freedom of dissemination of the results of the creative process, *supra*, No.343.
244. See, namely, art.19 ICCPR and art.10 ECHR.
245. Art.47 para.5 Fundamentals on culture. This does not concern non-commercial cultural organizations with regard to the sale of the produced products, works and services, provided by the statutes, if the income gained by such sales is immediately invested in that organization in order to guarantee, develop and perfect the statutory basic activity (art.47 para.3 Fundamentals on culture). Nor is such registration duty imposed on forms of paid cultural activity provided by cultural educational institutions, theaters, *filarmonii*, people's collectives and performers, if the income so gained is completely used for their development and perfection (art.47 para.4 Fundamentals on culture).
246. Art.41 para.3 Fundamentals on culture. See, also, art.49 (1) para.3 CC RF; art.17 Federal'nyi zakon RF, "O litsenzirovanii otdel'nykh vidov deiatel'nosti", 25 September 1998, *SZ RF*, 1998, No.39, item 4857, *Rossiiskaia gazeta*, 3 October 1998; PP RF, "O litsenzirovanii otdel'nykh vidov deiatel'nosti", 11 April 2000, *Rossiiskaia gazeta*, 27 April 2000.
247. Art.32 para.1 Fundamentals on culture.

obligatory registration or licensing was only instituted in Russia after private enterprise was admitted to the sectors in question. From the Russian perspective, government control of these sectors is, as it exists now, an enormous step away from the total control possible in earlier times through state ownership of cultural institutions and enterprises.

350. The enforcement of obligatory licensing for a whole series of cultural activities at the level of the subjects of the Russian Federation was made possible by a Government Decree of 27 May 1993.[248] This regards activities such as the public showing of cinema and video films; (the organization of) cultural mass manifestations and other manifestations for spectators; the reconstruction, the repair and the restoration of memorials of historically-culturally significant architecture, buildings, constructions; the making of reproductions and copies of objects exhibited in civic museums; the production and sale of audio tapes with recorded music; and publishing activity, with the exception of the publication of periodicals. When issuing a license, the local authorities were to be guided by an 'Exemplary procedure'. This states that making licensing obligatory for certain activities must be in order to: ensure the protection of the interests of consumers, improve the quality of service to the populace, and ensure compliance with planning, ecological, and sanitary standards and the rules of trade. For certain activities relating to the use of limited territorial fuels, ecological demands, zoning (historic centers, markets) *and other factors*, the local administration can issue only a limited number of permits. It is, in other words, possible that organizing concerts or founding a publishing house is made subject to a local decree of foundation. The criteria for the granting of licenses were not specified. By western standards, such a decree of foundation would be considered contrary to artistic freedom.

351. On 24 December 1994, the Government published a new Decree on obligatory licensing of diverse activities, at the federal level as well as at the level of the member entities.[249] A license can only be refused on the grounds

248. PSMP RF, "O polnomochiiakh organov ispolnitel'noi vlasti kraev, oblastei, avtonomnykh obrazovanii, gorodov federal'nogo znacheniia po litsenzirovaniiu otdel'nykh vidov deiatel'nosti", 27 May 1993, *SAPP RF*, 1993, No.22, item 2033, *Rossiiskaia gazeta*, 19 June 1993. See, also, Klein 208-209; A. Nozdrachev, "Status predprinimatelia", *Khoziaistvo i Pravo*, 1994, No.1, 31-35.

249. PP RF, "O litsenzirovanii otdel'nykh vidov deiatel'nosti", 24 December 1994, *SZ RF*, 1995, No.1, item 69, *Rossiiskaia gazeta*, 6 January 1995. See, also, V. Kucherenko, "Bez patenta ni shagu", *Rossiiskaia gazeta*, 12 November 1994. The decree of 27 May 1993 was not explicitly set aside, which raised questions about obligatory licensing of those activities which were mentioned by the first but not by the second Decree, such as the organization of cultural mass manifestations and other manifestations for spectators, the making of reproductions and copies of objects exhibited in civic museums, the production and sale of audiotapes with recorded music, and publishing.

of untruths in the documents enclosed with the application, or an unfavorable expert opinion on the safety standards or the conditions (made concrete by special Decrees) required for the exercise of that type of activity. The license can be suspended or annulled by the authorized administrative authority, among other reasons for violation of the conditions of the license or the non-execution of prescriptions or decisions of organs of state. Activities such as the conservation and the restoration of historical and cultural monuments or archival documents, the activities of architects, and the public screening of films, fall under this system.

352. In order to bring some coherence in the chaos of licensing requirements, and especially to reestablish basic unity in the whole territory of the Russian Federation in this matter, a special Law on licensing diverse activities was signed into law by the President on 25 September 1998.[250] The criterion for making certain activities subject to a licensing duty was the possibility that the activity might cause damage to the rights, legal interests, morality and health of citizens, the defense of the country and the security of the state, and may not be regulated in another way than through licensing. According to this Law, a license is required for, *e.g.*, television and radio broadcasting, the sale of antiques, any activity relating to the restoration and preservation of archives, museum exhibits and objects of the cultural heritage, the public screening of audiovisual works in cinemas, the distribution of copies of audiovisual works and phonograms on any material support, except for the retail sale, the reproduction of audiovisual works or phonograms on any material support, and any publishing and printing activity. Licenses in general are valid for no less than three years. Further licensing conditions are to be specified in separate decrees.

353. This Law was replaced by a new one on 8 August 2001, which entered into force in February 2002.[251] As a criterion for making certain activities subject to prior licensing, the morality of citizens was dropped, but the threat to the cultural heritage of the peoples of the Russian Federation was added. The list of activities subject to the prior receipt of a license—which is valid now for no less than five years—was shortened considerably, especially in the cultural sphere. The following remained subject to prior licensing: restoring objects of cultural heritage, public showing of audiovisual works in cinemas,

250. Federal'nyi zakon RF, "O litsenzirovanii otdel'nykh vidov deiatel'nosti", 25 September 1998, *SZ RF*, 1998, No. 39, item 4857, *Rossiiskaia gazeta*, 3 October 1998. This Law was said not to apply to foreign trade activities nor to the relationships emerging in relation with the use of results of intellectual activity (art. 1 (2)). The state bodies empowered to deliver licenses were determined by Government Decree: PP RF, "O litsenzirovanii otdel'nykh vidov deiatel'nosti", 11 April 2000, *Rossiiskaia gazeta*, 27 April 2000.

251. Federal'nyi zakon RF, "O litsenzirovanii otdel'nykh vidov deiatel'nosti", 8 August 2001. This Law does not apply to the use of results of intellectual activity (art. 1 (2)).

and reproducing (*i.e.*, manufacturing copies) of audiovisual works and phonograms on any kind of support. And activities other than those listed could only be added to this list through amending the Law. It would, therefore, be impossible for the Government to make other activities subject to a licensing duty.[252] It is at the moment of writing still unclear what this means for other cultural activities, which earlier were made subject to a licensing duty by a law or by governmental decree.

354. We have already pointed out that the *news media* and *printing businesses* are subject to a registration obligation,[253] as are of course the broadcasting organizations.

355. *Publishing houses*[254] have to obtain a permit as a prior, constitutive condition for exercising the right to publish. An application would be dealt with by the RF's Committee for the press[255] if it judges that the name, program, purposes and commissions mentioned in the application do not represent an abuse of the freedom of speech. Such a publishing license has to be renewed every five years.[256] The regulation is even stricter than with respect to the news media since the very first publication of printed matter containing an abuse of the freedom of speech in the private life of the citizens or an attack on their honor and dignity,[257] the publishing house risks the cancellation of its license[258] and cannot, hence, automatically apply for a new license for two years.[259] The cancellation of the publishing license does not, moreover, take place through a court of law but, rather, through the license-issuing state organ itself.[260] It is very much the question whether this provision is in agreement with article 31 para.3 Fundamentals on Culture which states that "a cultural activity can only be prohibited by a court of law and only in the case of the violation of the legislation".[261] It is certainly not in conformity with the Federal Law of 25

252. Art.17 Law 8 August 2001.
253. *Supra*, Nos.288 ff.
254. Point 2 PSM RSFSR, "O regulirovanii izdatel'skoi deiatel'nosti v RSFSR", 17 April 1991, in *Pechat' i drugie sredstva massovoi informatsii. Sbornik normativnykh i spravochnykh materialov*, I, M., 1991, 15-21, amended by PSMP RF, 8 June 1993, *SAPP RF*, 1993, No.24, item 2240, *Zakon*, 1994, No.6, 19-21. Because of this Decree a Provisional Decree on publishing in the RSFSR ("Vremennoe polozhenie ob izdatel'skoi deiatel'nosti v RSFSR") was approved "until the approval of a Law of the RSFSR on publishing activity". The original Government Decree was included in execution of PPVS RSFSR, "Ob osnovnykh nachalakh knigoizdaniia v RSFSR", 18 December 1990, *VSND i VS RSFSR*, 1990, No.29, item 399.
255. Originally, this was the Ministry of Press and Information and the State Inspectorate for the protection of the freedom of press and the mass information.
256. Point 9 Temporary Decree on Publishing Activity in the RSFSR.
257. Point 14 *juncto* 7 para.2 Temporary Decree on publishing activity in the RSFSR.
258. Point 14 Temporary Decree on publishing activity in the RSFSR.
259. Point 12 Temporary Decree on publishing activity in the RSFSR.
260. Point 14 Temporary Decree on publishing activity in the RSFSR.

September 1998, which in Article13 points out that only courts may cancel a license (although it is admitted that the license-issuing state body may suspend a license).

356. The *public screening of audiovisual works in cinemas or video films* in cinemas, video parlors, and suchlike was first made subject to the duty of obtaining a prior license from the Committee for Cinematography RF, but this obligation was limited to the screening of audiovisual works in cinemas, for which licenses are to be delivered by the executive power of the subjects of the RF.[262] This license can be refused, among other reasons, due to unfavorable reports from public health and epidemiology inspectors, the fire brigade, or an expert opinion on the professional qualifications of the personnel. The licensee has to observe the legislation concerning copyright and neighboring rights while exercising the activity concerned. A breach of the license conditions may lead to the suspension or—in case of repeated violations—the cancellation of the license. Neither at the moment the license is issued, nor at any subsequent inspection of the activity allowed under the license, does there seem to be any control over the contents of the films shown.

357. Setting up a business for the *sale of antique objects* requires obtaining a license from the Russian Federation's department for the preservation of cultural treasures.[263] The purpose of this license is to combat the illegal exportation of Russian cultural goods,[264] to prevent the sale of stolen antiques, and to enable state museums, archives, and libraries to be the first to buy particular antique objects before they are brought into trade. The license can only be refused on strictly formal grounds.

358. Obligatory licensing has also been introduced for *topographic and cartographic activities*,[265] *artistic architectural activity*,[266] as well as activities with relation to the *examination of the situation of archival collections, the valuation, description,*

261. One might, moreover, wonder whether in the period from 1991 until the adoption of the Federal Law of 25 September 1998 such obligatory licensing, imposed by government decree, was compatible with art.49 (1) para.3 CC 1994, which reserves the imposition of a licensing obligation to the legislator: see, also, point 19 PPVS RF i PVAS RF, No.6/8 "O nekotorykh voprosakh, sviazannykh s primeneniem chasti pervoi Grazhdanskogo kodeksa Rossiiskoi Federatsii", 1 July 1996, *Rossiiskaia gazeta*, 13 August 1996.

262. PP RF, "Ob utverzhdenii Pravil po kinovideoobsluzhivaniiu naseleniia", 17 November 1994, *SZ RF*, 1994, No.31, item 3282 (especially points 3 and 5); PP RF, "Ob utverzhdenii Polozheniia o litsenzirovanii deiatel'nosti, sviazannoi s publichnym pokazom kino- i videofil'mov", 19 September 1995, *SZ RF* 1995, No.39, item 3776, *Rossiiskaia gazeta*, 7 October 1995, replaced by PP RF, "Ob utverzhdenii polozheniia o litsenzirovanii deiatel'nosti, sviazannoi s publichnym pokazom audiovizual'nykh proizvedenii, osushchestvliaemom kinozale", 28 May 2001, *Rossiiskaia gazeta*, 3 July 2001. The city of Moscow has also, from 1 October 1996, imposed obligatory licensing on all cinemas, cultural institutions or broadcasters which publicly show cinema and video films, video stores and points of video rental with viewing parlors attached: "Kino tol'ko po litsenzii", *Rossiiskaia gazeta* 17 May 1996.

conservation, and restoration of archival documents,[267] and *of historical and cultural monuments of general Russian importance*,[268] all for the stated purpose of prior checking of the applicant's professional qualifications. *Museums* too have to be licensed,[269] and theaters are subject to prior registration.[270]

359.Finally, a license is required for any activity relating to the international exchange of information, as a result of which informational resources of

263. Ukaz Prezidenta RF, "O realizatsii predmetov antikvariata i sozdanii spetsial'no upolnomochennogo organa gosudarstvennogo kontrolia po sokhraneniiu kul'turnykh tsennostei", 30 May 1994, *SZ RF*, 1994, No.6, item 587, *Rossiiskaia gazeta*, 9 June 1994. This *Ukaz* replaced the Ukaz Prezidenta RF, "O merakh po sokhraneniiu kul'turnykh tsennostei i predotvrashcheniiu ikh nezakonnogo vyvoza za predely Rossiiskoi Federatsii", 30 July 1992, *VSND i VS RF*, 1992, No.31, item 1855. See for a similar Decree of August 1990: *Pravitel'stvennyi vestnik*, 1990, No.32, 2; Slider 809. On the Federal Department for the preservation of cultural treasures, see, also, Ukaz Prezidenta RF, "O Federal'noi sluzhbe Rossii po sokhraneniiu kul'turnykh tsennostei", *Rossiiskaia gazeta*, 30 November 1994. This Department had in the meantime been abolished again and its powers transferred to the Ministry of Culture: Ukaz Prezidenta RF, "O strukture federal'nykh organov ispolnitel'noi vlasti", 14 August 1996, *Rossiiskaia gazeta*, 16 August 1996.
264. A law of 15 April 1993 regulates the import and export of cultural treasures: Zakon RF, "O vyvoze i vvoze kul'turnykh tsennostei", 15 April 1993, *VSND i VS RF*, 1993, No.20, item 718, *Rossiiskaia gazeta*, 15 May 1993. See also L.V. Shchennikova, "Pravovaia okhrana kul'turnykh tsennostei Rossii", *GiP*, 1994, No.3, 9-15.
265. Art.12 Federal'nyi Zakon RF, "O geodezii i kartografii", 26 December 1995, *SZ RF*, 1996, No.1, item 2, *Rossiiskaia gazeta*, 13 January 1996; PP RF "Ob utverzhdenii Polozheniia o litsenzirovanii topografo-geodezicheskoi i kartograficheskoi deiatel'nosti v Rossiiskoi Federatsii", 26 August 1995, *SZ RF*, 1995, No.36, item 3552, *Rossiiskaia gazeta*, 10 October 1995, replaced by PP RF, 8 June 2001, *Rossiiskaia gazeta*, 26 June 2001. See, also, art.17 (1) Federal'nyi zakon RF "O litsenzirovanii otdel'nykh vidov deiatel'nosti", 8 August 2001.
266. PSMP RF, "Ob utverzhdenii Polozheniia o tvorcheskoi arkhitekturnoi deiatel'nosti i ee litsenzirovanii v Rossiiskoi Federatsii", 22 September 1993, *SAPP RF*, 1993, No.39, item 3618.
267. PP RF, "Ob utverzhdenii Polozheniia o litsenzirovanii deiatel'nosti po obsledovaniiu sostoianiia arkhivnykh fondov, ekspertize, opisaniiu, konservatsii i restavratsii arkhivnykh dokumentov", 24 July 1995, *SZ RF*, 1995, No.31, item 3134, *Rossiiskaia gazeta*, 17 August 1995.
268. PP RF, "Ob utverzhdenii Polozheniia o litsenzirovanii deiatel'nosti po obsledovaniiu sostoianiia, konservatsii, restavratsii i remontu pamiatnikov istorii i kul'tury federal'nogo (obshcherossiiskogo) znacheniia", 12 December 1995, *SZ RF*, 1995, No.51, item 5071, *Rossiiskaia gazeta*, 2 March 1996 (without appendix).
269. Federal'nyi zakon RF, "O muzeinom fonde Rossiiskoi Federatsii i muzeiakh v Rossiiskoi Federatsii", 26 May 1996, in B. Bukreev, *Zakonodatel'stvo Rossiiskoi Federatsii o kul'ture*, M., Izd. Aksamit-Inform, 1999, 115-130. See also PP RF, "Ob utverzhdenii polozhenii o Muzeinom fonde Rossiiskoi Federatsii, o Gosudarstvennom kataloge Muzeinogo fonda Rossiiskoi Federatsii, o litsenzirovanii deiatel'nosti muzeev v Rossiiskoi Federatsii", 12 February 1998, *Rossiiskaia gazeta*, 5 March 1998.
270. PP RF, "O gosudarstvennoi podderzhke teatral'nogo iskusstva v Rossiiskoi Federatsii", 25 March 1999, *SZ RF*, 1999, No.13, item 1615, in which it is stated that state registration for theaters may not be refused for the sake of expediency.

the State are exported from Russia, or documentary information is imported in order to supplement informational resources of the state, at the expense of the federal state budget or the budget of the subjects of the federation. Any such activity performed by the bodies of the legislative, executive, and judicial branches or the bodies of local government, or by the state archival services, is not subject to the licensing duty.[271]

360. In other parts of the cultural field, as is the case with art galleries,[272] auction houses, and concert organizations, there does not seem to be an obligation of registration or licensing at a federal level.

3.2. Repressive Measures

361. Unlike the case with regard to the news media,[273] there is no general description of what would constitute an "abuse of the freedom of literary and artistic creation". The relevant constitutional article[274] itself does not mention a single limitation to artistic freedom.

The criminal-law sanctions for illegal expressions are, however, also applicable to artistic and literary works. One can also disclose state or military secrets in a book, one can slander and defame, a work of visual art or a film can also be regarded as prohibited pornography, or contain an incitement to racial hatred or war propaganda. It is, however, true that for certain art forms (*e.g.*, works of visual art) the increase of the punishment is not applicable, if the crime (*e.g.*, slander and defamation) was committed with the assistance of the news media.

Similarly, with respect to civil liability, there is no indication that rules applicable to art and literature would be different from those applying to the news media.

§ 4. Material Guarantees for Artistic Freedom

4.1. A Defensive Right and Legitimation of State Intervention

362. The government has only a duty to refrain from interference in the arts. It is generally recognized that the freedom of art's effective realization as a cultural right depends on government measures for the active support of this freedom.

271. Art.18 Federal'nyi zakon RF, "Ob uchastii v mezhdunarodnom informatsionnom obmene"; PP RF Ob utverzhdenii Polozheniia o litsenzirovanii deiatel'nosti po mezhdunarodnomu informatsionnomu obmenu", 3 June 1998, *Rossiiskaia gazeta*, 2 July 1998.

272. A Decree of 30 December 1971 (PSM RSFSR "O poriadke provedeniia khudozhestvennykh vystavok v RSFSR", 30 December 1971, *SP RSFSR*, 1972, No.2, item 11) by which the permission of the Ministry of Culture was required to organize exhibitions of professional and folk art, was repealed in execution of the Fundamentals on culture (Point 69 of the List approved by PSMP RF, "O priznanii utrativshimi silu reshenii Pravitel'stva RSFSR v sviazi s priniatiem Zakona Rossiiskoi Federatsii 'Osnovy zakonodatel'stva Rossiiskoi Federatsii o kul'ture'", 23 October 1993, *SAPP RF*, 1993, No.45, item 4339).

273. Art.4 NMA RF.

274. Art.44 Const.1993.

Artistic freedom is, in this respect, the odd man out within the category of cultural, economic, and social rights, which are not otherwise in the nature of subjective rights against excessive government action. A blossoming cultural life presupposes active governmental action to bring about the necessary conditions for it without, however, interfering in the development of individual freedom.

The Russian government is very conscious of the necessity of playing (or continuing to play) an active role in the promotion of cultural creation. The Fundamentals on culture (because they are mostly declarations of intent) give a good overview of the range of measures, which the Russian government has resolved to take for the promotion of cultural creation. The RF is, for example, expected to encourage the activity of citizens to introduce children to creation and cultural development, the work of self-formation, amateur art and handicrafts, and to create the conditions for universally available aesthetic education and artistic initiation, especially through the humanization of the entire system of education, through the support and development of a network of special art schools, studios, courses, etc.[275] The Russian Federation undertakes to stimulate the activity of creative workers in order to increase the quality of life of the people, the preservation and development of culture; it thus guarantees conditions of labor and employment for the creative workers so that they have the option of devoting themselves to a form of creative activity they find desirable; it stimulates the demand for cultural works; it improves the system of social security and taxation, continuing to take account of the specificities of the artistic profession;[276] and it supports the foundation and the activity of all sorts of societies of creative workers (associations, creative unions, guilds, and suchlike).[277] The RF also intends to give priority to investment in the expansion of the cultural infrastructure[278] and to pay special attention to the development of the cultural sector in the rural areas and in the Arctic Circle.[279]

The active intervention of the Russian government in cultural life is mainly based on the principles of *equality* and *development* and, to a much more limited degree, on the principles of *pluriformity* or *diversity*.

364. Inequality can arise from intrinsic characteristics of the citizens as such (*e.g.*, sex), but, also, from social circumstances of a financial, geographic, and socio-cultural nature, and it is especially with regard to this latter inequality that active government intervention in culture can be necessary, *e.g.*, to make the right to access to cultural riches a reality for all social groups among the populace.[280]

275. Art.30 Fundamentals on culture.
276. Art.27 para.2 Fundamentals on culture.
277. Art.28 Fundamentals on culture.
278. Art.48 and 50 Fundamentals on culture.
279. Art.49 Fundamentals on culture.
280. Hoefnagel 42-43. See, *e.g.*, Art.30 Fundamentals on culture.

The *principle of equality and non-discrimination* recurs again and again in the Fundamentals on culture. The right to cultural activity, for example, belongs to every citizen irrespective of national and social origin, language, sex, political, religious and other convictions, place of residence, material situation, education, profession, and other circumstances;[281] there is equality between professional and non-professional creative workers with regard to copyright and neighboring rights, intellectual property rights, the protection of trade secrets, the freedom to dispose over the results of one's labor, and state support;[282] between Russian citizens, foreigners and stateless persons in the sphere of cultural activity;[283] between members and non-members of organizations of creative workers with regard to state support in their legal, social-economic and other relationships;[284] and no organization of creative workers has priority over other analogous organizations in its relations with the state.[285]

365. Whereas with the notion of freedom the emphasis is on eliminating obstacles to the individual's capacity to act, the *idea of development* is more about the dynamic aspects of the exercising of freedom, in other words the stimulation of that which is potentially present with the people.[286] This presupposes more active government involvement than does the idea of freedom. The government has to create the necessary conditions by which people can develop themselves artistically.

In the Fundamentals on culture, we find the principle of individual development in the provision that state bodies give their protection to new talents, creative youth, debutants, and beginning creative collectives, without attacking their creative independence;[287] and in the individual right to an artistic education[288] and the government's duty to create the conditions for universally available aesthetic education and artistic initiation, among other things through the support and the development of a system of art schools, studios, courses, the preservation of free basic library services, and of amateur art.[289]

281. Art.8 Fundamentals on culture.
282. Art.10 para.3 Fundamentals on culture.
283. Art.19 Fundamentals on culture. This article, however, furthermore determines that specific conditions for the cultural activity of foreign persons and persons without citizenship in the Russian Federation can only be determined by the laws of the Russian Federation and of the Republics which are part of the Russian Federation. See in the same sense art.62 (3) Const.1993, which, however, also allows exceptions on the basis of international decrees with which the Russian Federation is party.
284. Art.28 para.5 Fundamentals on culture. See also art.19 (2) Const.1993, separately and *juncto* art.30 (2) Const.1993.
285. Art.28 para.3 Fundamentals on culture. See also arts.13 (4) and 14 (2) Const.1993 in connection with the equality of social and religious associations before law.
286. Hoefnagel 48-50.
287. Art.33 Fundamentals on culture.
288. Art.13 Fundamentals on culture.
289. Art.30 para.2 Fundamentals on culture.

366. The intervention of the state in cultural life can also be justified as a means of promoting the socially and culturally valuable representation of the actual *pluralism* of opinions and expressions through the scope of the cultural facilities supported.

In the Fundamentals on culture we find this idea, with regard to collective cultural rights, with regard to supporting the culture of minority ethnicities,[290] and concerning individual rights, in government support for the foundation of alternative cultural organizations, enterprises, associations, creative unions, guilds, and other cultural associations, if a monopolization occurs with regard to the production and distribution of cultural values.[291] Here the legislator, however, seems to miss the fact that the monopolies in the Russian cultural sector are *state* monopolies, and that now enterprises and organizations *supported by the state* are suggested as possible alternatives.

367. It is striking how in the declaratory Fundamentals on culture the idea that government intervention can be necessary to promote *quality* (in the sense of "excellence") in cultural provision, and that in other words quality can be an aim of cultural policy, remains completely absent, at least with regard to support for current cultural production.[292] Such measures for stimulation are always formulated in general terms without any limitation on the basis of quality.[293] This phenomenon, combined with the strong emphasis on the idea of equality, should probably be understood as a reaction against the earlier communist rule in which State and Party themselves judged the quality of expressions of art and attempted to extinguish every form of pluriformity.

But government finances are limited, and state support is, consequently, by definition selective. The quality of a cultural creation or achievement can be a useful criterion for selection, especially taking into account the fact that from a cultural point of view qualitatively very exceptional pieces of work or activities, are from an economic point of view often the least remunerative

290. Art.22 Fundamentals on culture.

291. Art.32 Fundamentals on culture. Art.13 Const.1993 states that ideological and political pluralism are acknowledged in Russia, and that no ideology is to be established or enforced by the state.

292. See, however, with regard to the preservation of culture art.25 Fundamentals on culture. *Particularly valuable* parts of the cultural heritage enjoy a special statute of protection. The authority to possess, use and dispose over such objects can only be altered according to special procedure based on the findings of an *independent committee of experts* which takes into account the interests of the completeness of historically formed collections, the circumstances of their protection, accessibility for the citizens and the origin of the object.

293. Art.27 para.2 Fundamentals on culture does provide that the Russian Federation stimulates the activity of creative workers which is aimed at improving the *quality* of the life of the people, but it is not clear whether the aim of quality of life also involves the quality of the creative work itself, and no provision is made about who should evaluate this quality.

and profitable ones and thus the most in need of support. It is certainly so that the government's selective support of the range of cultural provision, based on the principle of quality, can lead to arbitrariness and violation of the principle of equality and of the government's duty to refrain from interference with the principle of freedom. But in a democratic society, this difficulty can largely be resolved if the government keeps a certain distance, namely by leaving the judging of the quality of contents to experts sitting on advisory boards.[294] Below, in a brief overview of the most recent measures specifically concerning culture, we will indeed see that—in the Russian authorities' concrete measures to support cultural activities—the notions of quality and objectivity are becoming increasingly important.[295]

4.2. Freedom of Association

368. Article 47 Constitution 1977 also mentioned state support for the voluntary and creative unions as a material guarantee for artistic creation, thus creating a link between this latter freedom and the freedom of association. This guarantee does not occur in the Russian Constitution, besides which the understanding of freedom of association as an autonomous right have changed radically.

Whereas, in the Soviet period, citizens were only free to join associations already in existence and operating under the auspices of the CPSU, the Russian Constitution recognizes their right to not join an association, or to leave it, *and* the right to found associations oneself.[296] Ideological interference or the granting of privileges is not allowed.[297] The membership or non-membership of a social association cannot be a basis for the limitation of the rights and freedoms of the citizen, nor can it be a condition for any preferential or privileged treatment by the state.[298]

294. Sociaal en Cultureel Planbureau, *Advies cultuurwetgeving*, Rijswijk, 1986, 101-102.

295. *Infra*, No. 527.

296. Art.30 Const.1993. See, also, art.3 Federal'nyi Zakon RF "Ob obshchestvennykh ob"edineniiakh", 19 May 1995, *SZ RF*, 1995, No.21, item 1930, *Rossiiskaia gazeta*, 25 May 1995, as amended (*SZ RF*, 1997, No.20, item 2231; *Rossiiskaia gazeta*, 24 July 1998 (Federal Law RF on social associations)). This Law also provides for the registration of social associations with the Ministry of Justice, but it is not constitutive for the freedom of association, it is only needed in order for an association to acquire legal personality (arts.3, 18 and 21-23). On the procedure of registration, see Prikaz Ministerstva Iustitsii RF,"Vremennye pravila registratsii ustavov politicheskikh partii i inykh obshchestvennykh ob"edinenii v Ministerstve iustitsii Rossiiskoi Federatsii", 16 September 1994, *BNA RF*, 1994, No.12, 3, *Rossiiskaia gazeta*, 5 October 1994. The Russian Law replaced the Soviet law which had been valid until then: Zakon SSSR, "Ob obshchestvennykh ob"edineniiakh", 9 October 1990, *VSND i VS SSSR*, 1990, No.42, item 839. For a discussion of the Soviet law, see van den Berg 1991, 501-506.

See, also, the Russian Law on unions: Federal'nyi Zakon RF, "O professional'nykh soiuzakh, ikh pravakh i garantiiakh deiatel'nosti", 12 January 1996, *SZ RF*, 1996, No.3, item 148, *Rossiiskaia gazeta*, 20 January 1996.

369.In formal terms, the creative unions of the past can no longer count on privileged treatment. In fact, they had lost many of their feathers even before this formal statement, as the policy of *glasnost'* revealed great differences of opinion within the supposedly monolithic unions, which led to the creation of splinter groups.[299] After the disintegration of the Soviet Union, the unions splintered even more, as the sections of the fifteen new independent states each had to continue under their own steam,[300] every splinter group demanded the statute of legal successor of the Soviet union, including the property rights to the goods (especially the real estate) situated in the Republic's territory, such as the old people's homes and holiday homes, workshops, health farms, polyclinics etc.,[301] and to the enterprises (especially publishing houses and factories producing professional material) of the creative unions which were organized at the level of the Union.[302] Gradually, however, new cooperation agreements grew among the different splinter groups of one union in one country,[303] among the different sections of the same union in different countries of the CIS,[304] and among the different professional groups, with the intention of more

297. By virtue of art.13 (5) Const.1993 the foundation and activity of social associations is prohibited if the purposes or actions are aimed at the violent alteration of the foundations of the constitutional structure and the violation of the integrity of the Russian Federation, the undermining of state security, the forming of armed militias, incitement to social, racial, national and religious hatred. And by virtue of art.13 (4) Const.1993 the social associations are equal before the law.
298. Art.19 para.6 Federal Law RF on social associations, *supra*, note 296.
299. See, *e.g.*, with regard to the Writers' Union: E. Rushina and M. Kudimova, "Redden we het zonder schisma?", *Literaturnaia gazeta*, 28 September 1991, translated in *Rusland monitor*, 1991-92, No.4, 22-24; "Writers Wage Nonliterary Warfare", *CDSP*, 1991, No.28, 17-22.
300. In the Filmmakers' Union, this problem could be resolved in time, as this union had reorganized itself as a Confederation even before the disintegration of the USSR: *Izvestiia*, 31 May 1991.
301. Savel'eva 1989, 14.
302. The property aspects of the reorganization which had become a necessity with the disintegration of the USSR, were regulated by a Decree of the Supreme Soviet RSFSR: PVS RSFSR, "O sobstvennosti obshchesoiuznykh i mezhrespublikanskikh obshchestvennykh organizatsii i fondov na territorii RSFSR", 27 September 1991, *VSND i VS RSFSR*, 1991, No.42, item 1325, *Zakon*, 1993, No.2, 31-32. See also Feldbrugge 1993, 308. On the property disputes with the Artists' union: "Tol'ko v edinstve", *Kul'tura*, 3 July 1993. The stakes in the struggle for the properties, and especially the enterprises, of the creative unions were very big, as these commercial activities earned over 90% of the income of the creative unions: O.Vedeneeva, "Spaset li tvorcheskie soiuzy blagotvoritel'nost'?", *Ekonomika i zhizn'*, 1991, No.45.
303. From 1994 onwards attempts were made to federate or confederate the three Russian Writers' unions, each of which claimed to be the successor to the earlier Writers' Union: A.Vystorobets, "Pisateli khotiat zhit' druzhno", *Rossiiskaia gazeta*, 28 June 1994; A.Vystorobets, "Possorilis'—pora ob"ediniat'sia", *Rossiiskaia gazeta*, 4 August 1994.
304. See, *e.g.*, concerning the Writers' Union: "Vmesto SP SSSR—MSPS", *Kul'tura*, 6 June 1992.

powerfully representing the common interests of one professional group, or of all of the group of cultural workers, *vis-à-vis* the government.[305]

370. The internal fractiousness of the creative unions and the loss of their former semi-official status meant that they could not adequately react to the new economic situations. Whereas in the second half of the eighties the social facilities of the creative unions were still extensive,[306] the hyperinflation of the first half of the nineties and the reigning chaos have dealt them a heavy blow. Because of this not only has the social property of the enterprises been affected, but indirectly also the different professional groups of cultural workers who saw the financing of their social facilities reduced.

4.3. Copyright

371. In part one,[307] we indicated that the status of copyright explicitly referred to in article 47 Constitution 1977, was unclear: was it a material guarantee for artistic freedom or was it an independent right? In article 44 (1) Constitution 1993, the situation is not much clearer.

The following differences with the earlier constitutional regulation are, in any case, striking:

— In 1977 the rights of authors, inventors, and rationalizers were named explicitly; in 1993 the catch-all term 'intellectual property' was used. As we will discuss below, this term is not used in legislation as a synonym of copyright, but as an umbrella term. Also intellectual property rights which in the past did not occur in the list (*e.g.*, drawings and models, trademarks, etc.) are thus constitutionally protected.[308]

305. See the foundation of the coordination council of the creative unions: L. Mikhailova, "Tvorcheskie soiuzy ob"edinilis'", *Kul'tura*, 9 July 1994.

306. Foundation of Soviet cultural fund: "Sovetskii fond kul'tury", *Literaturnaia gazeta*, 26 March 1986; "Bogatstva kul'tury—narodu", *Literaturnaia gazeta*, 19 November 1986; Savel'eva 1989, 14-15; the foundation of a Literary Fund RSFSR: PSM RSFSR, "Ob obrazovanii Literaturnogo fonda RSFSR iVserossiiskogo biuro propagandy khudozhestvennoi literatury Soiuza pisatelei RSFSR", 22 March 1988, *SP RSFSR*, 1988, No.10, item 41; foundation of a film fund attached to the USSR Filmmakers' Union and of theater funds, and the strengthening of the material-technical basis of the creative unions: Postanovlenie TsK KPSS i SM SSSR, "Ob uluchenii uslovii deiatel'nosti tvorcheskikh soiuzov", 14 February 1987, *SP SSSR*, 1987, No.16, item 61, see also Savel'eva 1989, 11; foundation of a journalists' fund in 1987: Savel'eva 1989, 11; foundation of a Fund for the art of photography: PSM SSSR, "Voprosy Soiuza fotokhudozhnikov SSSR", 26 July 1990, *SP SSSR*, No.18, item 95.

307. *Supra*, No.80.

308. With this, the Russian Constitution goes further than art.15 ICESCR and art.27 (2) UDHR which only guarantee the protection of copyright. According to Lippott (203), art.44 (1) second sentence Const.1993 only covers claims under personal law proceeding from intellectual property, since property-law claims would be directly protected as property rights (arts.34-36 Const.1993).

— This intellectual property is protected not by the state, but by the law. The term "law" refers in all probability to a law in the formal sense. In any case, the term can have no meaning with regard to the division of competence between the Federation and its constituent bodies. Indeed, at a federal level only *federal laws* are adopted, while the subjects of the Federation can adopt *laws*. However, the regulation of intellectual property is still an exclusive power of the Federation.[309] The use of the term 'law' can here thus only be understood in terms of the delineation of the competences of the executive and the legislative power.
— The protection of intellectual property is now named alongside the freedom of artistic, technical, and scientific freedom, and no longer in two separate paragraphs.

There is not much that can be deduced from these differences. The link with artistic freedom and the freedom of academic activity is made tighter in a formal manner. Considering the waning of the idea that material guarantees for achieving fundamental rights and freedoms have to be written into the constitution, it seems unlikely that the drafters of Constitution 1993 considered the constitutional protection of intellectual property a material guarantee for artistic and academic freedom. Hence, in our opinion it is an independent right, which can possibly be considered a *legal* guarantee for the effective realization of the freedom of artistic, technical, and academic creation.

§ 5. The Right to Cultural Consumption and Cultural Preservation

372. By virtue of article 44 (2) Constitution 1993 everybody has the right to participate in cultural life and make use of cultural institutions, as well as to have access to cultural treasures.[310] Naturally, a person engaging in creative activities who is hereby under the protection of the *freedom of artistic production*, as guaranteed by article 44 (1) Constitution 1993, also takes part in cultural life. For reasons of internal logic, we can thus assume that the constitution uses the expression "participation in cultural life" in the second paragraph of the same article to mean only *cultural consumption*.

Contrary to the rights, which concern cultural production, the right of access to culture does not have the nature of a subjective right. It does, however, oblige the authorities to maintain a policy aimed at as broad access as possible to art and culture and not arbitrarily to limit the accessibility of works of art in public possession.

The Russian legislator has, in the meantime, modernized legislation on libraries and archives, devoting attention to the right of access to these cultural "repositories". The age of the *spetsfondy*, compiled on an ideological basis, seems to belong to the past.

309. Art.71 (n) Const.1993 (in the Russian alphabet, art.71 (o)). See also Gavrilov 1995a, 686-687; Polenina 35.
310. See, also, art.12 Fundamentals on culture.

373. A new law on archives[311] states as a general rule that access to the documents of the state archives is, in principle, free for every legal and natural person,[312] whereas access to private archives naturally demands the permission of the owner. An important innovation is the limitation in time of the prohibition to access to certain documents.[313] Documents which contain a secret protected by law cannot be consulted until 30 years after their creation;[314] documents which concern the private life of citizens or which contain data which can threaten the life and the safety of citizens, can—subject to earlier permission of the person concerned or his heirs—only be made accessible 75 years from the moment of the drawing up of the document.[315] Access to particularly valuable and unique documents or documents in a bad state of repair can also be limited.[316]

311. Osnovy zakonodatel'stva RF "Ob Arkhivnom fonde Rossiiskoi Federatsii i arkhivakh", 7 July 1993, *VSND i VS RF*, 1993, No.33, item 1311, *Rossiiskaia gazeta*, 14 August 1993.
312. Art.20. The State cannot found secret archives (art.7). The CPSU and KGB USSR archives which were very important for historical research were transferred to the state organs responsible for archives (Ukaz Prezidenta RSFSR, "Ob arkhivakh Komiteta gosudarstvennoi bezopasnosti SSSR", 24 August 1991, *VSND i VS RSFSR*, 1991, No.35, item 1156; Ukaz Prezidenta RSFSR, "O partiinykh arkhivakh", 24 August 1991, *VSND i VS RSFSR*, 1991, No.35, item 1157, see also E. Maksimova, "Arkhivy KPSS i KGB perekhodiat v sobstvennost' naroda", *Izvestiia*, 28 August 1991), and were thus brought under the application of general archival legislation (see V. Tolz, "New Situation for CPSU and KGB Archives", *Report on the USSR*, 20 September 1991, 1-4; V. Tolz, "Access to KGB and CPSU Archives in Russia", *RFE/RL Research Report*, 1992, No.16, 1-7; V. Tolz and J. Wishnevsky, "The Russian Government Declassifies CPSU Documents", *RFE/RL Research Report*, 1992, No.26, 8-11). See, also, Rasporiazhenie Prezidenta RF, 22 September 1994, *Rossiiskaia gazeta*, 27 September 1994.
313. Skripilev *et al.*, "Arkhivnoe delo v SSSR: proshloe i nastoiashchee", *SGiP*, 1990, No.4, 44.
314. This term can be increased by a Decree of the Presidium of the Supreme Soviet on suggestion of the State archive service of Russia. Such a Decree had already been issued on 23 July 1993, by which documents with information on foreign espionage activity and which contain a state secret or another secret protected by law are declared inaccessible for 50 years. The list of data which were to be kept secret was drawn up by Russia's own Service for foreign espionage (PVS RF, "O sroke dostupa k arkhivnym dokumentam, otnosiashchimsia k sfere deiatel'nosti vneshnei razvedki", *VSND i VS RF*, 1993, No.34, item 1397; *Rossiiskaia gazeta*, 28 August 1993). Compare also with regard to archival documents of the Government of the USSR: PP RF, "Ob ustanovlenii poriadka rassekrechivaniia i prodleniia srokov zasekrechivaniia arkhivnykh dokumentov Pravitel'stva SSSR", 20 February 1995, *SZ RF*, 1995, No.9, item 762.
315. This regulation had already come into effect in 1992 by a temporary Decree of the Supreme Soviet: PVS RF, "O vremennom poriadke dostupa k arkhivnym dokumentam i ikh ispol'zovaniia", 19 June 1992, *VSND i VS RF*, 1992, No.28, item 1620. In execution of this Decree, the term of inaccessibility of documents concerning atomic science and atomic technology, containing state secrets or other secrets protected by law, was increased by 18 years. See PPVS RF, "O prodlenii ogranichitel'nogo sroka khraneniia arkhivnykh dokumentov, soderzhashchikh svedeniia po razrabotkam v oblasti atomnoi nauki i tekhniki", 21 December 1992, *VSND i VS RF*, 1993, No.1, item 39.

374. The Federal Law on libraries of 29 December 1994[317] guarantees the citizens the right of access to the libraries,[318] including the right to receive any document from library collections free of charge for temporary use.[319] No "censorship" can be exercised which would limit free access to certain collections.[320] In order to guarantee the completeness of a number of important collections, the legislation on mandatory deposit was modernized.[321] Although formally-legally free access to libraries and the collection of printed matter in Russia was guaranteed in this manner, the state's financial crisis has led to the closing down of many libraries, thus increasing the (geographical and psychological) distance between reader and library,[322] the underpayment of librarians, causing mass departure of qualified specialists for commercial enterprises, the non-observance of crediting terms in respect of all items in all approved budgets (except wages), entailing a reduction of the total volume of allotted funds and

316. Point 15 Polozhenie, "Ob Arkhivnom fonde Rossiiskoi Federatsii", approved by Ukaz Prezidenta RF, 17 March 1994, *SAPP RF*, 1994, No.12, item 878, *Rossiiskaia gazeta*, 24 March 1994.
317. Federal'nyi Zakon RF, "O bibliotechnom dele", 29 December 1994, *SZ RF*, 1995, No.1, item 2, *Rossiiskaia gazeta*, 17 January 1995. This law replaced the earlier Soviet legislation: UPVS SSSR "Ob utverzhdenii Polozheniia o bibliotechnom dele v SSSR", 13 March 1984, *VVS SSSR*, 1984, No.12, item 173. The access to the libraries was, among other things, regulated by the Model rules for the use of libraries in the USSR, issued by the Ministry of Culture on 3 January 1986 ("Tipovye pravila pol'zovaniia bibliotekami v SSSR", 3 January 1986, *BNA SSSR*, 1986, No.8, 36-41). The powers of the Ministry of Culture of the USSR to issue such rules was disputed in law: I.I. Dotsenko, "Struktura bibliotechnogo zakonodatel'stva", *VLU*, 1988, No.1, 91-92. See, further, the recent Statutes of the Russian State Library (PP RF 23 March 2001 No.227) and the Russian National Library (PP RF 23 March 2001 No.226).
318. Art.7 (1) Federal Law on Libraries. This Act does not explicitly mention that this access should be free of charge, whereas art.30 Fundamentals on culture does do this with regard to the "basic service".
319. Art.7 (4) para. 4 Federal Law on Libraries.
320. Art.12 (1) para.2 Federal Law on Libraries. Free library access is also provided for in the Statutes of the Russian State library (the former Lenin Library). Limitations on the use can only be determined to preserve particularly valuable and rare manuscripts and publications and in the cases provided by legislation. In any case, the information on the presence in the library of documents to which access is limited has itself to be generally accessible: PSMP RF, point 4 "Polozhenie o Rossiiskoi gosudarstvennoi biblioteke", 2 August 1993, *SAPP RF*, 1993, No.32, item 3021; PP RF, point 9, 23 March 2001.
321. Federal'nyi Zakon RF, "Ob obiazatel'nom ekzempliare dokumentov", 29 December 1994, *SZ RF*, 1995, No.1, item 1, *Rossiiskaia gazeta*, 17 January 1995; PP RF, "Ob obiazatel'nykh ekzempliarakh izdanii", 24 July 1995, *SZ RF*, 1995, No.31, item 3129, *Rossiiskaia gazeta*, 29 August 1995. See, already, earlier: PVS RF, "Ob obiazatel'nykh besplatnykh i platnykh ekzempliarakh izdanii", 3 June 1993, *VSND i VS RF*, 1993, No.25, item 908.
322. According to Ministry of Culture data there were 62,234 libraries in Russia in 1990, as against 54,814 at the end of 1994. In Moscow, the number fell from 1,236 in 1990 to 419 at the end of 1993, and in St Petersburg from 702 to 192. See A. Aleksandrov, "Kak proiti v biblioteku?", *Rossiiskaia gazeta*, 29 September 1995.

the impossibility to perform the most basic library activities (the development of full-value collections,[323] purchase of necessary equipment, etc.).[324]

375. The right to cultural consumption presupposes not only that works of art are created (art.44 (1) Const.1993), but, also, that existing works of art are not lost (art.44 (3) Const.1993). Although the duty to preserve cultural property is aimed at "everybody", it naturally also presupposes active state intervention.[325]

376. The Russian policy with regard to the care for the cultural heritage follows two main lines: on the one hand, the classical conservation of monuments and historic buildings;[326] on the other, a policy against the illegal export

323. Not even 10% of all new Russian books get into mass collections, *Rossiiskaia gazeta*, 13-19 July 1996.

324. E. Genieva, "Legal aspects of Russian library activities and international practice", in C. Keane (ed.), *Legislation for the book world*, Council of Europe Publishing, 1997, 213-224.

325. Compare art.35 Fundamentals on culture:

> "The state is responsible for the uncovering, taking an inventory of, the study, the restoration and the protection of historical and cultural monuments. The organs of state power and government and autonomous organs are obliged to contribute to the intactness and the use of such monuments as are situated in private and collective property, hence in particular to undertake a state inventory. The state has a prior right to acquire cultural treasures which are situated in private property, and legislatively regulates the rights and duties of the owners."

326. The Soviet legislation concerning the protection and the use of historical and cultural monuments is still valid (Zakon RSFSR, "Ob okhrane i ispol'zovanii pamiatnikov istorii i kul'tury", 15 December 1978, *VVS RSFSR*, 1978, No.51, item 1387. For the USSR law of the same name, see *VVS SSSR*, 1976, No.44, item 628). Sanctions in administrative and criminal law for infringements of this legislation were, however, increased in 1991 (Zakon SSSR, "Ob ugolovnoi i administrativnoi otvetstvennosti za narushenie zakonodatel'stva ob okhrane i ispol'zovanii pamiatnikov istorii i kul'tury", 2 July 1991, *VSND i VS SSSR*, 1991, No.29, item 837, *Izvestiia*, 13 July 1991. See, also, art.243 CrC 1996, and art.230 CrC 1960, as last amended on 20 October 1992, *VSND i VS RF*, 1992, No.47, item 2664; S.I. Nikulin, in Radchenko 443-445). For particularly valuable objects of the cultural heritage of the peoples of the RF, a special regulation was worked out (art.25 paras 2-3 Fundamentals on culture; Ukaz Prezidenta RF "Ob osobo tsennykh ob"ektakh natsional'nogo naslediia Rossii", 18 December 1991, *Rossiiskaia gazeta*, 25 December 1991, English translation in *CDSP*, 1991, No.51, 10 and 32; Ukaz Prezidenta RF, "Ob osobo tsennykh ob"ektakh kul'turnogo naslediia narodov Rossiiskoi Federatsii", 30 November 1992, *VSND i VS RF*, 1992, No.49, item 2936; Ukaz Prezidenta RF, "Ob utverzhdenii Polozheniia o Gosudarstvennom ekspertnom sovete pri Prezidente Rossiiskoi Federatsii po osobo tsennym ob"ektam kul'turnogo naslediia narodov Rossiiskoi Federatsii i ego sostava", 28 March 1993, *SAPP RF*, 1993, No.15, item 1242; PP RF, "Ob utverzhdenii Polozheniia o Gosudarstvennom svode osobo tsennykh ob"ektov kul'turnogo naslediia narodov Rossiiskoi Federatsii", 6 October 1994, *SZ RF*, 1994, No.25, item 2710, *Rossiiskaia gazeta*, 15 October 1994; PP RF, "Ob obshcherossiiskom monitoringe sostoianiia i ispol'zovaniia pamiatnikov istorii i kul'tury, predmetov Muzeinogo fonda Rossiiskoi Federatsii, dokumentov bibliotechnykh fondov, Arkhivnogo fonda Rossiiskoi Federatsii, a takzhe kinofonda", 5 July 2001.). Cultural treasures neglected by their owner can be bought by the state or publicly sold: art.240 CC RF.

of art treasures from Russia.[327] However, it would lead us much too far away from our main narrative to go here into these and other problems relating to cultural preservation (*e.g.*, the possibility of privatization of the cultural heritage, restitution of cultural treasures to other CIS member states or to Germany).

Conclusion

377. It cannot be denied that in the past fifteen years, the legal framework—within which the news media and the cultural sectors have to work—has changed fundamentally. The cult of secrecy and *partiinost'* was replaced by a real pluralism of expression of opinion and openness (*glasnost'*). Freedom of speech and artistic freedom are essentially now considered as defensive rights. They draw a line between the spheres of action of government and citizen; they create space for the sphere of liberty in which each individual strives for personal fulfillment and self-development. The basis for this is the idea that the individual is more important than the collective, and this means a radical rupture with the communist past. As part of the political system transformation, the freedom of speech and artistic freedom serve as a crowbar to force the splitting of state and civil society.

Even fundamental rights and freedoms have their limits. The Russian constitutional legislator has chosen for a *material* system of limitation. Only the federal legislator can impose limits to these constitutional freedoms, and can only do so if such limits are legitimized by certain constitutional purposes and if they are proportional to those purposes. Thus there is no danger of temporary majorities in the Russian parliament imposing unjust limitations on fundamental human freedoms. At the same time, the existence of these fundamental rights is functional in a democracy, which can only operate properly if majority decisions can be questioned critically. The judicial power is burdened with the (new) task of testing government action against the said conditions.

If it is Gorbachev and El'tsin's great merit to have made it possible to draw the line between public and private sphere, this cannot allow us to close our eyes to the fact that, according to the present state of Russian law, this line is situated in a different place than one could and might expect. Despite

327. Zakon RF, "O vyvoze i vvoze kul'turnykh tsennostei", 15 April 1993, *VSND i VS RF*, 1993, No.20, item 718, *Rossiiskaia gazeta*, 15 May 1993; PSMP RF, "O priznanii utrativshimi silu reshenii Soveta Ministrov RSFSR v sviazi s priniatiem Zakona Rossiiskoi Federatsii 'O vyvoze i vvoze kul'turnykh tsennostei'", 30 August 1993, *SAPP RF*, 1993, No.36, item 3393; Ukaz Prezidenta RF, "O Federal'noi sluzhbe Rossii po sokhraneniiu kul'turnykh tsennostei", 28 November 1994, *SZ RF*, 1994, No.32, item 3331; PP RF, "Voprosy Federal'noi sluzhbe Rossii po sokhraneniiu kul'turnykh tsennostei", 30 December 1994, *SZ RF*, 1995, No.2, item 156, *Rossiiskaia gazeta*, 17 January 1995; art.190 CrC 1996; PP RF, "Ob utverzhdenii polozheniia o provedenii ekspertizy i kontrolia za vyvozom kul'turnykh tsennostei", 27 April 2001. For a discussion, see L.V. Shchennikova, "Pravovaia okhrana kul'turnykh tsennostei Rossii", *GiP*, 1994, No.3, 9-15.

the prohibition of measures of censorship, the executive power has a broad administrative field of action. Although the government has retreated from the individual sphere of artists and authors, it is still very active with regard to art and the news media. Firstly, this appears from the obligation of registration or licensing of activities of art mediation, which are not reduced to a mere formality in the case of the news media and the publishing houses. Moreover, the registering or licensing state bodies exercised an administrative monitoring *a posteriori* on the cultural midfield, albeit under judicial control. Also the Judicial Chamber for Information Disputes (despite its name a purely administrative organ) could—on the basis of a complaint, a request for advice, or on its own initiative—intervene in the affairs of the media sector.

It is definitely legitimate for the government to intervene in the cultural sector to protect it against "the guillotine of the market". The fact that it intervenes in the exercise of the individual's freedom of speech, art and art mediation is, however, problematic.

TITLE III. THE TRANSFORMATION OF THE ECONOMIC SYSTEM

Introduction

378. It was not only the Soviet Union's political system, which was characterized by rigidity; from the early seventies the economic motor also began to sputter, so that in this area too reforms became necessary. Gorbachev thought he could halt economic stagnation by speeding up (*uskorenie*) social-economical development (Chapter I). Among other things, this required a *perestroika* of the economy. However, from the second half of 1989 it became clear that the crisis could only be overcome through the abandonment of the planned economy for the market (Chapter II). Our particular attention goes to the cultural sectors, for which the economic change certainly offered new possibilities, but, also, caused the call for culturally-specific measures of support from the government to increase rather than decrease.

Chapter I. Attempts to Improve the Existing System (1985–1989)

Introduction

379. In the first years of *perestroika*, the political leaders did not believe that the planned economy needed to be abolished as such but, rather, that it had to be "perfected" (section 1). At the same time, it was hoped that some control could be gained over the parallel, black economy by its partial legalization, also in the cultural sector (section 2).

Section 1. The State Sector

§ 1. The Law on State Enterprises of 30 June 1987

380. In the activation of the state sector, the Law on state enterprises of 30 June 1987[1] was of great importance. The theme of this law was to decrease the role of the ministries and to increase the responsibility and the autonomy of state enterprises.[2] By virtue of this Law, a state enterprise was expected to function on the basis of complete economic accountability (*khozraschet*) and self-financing (*samofinansirovanie*).[3] This meant that the productive and social

1. Zakon SSSR, "O gosudarstvennom predpriiatii (ob"edinenii)", 30 June 1987, *VVS SSSR*, 1987, No.26, item 385, amended 3 August 1989, *VSND i VS SSSR*, 1989, 214, *Ekonomicheskaia gazeta*, 1989, No.34, 5.
2. Bregman/Lawrence 195. The enterprises in 'social ownership' of the unions and the creative unions did not fall under this law's area of application.
3. Art.2 (2) Law on state enterprises.

activity of the enterprise and the payment of the labor force took place with the means gained through the efforts of the labor collective, and that the enterprise covered its material expenses with the income obtained from the sale of products (or services). This made them relatively independent.[4] Moreover, and this was really new, the state enterprises were given a certain freedom in the choice of trade partners, in determining prices, in electing management, in using the profits and in determining the employees' wages. The number of plan indicators was decreased.

381. This Law also applied to commercial[5] state organizations and to state enterprises active in the cultural sector, with all what that implied with regard to the autonomous decision-making of those enterprises and their economic position. For example, all enterprises within the system of the State committee for publishing, printing and the book trading (*Goskomizdat SSSR*) had to switch to the system of *khozraschet* and self-financing by 1 January 1989.[6]

Moreover, every state enterprise was—in the framework of the policy of attention for the human factor[7]—urged to build cultural houses for the relaxation of the employers and to develop the creative self sufficiency of laborers and their families.[8]

382. The reform of the state enterprise sector was not a success. The greater autonomy for the state enterprise was not used by their managers for a more efficient management, but for inflationary increases in staff wages[9] to buy re-election as head of the enterprise. This increased demand for ever more scarce consumer goods.

§ 2. Experiments with Autonomy in the Cultural Sector

383. In all sectors of the cultural business, initiatives were taken in the second half of the eighties to grant the 'cultural socialist user organizations' greater economic and artistic autonomy *within* the existing planned economy.

384. Soon after the initiation of the *perestroika*-policy, *film production* and *film distribution* were thoroughly reorganized. The 39 existing film studios switched, in accordance with the Law on State enterprises, to the principle of economic accounting and self-financing. The film studio itself became responsible for putting together the production program and itself hired employees per production. The creative teams of the studios were separate production

4. Götz 27-29.
5. Non-commercial organizations (such as libraries and museums) were called "institutions" (*uchrezhdenie*) and were completely financed by the state budget. They did not fall in this Law's area of application.
6. Postanovlenie TsK KPSS i Soveta Ministrov SSSR, No.665, 11 June 1987; English translation in *SSD*, Summer 1990, 71-78.
7. *Supra*, No.158.
8. Art.13 (4) Law on state enterprises.
9. Götz 28-29.

units which were given increasingly more say and which could eventually, on the basis of a Decree of the Council of Ministers of 18 November 1989,[10] cut themselves loose from the big studios.[11] In this way the role, the activity, and the independence of the creative workers and their collectives were increased.[12]

With regard to film distribution, the administrative decisions concerning classification, number of copies, and distribution by the central distribution section (*Glavkinoprokat*) of the State Committee for Cinematography of the USSR, *Goskino*, were replaced by a film market (*kinorynok*), where representatives of local *Goskino*-departments could buy the rights directly from the studios and demand determined the number of film copies to be produced.[13]

385. On 1 January 1987, on the initiative of the Ministry of Culture, an experiment in the *world of theater* started, which involved four-fifths of all theaters (in Moscow one-half). The complete theater structure was democratized (which among other things meant the election of the manager by the staff), and the repertoire of a theater company was no longer chosen by the Ministry of Culture, but autonomously by the artistic council of the theaters. The theaters which took part in the experiment, switched from permanent repertoire companies to short-term contracts with freelance collaborators. They were also granted a certain freedom in determining the prices of admission tickets. Although they could still count on state subsidies, these were no longer calculated in relation to the number of planned productions or the level of wages, nor on the basis of the observance of a ratio between classical, modern, and foreign plays, but in relation to the number of admission tickets sold.[14]

386. In the *world of music*, the only concert organization was re-organized and decentralized in April 1986.[15] The concert agencies at a local level were given greater freedom of action; the number of plan indicators was drastically reduced, in the sense that the maximalization of the number of visitors was given priority over a previously determined number of concerts. It was hoped that this would encourage creativity in the organization of concerts, and prevent the falsification of planning figures. Organizations with better results than planned for, were allowed to retain their profit.[16] In the framework of

10. PSM SSSR, "O perestroike tvorcheskoi, organizatsionnoi i ekonomicheskoi deiatel'nosti v sovetskoi kinematografii", 18 November 1989, *SP SSSR*, 1990, No.1, item 5.
11. Ageenkova 421; Chernysheva 1995, 116.
12. Ageenkova 421.
13. Manson 36.
14. M. Glenny, "Soviet Theatre: Glasnost' in Action—with Difficulty", in Graffy/Hosking 81-82; G. Jacobs and H. Olink, "Als Poesjkin uit zijn graf herrijst, krijgt ook hij een schamel honorarium", *De Volkskrant*, 30 August 1986; "Teatr, vremia, zhizn'", *Literaturnaia gazeta*, 10 December 1986, 1-2.
15. C. Rice, "Soviet Music in the Era of Perestroika", in Graffy/Hosking 103. See also *Sovetskaia Kul'tura*, 26 March 1987, 26 May 1987 and 14 July 1987.
16. Rice, *l.c.*, 103-104.

the Law on state enterprises, the state record company *Melodiia* also adopted the principles of economic accounting and self-financing. This caused *Melodiia* to search for popular, light music and musical groups, which had in the past operated illegally. Even so, *magnitizdat*[17] continued to compete with the state enterprise sector.[18]

387. Just as in the other sectors, so also in the *publishing business* the shift of responsibilities from the administration to the state enterprises was one of the most remarkable evolutions of the late eighties. A decision of the college of *Goskomizdat SSSR*, reached on 20 November 1986,[19] led to the publishing houses being granted greater freedom and independence in drawing up their thematic plans.[20] The final responsibility for this lay with the manager of the publishing house, and no longer with the state administration. Previously, the general publishing board had had an advisory vote; now it became decisive.[21]

Henceforth, authors could also publish at their own expense (*izdanie za schet avtora*).[22] To do so, the author had to sign an agreement with the state publishing house or a publishing house in social ownership.[23] For obvious reasons, this option was seldom exercised.[24]

17. *Supra*, Nos. 47 ff.
18. Nijenhuis 42-44.
19. This decision was taken after the President of *Goskomizdat*, M.F. Nenashev, at the Eighth Congress of the Writers of the USSR, had expressed self-criticism concerning the lack of knowledge with regard to reader demand. This is why a democratization of the publishing plan was announced: *Literaturnaia gazeta*, 2 July 1986.
20. Reshenie kollegii Goskomizdata SSSR, "O rasshirenii prav i samostoiatel'nosti izdatel'stv i sovershenstvovanii tematicheskogo planirovaniia", 20 November 1986, in Zharko *et par.* 51-64.
21. E. Kuz'min, "Tirazhi vmesto mirazhei?", *Literaturnaia gazeta*, 25 February 1987. Established authors whose membership of the CPSU or participation in the running of the Writers' Union gave them a lot (of privileges) to lose by the reforms, spoke of the increased independence of the publishing houses as 'an attack on the rights of the author, a strengthening of the arbitrariness of the publishing houses', and of 'feudal dependency on the publisher', and 'the dictate of the publishers over the authors' (quoted Shishigin, M., "Avtor, izdatel', chitatel'—garmoniia interesov", *Literaturnaia Rossiia*, 14 October 1988).
22. Prikaz Goskomizdata SSSR, "Polozhenie o poriadke vypuska knig za schet avtora", *Knizhnoe obozrenie*, 15 April 1988; and under the same name, Order No. 41 of Goskomizdat SSSR, 7 February 1989, quoted Prins 1991a, 136-7 and 283-284.
23. Of the remuneration in foreign currency which an author might earn in this manner, 70% was effectively paid in cash, and 30% was changed into rubles: PSM SSSR "Ob otchisleniiakh v inostrannoi valiute avtoram proizvedenii, izdannykh v SSSR za ikh schet", 16 June 1989, *SP SSSR*, 1989, No. 26, item 93.
24. E. Kuz'min, "Pervaia kniga za svoi schet", *Literaturnaia gazeta*, 13 April 1988. T. Ivanova made a joke about the fact that these publications included many books of poor quality, but, she says, this was also the case with the normal state publications: "It is hard to understand why the state gives the one pulp writer money and takes money from the other", *Knizhnoe obozrenie*, 13 April 1991.

Section 2. The Development of a Private Sector

§ 1. The Law of 19 November 1986 on Individual Labor Activity

388. We have previously pointed out that under communism private enterprise was not entirely prohibited, but was organized along strict lines,[25] in the cultural sector on the basis of a government decree of 3 May 1976.[26] This Decree was replaced[27] by the Law of the USSR on individual labor activity of 19 November 1986.[28] This Law gave citizens a limited right to exercise a number of commercial activities *alongside* their tasks in the planned economy, in other words only in their free time. Just as in 1976, it was hoped that this law would legalize and bring under control at least part of the parallel economy, specifically handicrafts, service provision, and certain activities in the socio-cultural sector and in the sector of the folk crafts. Moreover, it was hoped that by giving recognition to individual labor activity, the social needs for goods and services would be met more satisfactorily.[29]

389. The Law on individual labor activity principally allowed the making of pottery and ceramics, toys and souvenirs, making and repair of objects of precious metals, precious stones and amber, the photographing under the authority of citizens, the teaching of music and dance and the translation of texts from foreign languages, and also from the languages of the peoples of the USSR.[30] These activities were, however, subject to numerous limitations: prior registration, the payment of an annual 'patent levy',[31] the prohibition of the employment of third parties, and the prohibition on the use of individual labor activity for the acquisition of income which did not result from labor.[32]

390. Several activities were also explicitly prohibited, such as the production of multiplication and photocopying machines,[33] stamps, presses and letters, and

25. *Supra*, Nos. 43 ff.
26. PSM SSSR, "Ob utverzhdenii Polozheniia o kustarno-remeslennykh promyslakh grazhdan", 3 May 1976, *SP SSSR*, 1976, No.7, item 39.
27. PSM SSSR, "Ob izmenenii, dopolnenii i priznanii utrativshimi silu reshenii Pravitel'stva SSSR v sviazi s priniatiem Zakona SSSR 'Ob individual'noi trudovoi deiatel'nosti'", 3 April 1987, *SP SSSR*, 1987, No.28, item 99.
28. Zakon SSSR, "Ob individual'noi trudovoi deiatel'nosti", *VVS SSSR*, 1986, No.47, item 964, amended 14 March 1988, *VVS SSSR*, 1988, No.11, item 1784. For a thorough discussion of this law, see Ioffe 1988b, 59-67; Malfliet 1986.
29. Preamble to the Law on individual labor activity.
30. Arts. 12-13, 15-16 and 18 Law on individual labor activity.
31. Art. 7 Law on individual labor activity; PSM RSFSR, "O vidakh individual'noi trudovoi deiatel'nosti, na kotorye grazhdane mogut priobretat' patenty, i razmerakh ezhegodnoi platy za patent", 14 April 1987, *SP RSFSR*, 1987, No.6, item 43.
32. Art. 1 para. 4 Law on individual labor activity.
33. In 1986, the number of copy machines in the whole of the Soviet Union was estimated at 50,000, see "Kopieerapparaten in Sovjetunie streng gekontroleerd", *De Financieel-Economische Tijd*, 16 January 1986.

the organization of displays.[34] In comparison with the Decree of 3 May 1976, it is striking that neither the reproduction of printed matter and photographic products, nor the multiplication of gramophone records, films, and magnetic tapes were among the prohibited activities.

391. The Law on individual labor activity was, however, not applicable to the creative activity of citizens in the areas of science, technology, literature, and art.[35] In the early days of *glasnost'* and *perestroika*, it was thought that liberalization in these areas would lead to undesired developments.[36] Because of this provision, the effect of this law in the cultural sector was limited to those activities explicitly allowed by the law.[37]

§ 2. The Law on Cooperatives of 26 May 1988

392. The Law on cooperatives of 26 May 1988[38] went a step further by allowing that a number of citizens could together practice as their main profession a commercial activity in the form of a cooperative, and could employ personnel for this. From an ideological point of view, this was a significant about-turn since, for the first time, private persons could employ other people. Yet was it not precisely such 'exploitation', which had lain at the origin of Marxism?

Cooperatives were the collective property of their members and were, thus, considered free of the control of ministries and state agencies.[39] They disposed freely over their profits; their output was not centrally planned. Initially they were also free to determine the prices of their products and services and enjoyed a favorable tax rate; however, under pressure of public opinion,[40] both these advantages were quickly reconsidered.[41] The cooperative movement in its new form had a great attraction.[42] The Law of 1988 was, thus, the first real step away from a state-controlled economy.[43]

393. In principle, the cooperatives chose their field of activity themselves, with the exception of those activities, which were prohibited by the legislation of the USSR and the Union Republics.[44] On 29 December 1988, the Council

34. Arts. 13 and 19 Law on individual labor activity.
35. Art. 2 para. 2 Law on individual labor activity.
36. Malfliet 1986, 2265.
37. On the eve of the introduction of the Law on individual labor activity, 65,000 people were active under the provisions of the Decree of 1976 (Lapina 14); 9 months after the coming into force of the new Law, 200,000 citizens had had registered themselves for individual labor activity (S. Pomorski, "Notes on the 1986 Law on Individual Labor Activity", in Schmidt 151-155), in 1990, there were already 5 million (Lapina 14-15).
38. Zakon SSSR, "O Kooperatsii v SSSR", 26 May 1988, *VVS SSSR*, 1988, No. 22, item 355, amended 16 October 1989, *VSND i VS SSSR*, 1989, No. 19, item 350, and 6 June 1990, *VSND i VS SSSR*, 1990, No. 26, item 489.
39. In fact, local governments retained a large degree of control over the activities of the cooperatives; see Griffin/Soderquist 214-216; Zimbler 393.
40. Braginskii 1993a, 370-371; Slider 804-806; Zimbler 393-394.
41. Slider 813-817; Zimbler 394.

of Ministers of the USSR issued a Decree in which a number of activities was prohibited for cooperatives, whereas other activities would only be exercised by cooperatives on the basis of agreements with other enterprises for which this activity was the basic activity.[45]

394. Just as with the Law on individual labor activity, the Soviet governments seemed very suspicious of freedom of enterprise in the cultural sector. Cooperatives could not, according to said Decree, meddle with the production, purchase, and sale of precious metals and precious stones; the publication of works of science, literature, and art; the production, exchange, sale, rental, and public display of films and videos, as well as foreign economic activities in this area; the production of a large edition of films and video programs and all related activities; and the production and restoration of icons, ecclesiastical "tools", and objects of religious symbolism and attribution, or the production of candles (except decorative candles).[46] For other activities the cooperatives had to sign agreements with enterprises, organizations, and institutes for which this activity was the main task, *i.e.*, with state enterprises or enterprises under social ownership.[47]

395. The strict attitude towards private initiative in the cultural sector was, in this period, motivated by fear of the spread of ideologically hostile ideas and pornography, and because of the necessity of enforcing international copyright

42. At the beginning of 1991, there were almost 300,000 registered cooperatives in the whole country, 82% of which were also effectively functioning, and in which 6.1 million people were employed: V. Barbashov and I. Chebatkov, "Kooperativnyi sektor: problemy i perspektivy", *Ekonomika i zhizn'*, 1991, No.20, 12. See also Lapina 15; Slider 797-804. The cooperatives had a particular attraction for the *nomenklatura*, for whom this new structure, combined with their network of personal relations, financial sources and experience in leadership, offered a way to accumulate large profits at low risk; profits which later, when state enterprises were privatized, could be used to participate in the acquisition of the former state economy: Laptev 16-19.
43. Feldbrugge 1993, 267; Götz 29-31; Lapina 15 ("La Loi sur les coopératives a ouvert la voie à un secteur privé").
44. Art.3 (1) Law on the cooperatives. Thanks to the amendments of 6 June 1990 (*VSND i VS SSSR*, 1990, No.26, item 489), the autonomous Republics were also granted powers to issue a list of prohibited activities. Apart from this, the USSR, the Union Republics and the autonomous Republics were given the possibility, rather than prohibit certain activities, to make them subject to mandatory licensing: Slider 811.
45. PSM SSSR, "O regulirovanii otdel'nykh vidov deiatel'nosti kooperativov v sootvetstvii s Zakonom o kooperatsii v SSSR", 29 December 1988, *SP SSSR*, 1989, No.4, 12, English translation in *SSD*, Spring 1990, 18-23.
46. This list of activities prohibited to cooperatives was extended further, for instance, on the suggestion of the authors' association *VAAP*, to the production and sale of playing cards: PSM SSSR, "O dopolnenii Perechnia vidov deiatel'nosti, kotorymi ne vprave zanimat'sia kooperativy", 31 May 1990, *SP SSSR*, 1990, No.14, item 80.

law.[48] Undoubtedly, also the resistance of the cultural administrations, which feared the loss of their monopoly, played an important role.[49]

47. This list included: the production, reworking and repair of objects of semi-precious stones and amber, as well as reworking and repair of objects of precious metals and precious stones; the lending of editorial publishing services (including the making of a large print run of printed matter and the publication of advertising and information publications) to organizations empowered to function as publishing houses; the printing of forms, labels, menus and suchlike; the organization of paid concerts, discos, creative soirées and recreational programs; the production of multiplication and copying machines; the production, the making of a large edition and the sale of records and magnetic recordings and recordings on other carriers; the sale of printed matter; the organizing of lectures. In Russia this category was extended to include the production and sale of objects which are analogous to objects of traditional folk handicrafts of the RSFSR (PSM RSFSR, "O regulirovanii otdel'nykh vidov deiatel'nosti kooperativov", 3 January 1990, *SP RSFSR*, 1990, No.6, item 46). The production of film products and video products initially belonged to the category of prohibited activities, but was later moved to this second category of activities permitted on the basis of agreements signed with empowered enterprises under state or social ownership: point 4 PSM SSSR, "O perestroike tvorcheskoi, organizatsionnoi i ekonomicheskoi deiatel'nosti v sovetskoi kinematografii", 18 November 1989, *SP SSSR*, 1990, No.1, item 5. See, also, Chernysheva 1995, 116.
48. Criticism was repeatedly voiced concerning cooperative video salons where films were shown in violation of the copyright of foreign legal rightholders. See *Izvestiia*, 2 January1989, 1-2; Manson 36; Taska 402.
49. At the beginning of 1987, for example, small groups of writers undertook, with the support of the Writers' Union, the first attempts to organize an alternative to the state publishing houses ("Sibirskie 'zharki'. Sozdano kooperativnoe izdatel'stvo", *Literaturnaia gazeta*, 10 June 1987; English translation: "Siberian 'Zharki'. The Establishment of a Cooperative Publishing House", *Soviet Law and Government*, 1988, vol.27 No.1, 97-99). In October 1987, at the request of *Goskomizdat*, a Decree of the Council of Ministers put an end to these attempts (B. Keller, "New Ban on Press in Russia: Decision Outlaws Co-ops to Protect State Monopoly", *International Herald Tribune*, 3 February 1988, 1, 6; Slider 807). A number of such "private" publishing houses, however, could escape this rule by contracting out the actual printing to state publishing houses, a practice which was finally legalized by the Decree of 29 December 1988 (*supra*, note 45) (Slider 806-807). According to V. Rakhmanov, specialist of *Goskomizdat* USSR, the state publishing houses with which the cooperatives had to sign agreements, were burdened with the task of monitoring ideology (Iu. Alexsandrov, "Kooperativ i kniga", *Literaturnaia gazeta*, 9 August 1989).

Chapter II. The Development of a Market Economy in Russia (1990–2000)

Introduction

396. The experiments of the second half of the eighties were drenched in ambiguity, since they left the fundamentals of the planned economy intact. Their success was limited; the economic crisis was ever plainer, especially because of increasing shortages of consumer goods. In 1990 the regime's ideological mainspring broke, and a fundamental pillar of Marxism-Leninism collapsed, with the acknowledgement of private ownership of the means of production. This would form the beginning of a stream of legislation which would further refine the organization of property, which would acknowledge the freedom of enterprise and trade, which would combat the formation of monopolies, organize government enterprises, and also introduce new legal institutes considered necessary in a market economy in Russian law. In this chapter, we will go into a number of these themes, not, however, without first very briefly casting light on the reform of civil law as a legal branch in its whole, as it was modernized and recodified in two stages.

Section 1. The Modernization of Civil Law

397. On 31 May 1991, new Fundamentals of Civil Legislation of the USSR and the Republics were adopted ("Fundamentals 1991").[1] They were to replace the Fundamentals of Civil Law of 1961, and, by the old system of the division of powers, were to be further executed and detailed in the 15 Union Republics in the form of Civil Codes. On 1 January 1992, the date on which the Fundamentals 1991 were to come into force, the state in which they were to apply, was no longer to be found on the geopolitical map. The Russian parliament, however, decided on 14 July 1992 to introduce the Fundamentals 1991 into force on Russian territory on 3 August 1992[2] to the extent that they were not contrary to the Constitution of the Russian Federation and the legislative acts of the Russian Federation passed after 12 June 1990.[3] This led to a confusing hierarchy, with at the top the Russian Constitution, Russian laws and presidential *Ukazy*, issued on the basis of special powers dating from after the approval of the declaration of sovereignty of 12 June 1990; then the Fundamentals 1991 insofar as they were not contrary to the first category; then

1. "Osnovy grazhdanskogo zakonodatel'stva SSSR i Respublik", *VSND i VS SSSR*, 1991, No.26, item 733.
2. PVS RF, "O nekotorykh voprosakh primeneniia zakonodatel'stva Soiuza SSR na territorii Rossiiskoi Federatsii", *VSND i VS RF*, 1993, No.11, item 393, *Rossiiskaia gazeta*, 25 March 1993.
3. Point 1 PVS RF, "O regulirovanie grazhdanskikh pravootnoshenii v period provedeniia ekonomicheskoi reformy", *VSND i VS RF*, 1992, No.30, item 1800, *Rossiiskaia gazeta*, 24 July1992.

the RSFSR Civil Code insofar as it was not contrary to the first and second categories; and finally at the bottom all other normative acts.[4]

398.Many factors made a new codification of the civil law an urgent necessity. These included the lack of legal clarity resulting from the confusing hierarchy of laws, the radical alteration of the economic system, the fact that the Fundamentals 1991 only sketched the outline of the new legal order, that later specific legislation put certain parts of the Fundamentals "out of effect", that the further application of the Soviet legislation after the disintegration of the USSR was considered politically undesirable, the need to guarantee the unity of the civil law on the territory of the Russian Federation through federal legislation, the numerous specific laws and Edicts with normative value which often contradicted one another and, moreover, only considered the legal capacity of persons and property law, *i.e.*, the static aspect of civil-law relations, but barely modernized the dynamic aspect, contract law.[5]

399.During the drafting of the new Russian Civil Code, the decision was made to divide the material into a number of volumes, which were not necessarily to be introduced at the same time—following the example of the Dutch, who were actively involved in this legislative project.[6] Book (Part) I of the Civil Code of the Russian Federation (hereinafter: CC RF) was signed into law by President El'tsin on 30 November 1994.[7] It contains three main parts: (i) General provisions; (ii) Property law and other rights *in rem*; (iii) General law of contract. Most of Book I of the CC RF entered into force on 1 January 1995, the date on which most of the parallel parts of the Fundamentals 1991 and the CC RSFSR were rescinded on the territory of the Russian Federation.[8] On 26 January 1996 President El'tsin signed Book II of the CC RF,[9] which came into force on 1 March 1996.[10] It treats specific contracts. The

4. Sukhanov 1995a, 3. See, also, Hüper 162.
5. Sukhanov 1995a, 2-3.
6. F.J.M Feldbrugge, "Het nieuwe Russisch Burgerlijk Wetboek en Nederland", *NJ*, 1993, 1073-1077.
7. "Grazhdanskii kodeks Rossiiskoi Federatsii", 30 November 1994, *SZ RF*, 1994, No.32, item 3301, *Rossiiskaia gazeta*, 8 December 1994; English translation in *RCEEL*, 1995, 259-431 (including executive decree). For a first discussion, see Braginskii 1995; Makovskii/Khokhlov. On the coming into effect of the CC RF, see PPVS RF i PVAS RF, No.2/1 "O nekotorykh voprosakh, sviazannykh s vvedeniem v deistvie chasti pervoi Grazhdanskogo kodeksa Rossiiskoi Federatsii", 28 February 1995, *BVS RF*, 1995, No.5, 1-3; N. Solovianenko, "Grazhdanskii kodeks vvoditsia v deistvie poetapno", *Rossiiskaia. Iust.*, 1995, No.3, 9-11.
8. This was, for instance, the case for Section I (General provisions), II (property law and business law) and III, Chapter 8 (General law of contract) Fundamentals 1991. For more detail: Hüper 162-163.
9. "Grazhdanskii kodeks Rossiiskoi Federatsii. Chast' vtoraia", 26 January 1996, *Rossiiskaia gazeta*, 6, 7, 8 and 10 February 1996.
10. Point 1 Federal'nyi Zakon RF, "O vvedenii v deistvie chasti vtoroi grazhdanskogo kodeksa Rossiiskoi Federatsii", 26 January 1996, *Rossiiskaia gazeta*, 6 February 1996.

first two books together include 1109 articles, already twice as many as the total number of articles of the CC RSFSR. Book III was adopted in the fall 2001 and entered into force on 1 March 2002;[11] it deals with inheritance law and the rules of IPR. It is unclear whether there will be Book IV containing a section on intellectual property law.[12]

400. In the following sections we will return to various provisions of the CC RF; here it will suffice to refer to the basic fundamentals of the civil code, which are the core of what Sukhanov calls "the rebirth of the private-law fundamentals in the civil legal regulation"[13] and are summarized in article 1 CC RF. This concerns the recognition of the equality of the participants to the relations regulated by the civil legislation, the inviolability of property, freedom of contracting, the unacceptability of arbitrary interference by anyone in private matters, the necessity for the unhindered exercise of civil law, the guarantee of the restoration of violated rights and their judicial protection. Natural and legal persons acquire and exercise their rights according to their own will and in their own interest. They are free to establish their rights and duties on the basis of an agreement and in determining any contractual clause which does not contradict legislation.

These basic fundamentals of civil legislation form a core of the legal ordering of the horizontal relationships within a civil society based on private ownership and market mechanisms. We will now concentrate on the most important legal institutes and legal constructions within civil law.

Section 2. Property Law

§ 1. Acknowledgement of the Principle of Private Ownership

401. The economic and political monopolies of power of the CPSU were inseparably linked to one another, so that the abolition of the one monopoly would be useless without the simultaneous abolition of the other monopoly. It need not then surprise us that both monopolies of power were struck from the Soviet Constitution simultaneously on 14 March 1990.[14] By recognizing

11. "Grazhdanskii kodeks Rossiiskoi Federatsii. Chast' tret'ia", 26 November 2001, *Rossiiskaia gazeta* No.233, 28 November 2001.
12. V. Maslennikov, "Teper' u rynka est' nadezhnyi garant", *Rossiiskaia gazeta*, 6 February 1996 (interview with the President of the Supreme Arbitration Court, V. Iakovlev). The original plea was to include these three sections in the Second Book, but the chapter on "intellectual property" was so divisive (W. Bergmann, and M. Glöckner, "Der Zweite Teil des ZGB—ein neues Zivilrecht für Russland", *WiRO*, 1995, 447) that it was decided that this and the following chapters should appear in a Book which would be issued later, as the introduction of the provisions on special agreements could no longer be postponed. For a discussion of the articles concerning intellectual property, as included in Section V of a draft of Book II of the CC, see Gavrilov 1995b. For a general discussion of the new Russian code, see L.H. Blumenfeld, "Russia's New Civil Code: The Legal Foundation for Russia's Emerging Market Economy", *Int'l Law.*, 1996, 477-519.
13. Sukhanov 1995a, 4.

private ownership the Soviet governments and the Russian State aimed, and still aim, not only at an economic goal, namely the establishment of a market economy based on free enterprise and free competition, but, also, a political goal: the establishment of a civil society in which the private ordering of property has to lead to the individual's economic and social self-determination, which is considered indispensable to achieving the political goal of democratization and political pluralism.[15]

402. Article 24 of the Declaration of human rights and freedoms of the USSR[16] provided that:

> Every human being has the right to property; this is the right to possess goods, to have the enjoyment of them and to dispose over them, individually as well as together with other persons. The right of inheritance is guaranteed by law. The inalienable right to be an owner guarantees the achievement of the interests and freedom of the person.[17]

In the Constitution 1993, the right to private ownership and its three elements (possession, use, and disposal) are specifically guaranteed, including private ownership of land.[18] Forced dispossession of property for the needs of the state is only possible on condition of prior and reasonable recompense.[19] The right to inheritance is also constitutionally anchored.[20]

§ 2. The Ordering of Property

403. Soviet law acknowledged two categories of property rights: on the one hand, socialist property, subdivided into state property, cooperative property, and property of social organizations, and on the other hand personal property, which in principle could not apply to the means of production. State property and cooperative property were called the basis of the economic system.[21] This ordering of property rights was repeatedly rearranged to accept in the end a plurality of legally equal forms of property.[22] This idea of different *forms* of property, however, lost meaning to the extent that the right of private persons to own production goods, as well as consumer goods, was acknowledged.

14. Zakon SSSR, "Ob uchrezhdenii posta Prezidenta SSSR i vnesenii izmenenii i dopolnenii v Konstitutsiiu (Osnovnoi Zakon SSSR)", 14 March 1990, *VSND i VS SSSR*, 1990, No.12, item 189.
15. Roggemann 321-324.
16. "Deklaratsiia prav i svobod cheloveka", 5 September 1991, *VSND i VS SSSR*, 1991, No.37, item 1083. See *supra*, No.230.
17. Art.22 (1) Declaration of rights and freedoms of man and citizen of Russia (PVS RSFSR "O Deklaratsii prav i svobod cheloveka i grazhdanina", 22 November 1991, *VSND i VS RSFSR*, 1991, No.52, item 1865) was written in almost the same phrases, but without the last sentence which lays the link between property and freedom.
18. Arts.35-36 Const.1993.
19. Art.35 (3) Const.1993.
20. Art.35 (4) Const.1993.
21. *Supra*, No.29.

404. Not until 1993 does the Russian constitutional legislator seem to have resigned himself to the impossibility of comprehensively cataloguing different forms of ownership. Chapter I of the First Part of the Fundamentals of the constitutional structure provided for the legal equality of private, state, municipal *and other* forms of ownership in Russia.[23] From this provision, it cannot be deduced with certainty whether the list is of different *forms of ownership* (as had previously been the case) or of different *subjects* (persons) in which property rights were vested.

405. The same open listing of forms of property figures in the CC R.F.[24] Because of the mention of this listing in an article with the title "subjects of property rights", and because of the specification that assets can be "in the

22. Götz 6. With the revision of the constitution of 14 March 1990 and the Law on property in the USSR (Zakon SSSR, "O sobstvennosti v SSSR", 6 March 1990, *VSND i VS SSSR*, 1990, No.11, item 164. For a discussion, see, *e.g.*, Stephan 57-59; Sukhanov, *et al.*, "Zakon o sobstvennosti v SSSR", *VMU*, 1990, No.5, 38-49) the division socialist property *versus* personal property was abolished, and replaced with a tripartite system: the property of the citizen of the USSR (which could include a number of production goods), collective property (*i.e.*, the property of legal persons), and state property, which could be owned by constituent entities as well as the USSR itself, the Soviet legislator's answer to the gradual disintegration of the Soviet Union and the claims—including property claims—of the constitutional entities (Feldbrugge 1993, 235-236). The Law on property in the USSR soon lost much of its significance in Russia, as the RSFSR in a Law of 31 October 1990 (Zakon RSFSR, "Ob obespechenii ekonomicheskoi osnovy suvereniteta RSFSR", *VSND i VS RSFSR*, 1990, No.22, item 260) laid claim to all USSR property situated in Russia, including state enterprises and institutions (see also: Zakon RSFSR, "O sobstvennosti na territorii RSFSR", 14 July 1990, *VSND i VS RSFSR*, 1990, No.7, item 101) and hence *de facto* abolished the federal Soviet state as owner of state property. The Soviet law on ownership was *de jure* annulled by the Russian Law on ownership in the RSFSR of 24 December 1990 (Zakon RSFSR, "O sobstvennosti v RSFSR", 24 December 1990, *VSND i VS RSFSR*, 1990, No.30, item 416). For the first time this Law mentions the right of citizens and legal persons to own private property, including production goods, news media or goods with a cultural purpose. Apart from private ownership, the property rights of social associations (organizations) and the property rights of state and municipality were also acknowledged. In the Fundamentals of civil legislation of the USSR and the Republics of 31 May 1991 ("Osnovy grazhdanskogo zakonodatel'stva Soiuza SSR i Respublik", 31 May 1991, *VSND i VS SSSR*, 1991, No.26, item 733; on their coming into effect, see *infra*, No.598) the forms of ownership are again renamed: the property of the citizen, the property of the legal person (including the legal person founded without profit motive) and the property of the state. A constitutional amendment to art.10 Const.1978 of 9 December 1992 (Zakon R.F "Ob izmeneniiakh i dopolneniiakh Konstitutsii (Osnovnogo Zakona) Rossiiskoi Federatsii—Rossii", 9 December 1992, *VSND i VS RF*, 1993, No.2, item 55) gave yet another classification of types of ownership: now there was mention of private property (of legal persons and citizens), collective property (*i.e.*, common divisible or indivisible property), state and municipal property, and the property of social associations.

23. Art.8 (2) Const.1993.

ownership of citizens, legal persons, as well as the Russian Federation, the constituent entities of the Russian Federation and the municipalities",[25] one can conclude that the Russian legislator has accepted that there is only a single, indivisible right of property, in whomever that right may be vested in any given instance.[26] This property right is defined irrespective of the holder of the right in general terms according to the classic threefold right of possession, enjoyment, and disposal.[27] Any assets can be the object of the property right of the citizens and the legal persons.[28]

406. The assets owned by the federal state or its constituent entities (state ownership) or by the towns and municipalities (municipal ownership) can be entrusted by its owner to, respectively, state or municipal "unitary enterprises" (*unitarnoe predpriiatie*).[29] The adjective "unitary" refers to the fact that the assets of such an enterprise are indivisible.[30] These unitary enterprises have a "right of economic jurisdiction" (*pravo khoziaistvennogo vedeniia*) over the state or municipal assets entrusted to them,[31] or in the cases which are provided by the relevant legislation, a "right of operative management" (*pravo operativnogo upravleniia*).[32] Both cases concern limited rights in rem, which remain with their holders even in the case of transfer of the property.[33]

24. Art.212 (1) CC RF. Together with the coming into effect of Book I CC RF the Law RSFSR of 24 December 1990 "On property" was abolished: Art.2 Federal'nyi Zakon RF "O vvedenii v deistvie chasti pervoi grazhdanskogo kodeksa Rossiiskoi Federatsii", 30 November 1994, *SZ RF*, 1994, No.32, item 3302, *Rossiiskaia gazeta*, 8 December 1994.
25. Art.212 (2) CC RF.
26. Sukhanov, *et al.*, in Braginskii 1995, 233; Sukhanov 1995a, 6.
27. Art.209 (1) CC RF.
28. Art.213 CC RF. The law can, however, indicate specific sorts of assets as an exclusive object of state and municipal property (art.212 (3) para.2 CC RF. See also Makovskii/Khokhlov 93).
29. The decision whether or not to assign *federal* property to an enterprise is taken by a State committee RF concerning the management of state assets (*Goskomimushchestvo*): PSM RSFSR, "Polozhenie o Gosudarstvennom komitete Rossiiskoi Federatsii po upravleniiu gosudarstvennym imushchestvom", 21 January 1991, *SP RSFSR*, 1991, No.11, item 145. See, also, PP RF, "O delegirovanii polnomochii Pravitel'stva Rossiiskoi Federatsii po upravleniiu i rasporiazhdeniiu ob"ektami federal'noi sobstvennosti", 10 February 1994, *SAPP RF*, 1994, No.8, item 593.
30. Art.113 (1) para.1 CC RF.
31. Art.114 CC RF. This quasi-property right was previously called "operative management" (*operativnoe upravlenie*) of state goods, and had already been renamed as the right of "full economic management" (*polnoe khoziaistvennoe vedenie*) by art.24 (1) para.1 Law on property USSR of 6 March 1990 (see already art.4 "Osnovy zakonodatel'stva SSSR i soiuznykh respublik ob arende", 23 November 1989, *VSND i VS SSSR*, 1989, No.25, item 481).
32. Art.115 CC RF. This right to operative management of assets in state property, was previously reserved to commercial state enterprises, but was by art.26 Law on property of the USSR of 6 March 1990 for the first time reserved to the non-commercial state institutions directly financed from the state budget (*e.g.*, museums, libraries).

407. The term "enterprise" refers to a particular organizational-judicial form: that of the commercial organization which is not an owner[34] (and of which only the state and its component entities, and organs of local autonomy, can be the owner), a remnant of the days when the state wanted to use property law to monitor the whole economy, and was at the same time forced to entrust means of production to economically and legally separate entities which interacted with each other and thus sustained a shadow of a market economy.[35]

408. Unitary enterprises based on the right of economic jurisdiction can be founded by a state body or a body of local self-government with jurisdiction.[36] These state and municipal enterprises have, unlike private legal persons, only a limited legal capacity, described by the documents of foundation.[37] It is the owner (a governmental body) which approves these documents[38] so that it is still the authority with jurisdiction, as owner, which can carry through a specialization in the profile of the diverse enterprises. It is thus quite possible that, for example, state publishing houses still keep an (actual) monopoly in a sub sector of the cultural business (*e.g.*, the publication of art books) as long as private persons do not establish similar enterprises.

409. The right of economic jurisdiction is defined as the right of possession, enjoyment, and disposal of the assets granted to the enterprise by the state or the organ of self-government within the limits determined in conformity with the CC R.F.[39] The owner of the assets which an enterprise has in economic management not only has the power of decision over the foundation of the enterprise and the determination of the object and the purposes of its activity, but, also, on its reorganization and liquidation; he appoints the manager of the enterprise and monitors his use of the assets entrusted to the enterprise according to their purpose and preservation. The owner has the right to receive part of the profit from the use of the said assets[40] but is not liable for the commitments made by the enterprise.[41]

33. Art.300 CC R.F. Naturally, this only concerned the transfer of property right of an enterprise or an institution of the one government (*e.g.*, federal sate) to the other (*e.g.*, a region); it does not concern the property transfer for the benefit of a private person, which would be privatization of the assets: Sukhanov, *et al.*, in Braginskii 1995, 268.
34. Sukhanov 1995a, 6.
35. Sukhanov, *et al.*, in Braginskii 1995, 263.
36. Art.114 (1) CC R.F.
37. Art.49 (1) para.2 CC R.F.
38. Art.114 (2) CC R.F.
39. Art.294 CC R.F.
40. Art.295 (1) CC R.F.
41. Art.114 (8) CC R.F. If, nevertheless, the bankruptcy of such a unitary enterprise is caused by its founders, or by the owner of the assets of the enterprise (*i.e.*, the state or the organs of local self-government), the assets of this founder or owner are drawn on as a subsidiary source for the meeting of the commitments of the unitary enterprise (art.56 (3) para.2 CC R.F).

On its part, the enterprise does not have the right, without the owner's permission, to sell, rent, mortgage, put up as capital, or dispose in any other way of the real estate given into its economic management. The enterprise disposes over other goods independently, unless the law or other normative acts enforce certain limitations to this.[42] The enterprises' right of disposal is consequently very curtailed. The owner can, however, no longer disturb the possession and the enjoyment of the assets entrusted to the enterprise by removing or reallocating goods from the assets, unless the enterprise be reorganized or liquidated (and then keeping account of the interests of the creditors).[43] The enterprise and all its assets can be required to meet commitments made.[44]

410. In comparison with the legislation previously in force, the CC RF gives the owners more possibilities for monitoring the purposefulness of the activity of the (state and municipal) enterprises.[45] The legislator had to tighten this control, because in the circumstances of a nascent market the bodies of enterprise did not manage the assets placed at their disposal by the owner in the interests of the owner or the enterprise, but rather transferred them to the private sector on terms disadvantageous to the owner.[46]

411. The Government can also decide to found, from assets in federal ownership, a unitary enterprise with the right of operative management, a so-called "federal treasury enterprise" (*federal'noe kazennoe predpriiatie*)[47] which is at least partly directly financed by the State. The Statutes of such an enterprise are approved by the Government,[48] which can at any time decide on a reorganization or liquidation of the enterprise.[49] Unlike "ordinary" government enterprises, the Russian state is subsidiarily liable for the commitments made by such an enterprise.[50] The right of operative management, like the right of economic management, is defined as a threefold right of possession, enjoyment, and disposal, but under the qualification that these rights are exercised within the boundaries of the law, in agreement with the goals of its activity, the tasks of the owner and the destination of the assets which are the object of the right of operative management.[51]

42. Art.295 (2) CC RF.
43. Sukhanov, *et al.* in Braginskii1995, 265. See, already, the Law of the RSFSR on property, by applying an *a contrario* reasoning to art.5 (3). See, also, "Russian Property Law, Privatization, and the Right of 'Full Economic Control'", *Harvard L. Rev.*, 1994, 1047-1048.
44. Art.56 (1) CC RF.
45. Makovskii/Khokhlov 94.
46. Sukhanov, *et al.*, in Braginskii 1995, 264.
47. Art.115 (1) CC RF.
48. Art.115 (2) CC RF.
49. Art.115 (6) CC RF.
50. Art.115 (5) CC RF.
51. Art.296 (1) CC RF.

A federal treasury enterprise's right of disposal over the assets held in operative management can only be exercised with the owner's permission. In principle, the enterprise independently sells the products it produces.[52] The owner of the assets determines the way in which the income of the enterprise is divided[53] and can remove superfluous assets, unused assets, or assets which were not used according to their destination (and, thus, in no other case[54]) from the enterprise and dispose of them as he sees fit.[55]

The federal treasury enterprises are consequently clearly a lot less independent than are "ordinary" state enterprises, *i.e.*, the unitary enterprises, which have acquired a right of economic management over some state or municipal assets. In a certain sense, they can be compared to those enterprises, which, in the time of the planned economy, had the losses inherent in their economic activity "planned".[56]

412. For the cultural sector, the status of institutions (*uchrezhdenie*) is also important. Institutions are organizations which are founded by the (possibly private) owner for the exercising of management, socio-cultural and other functions of a non-profit-making nature which are completely or partially financed by the owner.[57] The institution, like the treasury enterprise, has the right to operative management of the assets which are put at its disposal by the owner,[58] but unlike the treasury enterprise the institution has no right to alienate the assets entrusted to it in operative management by the owner (not even with the owner's permission) nor to dispose of them in any other way.[59] If, according to the founding documents, the institution has the right to exercise a profit-making activity, it can independently dispose of this income and of the assets which have been acquired with it.[60] This provision concerns institutions, which are only partially financed by the owner. Such an institution exercises a right of economic (and, thus, not operative) management over that part of the assets which the institution itself acquires.[61] The financial means

52. Art.297 (1) CC R.F.
53. Art.297 (2) CC R.F.
54. Sukhanov, *et al.* in Braginskii 1995, 265-266.
55. Art.296 (2) CC R.F. The right of operative management of these assets is in such a case automatically terminated: art.299 (3) CC R.F.
56. *Supra*, No.31.
57. Art.120 (1) CC R.F. For a further determination of the legal status of the cultural institutions in federal ownership, see: PP R.F, "Ob utverzhdenii Polozheniia ob osnovakh khoziaistvennoi deiatel'nosti i finansirovaniia organizatsii kul'tury i iskusstva", 26 June 1995, *SZ RF*, 1995, No.28, item 2670. In relation to museums, see art.26 Federal'nyi zakon, "O muzeinom fonde Rossiiskoi Federatsii i muzeiakh v Rossiiskoi Federatsii", 26 May 1996.
58. Art.296 B.W. 1996.
59. Art.298 (1) CC R.F.
60. Art.298 (2) CC R.F.
61. Sukhanov, *et al.* in Braginskii 1995, 266-267. See, also, art.48 (2) Fundamentals 1991.

at the disposal of the institutions are the preferential execution-object for the execution of commitments, the owner of the institution can alternatively be held accountable.[62]

413. Finally, state and municipal enterprises and the institutions cannot, in any way, become holders of a property right, as the results of their economic activity (products, income, assets acquired on a contractual basis from third parties) come only under the economic or operative management of these enterprises and institutions,[63] whereas the right to ownership of these results goes to the state, its constituent entities, or organs of local self-government.[64]

414. The earlier distinction between consumption and production goods has become irrelevant in the modernized order of the civil law. The right to private property of both is guaranteed by the CC R.F. This is undoubtedly a prior condition for the success of market-oriented reforms. Moreover, the acknowledgement of the right to private property is the realization of an important point on the political agenda: private property rights are considered the basis for the establishment of a civil society.

Over against this positive development stands the continuing existence of the limited rights *ad rem* of operative or economic management as property surrogates.[65] In the new economic circumstances Russian law considers them "an artificial construction",[66] typical for a transitional economy in which "certain elements of the earlier economic system are unavoidably maintained temporarily and in a modified form".[67]

Section 3. The Freedom of Entrepreneurship and Trade

§ 1. The Freedom of Entrepreneurship

415. After the only modest success of the partial reforms instigated by the Law on individual labor activity in 1986,[68] the Law on state enterprises in 1987,[69] and the Law on cooperatives in 1988,[70] it transpired that there was a need for a single legislative framework for all types of enterprises, irrespective of the form of ownership on which an enterprise was based.[71]

62. Art. 120 (2) CC R.F.
63. Art. 299 (2) CC R.F.
64. Sukhanov, *et al.*, in Braginskii 1995, 267.
65. Roggemann 323.
66. Sukhanov 1995a, 6. N. Solovianenko, "Grazhdanskii kodeks vvoditsia v deistvie poetapno", *Rossiiskaia Iust.*, 1995, No. 3, 11 speaks in this regard of "aged and to a meaningful degree dogmatic constructions".
67. Sukhanov, *et al.*, in Braginskii 1995, 263.
68. *Supra*, Nos. 388 ff.
69. *Supra*, Nos. 380 ff.
70. *Supra*, Nos. 392 ff.
71. Braginskii 1993a, 371.

First, a Law was passed at the Union level,[72] which was then abolished by a RSFSR Law at least on the territory of the RSFSR.[73] On 2 April 1991, again at the Union level, a Law was passed which regulated the general fundamentals of the entrepreneurship of the citizens in the USSR.[74] Here, the concept of private entrepreneurship was introduced for the first time at that level.[75] Finally, on 31 May 1991 a regulation on entrepreneurship was again worked out in the Fundamentals of Civil Legislation of the Union and the Republics.[76]

416. In fact, the recognition of the citizen's economic freedom was at the center of Russian (Soviet) civil-economic law reform. Article 1 para.2 of the programmatic Fundamentals of Entrepreneurship of the citizens of the USSR, for example, provided that "the entrepreneur can exercise any economic activity, including commercial mediation, trade, innovation, consulting and other activities, unless these are prohibited by the legislative acts of the USSR and the Republics".[77] The principle of permission (anything not explicitly allowed is prohibited) was exchanged for the principle of freedom of every citizen to determine for himself which entrepreneurial activities he wished to exercise, insofar as these were not prohibited by law[78] or subject to the fulfillment of certain formalities.[79]

417. Article 34 (1) Constitution 1993 expresses the economic freedom of all in general terms: "Everyone has the right to the free use of his talents and

72. Zakon SSSR, "O predpriiatiiakh v SSSR", 4 June 1990, *Izvestiia*, 12 June 1990. As a consequence of this Law, a series of Decrees of the Council of Ministers was abolished: PSM SSSR, "O priznanii utrativshimi silu i izmenenii reshenii Pravitel'stva SSSR v sviazi s Zakonom SSSR 'O predpriiatiiakh v SSSR'", 21 December 1990, *SP SSSR*, 1991, No.3, item 12.
73. Zakon RSFSR, "O predpriiatiiakh i predprinimatel'skoi deiatel'nosti", 25 December 1990, *VSND i VS RSFSR*, 1990, No.30, item 418. For a discussion, see, *e.g.*, Y.M. Yumashev, "Die schwierige Wiederentstehung des russischen Gesellschaftsrechts", *ROW*, 1993, 98-99. As both laws were to come into effect on 1 January 1991, the Soviet law in Russia was abolished on the day that it would have come into force. Also, the Law of the USSR on individual labor activity and the Law of the USSR on the cooperatives were placed out of effect on Russian territory to the extent that they contradicted the Law of the RSFSR on enterprises and entrepreneurship.
74. Zakon SSSR, "Ob obshchikh nachalakh predprinimatel'stva grazhdan v SSSR", *Izvestiia*, 10 April 1991. With the executive decree of this Law, the Law on individual labor activity (now for all of the Soviet Union's territory) was abolished: point 5 PVS SSSR, "O vvedenii v deistvie Zakona SSSR 'Ob obshchikh nachalakh predprinimatel'stva grazhdan v SSSR'", *Izvestiia*, 10 April 1991. On the effect of two Soviet laws on the Russian law on entrepreneurship, see Götz 13-18.
75. R. Artem'ev, "Soiuznyi Zakon o predprinimatel'stve: menia neschastnuiu, torgovku chastnuiu, ty pozhalei", *Kommersant"*, 1-8 April 1991.
76. "Osnovy grazhdanskogo zakonodatel'stva Soiuza SSR i Respublik", 31 May 1991, *VSND i VS SSSR*, 1991, No.26, item 733. On the coming into effect of these Fundamentals 1991 on the territory of the Russian Federation, see *supra*, No.397.
77. See, also, art.21 (1) and (2) Law RSFSR on enterprises and the activity of enterprises.

wealth for entrepreneurial and other economic activities, which are not prohibited by law".[80] And article 8 (1) Constitution 1993 states: "In the Russian Federation [...] the maintenance of competition and the freedom of economic activity is guaranteed".[81]

418. The CC RF, which is also applicable to the relationships between tradesmen,[82] provides that the citizen has the right to exercise an entrepreneurial activity without forming a legal person from the moment of his entry in the state register as an individual entrepreneur.[83]

The citizens can also form a legal person by entering it in the public state register for legal persons with the organs of justice.[84] Registration can only be refused on formal grounds, not for reasons of ineffectiveness of the foundation of a legal person.[85]

A legal person can be of a commercial nature (*i.e.*, with profit motive) and adopt several forms of company in that capacity,[86] or it can be of a non-commercial nature, in which case it can be founded as a consumer cooperative, a

78. By virtue of the Law RSFSR on enterprises and the activity of enterprises, only state enterprises are economically active in the arms industry, the medical and pharmaceutical sector, the working of raw precious metals and radioactive elements, etc. (art.21 (3) as amended on 20 July 1993: Zakon RF, "O vnesenii izmeneniia v stat'iu 21 Zakona RSFSR 'O predpriiatiiakh i predprinimatel'skoi deiatel'nosti'", 20 July 1993, *VSND i VS RF*, 1993, No.32, item 1256).
79. Such as prior licensing (*litsenziia*): art.21 (4) Law RSFSR on enterprises and the activity of enterprises.
80. See, already, art.22 (2) Russian Declaration of rights and freedoms of man and the citizen (*supra*, No.230): "Everyone has the right to an enterprises activity which is not prohibited by law."
81. See, also, L. Rakitina, "O tak nazyvaemoi svobode ekonomicheskoi deiatel'nosti", *Khoziaistvo i Pravo*, 1994, No.9, 109.
82. Art.2 (1) para.3 CC RF. This seems to have brought an end to the decade-long discussion in jurisprudence about whether or not a separate code should be adopted for trade. See, also, V.A. Dozortsev, "Odin kodeks ili dva ? (Nuzhen li Khoziaistvennyi kodeks nariadu s Grazhdanskim?)", in *Pravovye problemy rynochnoi ekonomiki v Rossiiskoi Federatsii*, Trudy Instituta zakonodatel'stva i sravnitel'nogo pravovedeniia pri Pravitel'stve RF, vyp.57, M., 1994, 115-143, translated into English as "One Code or Two?", *PS JEEL*, 1995, 27-57; Sukhanov 1995a, 8.

    Together with the coming into effect of Book I CC RF the Law RSFSR of 25 December 1990 "On enterprises and the activity of enterprises" was abolished: art.2 Federal'nyi Zakon RF, "O vvedenii v deistvie chasti pervoi grazhdanskogo kodeksa Rossiiskoi Federatsii", 30 November 1994, *SZ RF*, 1994, No.32, item 3302, *Rossiiskaia gazeta*, 8 December 1994.
83. Art.23 (1) CC RF.
84. Art.51 (1) para.1 CC RF.
85. Art.51 (1) para.2 CC RF. See, already, arts.20 (1) and 35 (1) Law RSFSR on enterprises and the activity of enterprises. See also Braginskii 1993a, 378.
86. Art.50 (1)and(2) and arts.66-115 CC RF. See also S. Lucas and Y. Maltsev, "The development of corporate law in the former Soviet republics", *International and Comparative Law Quarterly*, 1996, 365-391.

social or religious association, an institution financed by the owner, a charity or other foundation, etc.[87] It is clear that the possibility for private persons to found non-commercial organizations, which was acknowledged for the first time in the Fundamentals 1991,[88] can be very useful in the cultural sector.

419. Notwithstanding the outright recognition of freedom of entrepreneurship, a number of specific activities may only be exercised subject to the obtainment of a special permit: in general, economic activities are subject to licensing rules where the exercise of such activities may bring about damage to the rights, legal interests, health of citizen, to the national defense and safety of the state, or to the cultural heritage of the peoples of the Russian Federation.[89] Violating the requirement to obtain a permit leads to an administrative (or in case of a second criminal) sanction.[90] Above, we have showed the importance of this possibility for cultural activities.[91] In general, it seems that the system of permits not only aims to lead the wild market into civilized directions, but, also, to sustain the earlier bureaucracy, which is losing many of its functions as

87. Art.50 (1) and (3) and arts.116-123 CC RF; Federal'nyi Zakon RF, "O nekommercheskikh organizatsiiakh", 12 January 1996, *SZ RF*, 1996 No.3, item 145, *Rossiiskaia gazeta*, 24 January 1996, as amended on 26 November 1998, *Rossiiskaia gazeta*, 2 December 1998, and on 8 July 1999, *Rossiiskaia gazeta*, 14 July 1999; Federal'nyi Zakon RF, "O blagotvoritel'noi deiatel'nosti i blagotvoritel'nykh organizatsiiakh", 11 August 1995, *SZ RF*, 1995, No.33, item 3340, *Rossiiskaia gazeta*, 17 August 1995; L.I. Iakobson, "Nekommercheskii sektor ekonomiki: problemy pravovogo regulirovaniia", *SGiP*, 1992, No.3, 40-48; K.W. Simon, "Privatization of social and cultural services in Central and Eastern Europe: comparative experiences", *Boston U. Int'l L. J.*, 1995, 391-392; E. Sukhanov *et al.* in Braginskii 1995, 146-153.

88. Art.18 Fundamentals 1991.

89. Art.4 Zakon RF, "o litsenzirovanii otdel'nykh vidov deiatel'nosti", 8 August 2001. This Law abolished the earlier Zakon RF "o litsenzirovanii otdel'nykh vidov", 25 September 1998, *Rossiiskaia gazeta*, 3 October 1998, which referred also to the morality of the citizens, but not to the cultural heritage of the peoples of the RF. See, also, art.49 (1) para.3 CC RF; PSMP RF, "O polnomochiiakh organov ispolnitel'noi vlasti kraev, oblastei, avtonomnykh obrazovanii, gorodov federal'nogo znacheniia po litsenzirovaniiu otdel'nykh vidov deiatel'nosti", 27 May 1993, *SAPP RF*, 1993, No.22, item 2033, *Rossiiskaia gazeta*, 19 June 1993 (see also Klein 208-209; A. Nozdrachev, "Status predprinimatelia", *Khoziaistvo i Pravo*, 1994, No.1, 31-35); PP RF, "O litsenzirovanii otdel'nykh vidov deiatel'nosti", 24 December 1994, *SZ RF*, 1995, No.1, item 69, *Rossiiskaia gazeta*, 6 January 1995.

90. Zakon RF, "O vnesenii izmenenii i dopolnenii v zakonodatel'nye akty Rossiiskoi Federatsii v sviazi s uporiadocheniem otvetstvennosti za nezakonnuiu torgovliu", 1 July 1993, *VSND i VS RF*, 1993, No.32, item 1231, *Rossiiskaia gazeta*, 11 August 1993 introduced a.o. a new art.162^4 CrC 1960 (illegal enterprise activity) and art.162^5 CrC 1960 (illegal trade). Because of this the original art.162 CrC 1960 (as amended 28 May 1986, *VVS RSFSR*, 1986, No.23, item 638; and 20 October 1992, *VSND i VS RF*, 1992, No.47, item 2664) *de facto* lost its importance for illegal individual labor activity (B.V. Volzhenkin, in Radchenko 285). In the new Criminal Code 1996, illegal entrepreneurship, illegal bank activities and front enterprises are punishable under arts.171-173.

91. *Supra*, Nos.347 ff.

the planned economy makes room for a market economy; thus, it is a means to maintain (a certain degree) of control over an enterprise.[92]

§ 2. The Freedom of Trade

2.1. Domestic Trade

420. Domestic trade was freed by a presidential Edict of 29 January 1992, for citizens as well as for enterprises, irrespective of their form of ownership.[93] No other permit was required, except for the arms trade, trade in medicine and suchlike, or for other products of which the sale was prohibited or limited by current legislation. This Edict aimed at stimulating the development of the market in consumer goods and breaking the state monopoly in the retail trade, by allowing all Russian citizens to sell whatever they liked wherever they liked.[94]

421. The consequence of this broadly interpreted freedom was that, in a short period of time, the retail trade took over the pavements of the great cities in an uncontrollable manner, resulting in an enormous loss of tax income for the government.[95] This is why President El'tsin changed direction with an Edict which, from 1 December 1992 onwards, was to protect the rights of purchasers and to stop the speculation.[96] This Edict introduced a licensing requirement for the trade in food stuffs and other goods subject to excise duty.[97] A Government Decree of 27 May 1993 not only imposed duty on the sale of wine, liquor, vodka, and tobacco goods, but, also, on retail trade in kiosks or in temporary points of sale.[98] Again, required licensing was to be enforced through administrative and criminal sanctions.

92. N.I. Matuzov and A.V. Mal'ko, "Pravovoe stimulirovanie v usloviiakh stanovleniia rynochnykh otnoshenii", *GiP*, 1995, No.4, 16. According to these authors (at the federal level alone) 144 activities require a permit. A Government Decree of 24 December 1994 (PP RF, "O litsenzirovanii otdel'nykh vidov deiatel'nosti", 24 December 1994, *SZ RF*, 1995, No.1, item 69) reduced the number of activities requiring a permit and harmonized the procedure for the issuing of permits.
93. Point 1 Ukaz Prezidenta RF, "O svobode torgovli", 29 January 1992, *VSND i VS RF*, 1992, No.6, item 290, 23 June 1992, *VSND i VS RF*, 1992, No.26, item 1509. See, also, PP RF, "O dopolnitel'nykh merakh po ustraneniiu nedostatkov v organizatsii svobodnoi torgovli", 31 August 1992, *Zakonodatel'stvo i Ekonomika*, 1992, No.22/23, 78.
94. E. Mah, "La privatization des PME en Russie", *Le courrier des pays de l'Est*, June-July 1994, 63.
95. Naumov 17.
96. Ukaz Prezidenta RF, "O merakh po zashchite prav pokupatelei i predotvrashchenii spekuliatsii", 29 October 1992, *VSND i VS RF*, 1992, No.44, item 2521.
97. In execution of this, measures were taken such as prohibiting the sale of alcohol hand-to-hand or in places not suitable for storing such products (Ukaz Prezidenta RF, "O vosstanovlenii gosudarstvennoi monopolii na proizvodstvo, khranenie, optovuiu i roznichnuiu prodazhu alkogol'noi produktsii", 11 June 1993, quoted by Naumov 17).

2.2. Foreign Trade

422. The state monopoly and the strict organization of the foreign trade was somewhat liberalized with the introduction of the policy of *perestroika*.[99] The possibility of setting up joint ventures with foreign partners was created.[100] The real breakthrough, however, came with a Decree of the Council of Ministers of the USSR of 2 December 1988,[101] which as of 1 April 1989 granted all enterprises, associations, production cooperatives, and other organizations producing goods which could compete on foreign markets, the right to carry out direct export-import operations after prior registration.[102] For the import and export of a number of products and services, a special permit was required. This was, for instance, the case for the importing and exporting of theater and concert activities and the activities of artists, *and* for the importing of printed matter, film, video and audio products,[103] apparently still out of fear of the importation of ideologically undesirable works and the emigration of famous performing artists.

423. Later, an Edict of President El'tsin of 15 November 1991[104] confirmed the principle that all registered enterprises,[105] irrespective of their form of ownership, had the right to exercise a foreign trade activity. For the import or export of certain goods or services, a permit was still required (or these actions

98. PSMP RF, "O polnomochiiakh organov ispolnitel'noi vlasti kraev, oblastei, avtonomnykh obrazovanii, gorodov federal'nogo znacheniia po litsenzirovaniiu otdel'nykh vidov deiatel'nosti", 27 May 1993, *SAPP RF*, 1993, No.22, item 2033, *Rossiiskaia gazeta*, 19 June 1993.
99. Malfliet 1989b, 3-15.
100. PSM SSSR, "O poriadke sozdaniia na territorii SSSR i deiatel'nosti sovmestnykh predpriiatii, mezhdunarodnykh ob"edinenii i organizatsii SSSR i drugikh stran-chlenov SEV", 13 January 1987, *SP SSSR*, 1987, No.8, item 38; PSM SSSR, "O poriadke sozdaniia na territorii SSSR i deiatel'nosti sovmestnykh predpriiatii s uchastiem sovetskikh organizatsii i firm kapitalisticheskikh i razvivaiushchikhsia stran", 13 January 1987, *SP SSSR*, 1987, No.9, item 40. See, also, Malfliet 1989b, 23-34.
101. PSM SSSR, "O dal'neishem razvitii vneshneekonomicheskoi deiatel'nosti gosudarstvennykh, kooperativnykh i inykh obshchestvennykh predpriiatii, ob"edinenii i organizatsii", 2 December 1988, *SP SSSR*, 1989, No.2, item 7.
102. Point 2 PSM SSSR, "O merakh gosudarstvennogo regulirovaniia vneshneekonomicheskoi deiatel'nosti", 7 March 1989, *SP SSSR*, 1989, No.16, item 50.
103. V. Oreshkin, "Sistema litsenzirovaniia eksporta i importa", *Ekonomika i zhizn'*, 1991, No.35, 11. See, also, at the level of the RSFSR, the duty for enterprises to obtain a permit for the importation of film, video and audio productions: PSM RSFSR, "O merakh po vypolneniiu postanovleniia Soveta Ministrov SSSR ot 7 marta 1989 g. No.203", 12 April 1989, *SP RSFSR*, 1989, No.11, item 61.
104. Ukaz Prezidenta RSFSR, "O liberalizatsii vneshneekonomicheskoi deiatel'nosti na territorii RSFSR", 15 November 1991, *VSND i VS RSFSR*, 1991, No.47, item 1612. See Braginskii 1993a, 389-390.
105. It was not clear whether this Ukase also allowed citizens to enter directly into foreign economic activities (Feldbrugge 1993, 273).

were subject to quotas).[106] The said cultural goods and services, however, no longer seemed to fall under these restrictions.

424. The Fundamentals on culture of 1992 give Russian citizens the right to export the results of their creative activity abroad for an exhibition, other forms of public performance, as well as sale, in a manner determined by legislation of the Russian Federation.[107]

425. A Law of 13 October 1995 on the state regulation of foreign trade activity[108] confirmed that all Russian persons (also individual tradesmen[109]) have the right to exercise foreign trade activity (save in the cases provided for by legislation of the Russian Federation).[110] The expression "foreign trade activity" refers to entrepreneurial activity concerning the international exchange of goods, works, services, information, *results of intellectual activity, including the exclusive rights to such results (intellectual property)*.[111]

A federal law can establish a state monopoly on the import and export of certain kinds of goods.[112] The import or export of goods, works, services, and results of intellectual activity (including the exclusive right thereto) can also be limited or even prohibited, depending on Russia's national interests, such as the maintenance of public order and decency, the preservation of the cultural inheritance of the people of Russia, the protection of cultural treasures from illegal import or export or property transfer, national security, etc.[113] Such a law was, indeed, adopted in 1998 but does not apply to the protection of economic interests of the Russian Federation in relation to the foreign trade in subject matter of intellectual property rights (art.1 (2)).[114] Also note that there exist special rules on the receipt of hard currency in the framework of (international) contracts on the transfer of results of intellectual property.[115]

106. See, *e.g.*, the Ukase of President El'tsin of 31 December 1991: *Financial & Business News*, 1992, No.7, 12; PP RF "O litsenzirovanii i kvotirovanii eksporta i importa tovarov (rabot, uslug) na territorii Rossiiskoi Federatsii", 6 November 1992, *SAPP RF*, 1992, No.19, item 1589; PSMP RF, "O merakh po liberalizatsii vneshneekonomicheskoi deiatel'nosti", 2 November 1993, *Rossiiskaia gazeta*, 11 November 1993.
107. Art.17 Fundamentals on culture. Art.18 Fundamentals on culture grants citizens the right to exercise a cultural activity abroad and to found cultural organizations in other states insofar as not contrary to local law.
108. Federal'nyi Zakon RF, "O gosudarstvennom regulirovanii vneshnetorgovoi deiatel'nosti", 13 October 1995, *Rossiiskaia gazeta*, 24 October 1995.
109. Art.2 (definition "Russian participators to the foreign trade activity") Law on foreign trade activity.
110. Art.10 para.1 Law on foreign trade activity.
111. Art.2 (definition "foreign trade activity") Law on foreign trade activity.
112. Art.12 para.6 and art.17 Law on foreign trade activity.
113. Art.19 Law on foreign trade activity.
114. Federal'nyi zakon RF, "O merakh po zashchite ekonomicheskikh interesov Rossiiskoi Federatsii pri osushchestvlenii vneshnei torgovli tovarami", 14 April 1998, *Rossiiskaia gazeta*, 22 April 1998.

Section 4. The Struggle against Monopolies and Unfair Competition

426. Entrepreneurial freedom aside, one of the most important tasks of the government at the introduction of a market economy was the dismantling of economic monopolies. This went to the core, the essence itself, of the old system.[116] The success of the economic reforms in Russia strongly depends on the success of anti-monopoly legislation. This is, as it were, symbolized by the fact that, by virtue of the new Russian Constitution, the government was empowered to prohibit economic activities aimed at the formation of a monopoly.[117]

427. An important step in the direction of the de-monopolization of the national economy was taken by a Decree of the Council of Ministers of the USSR on 16 August 1990.[118] The Decree was mainly of a programmatic nature, but still recorded a number of concrete measures, such as establishing an anti-monopoly committee attached to the Council of Ministers,[119] freeing of state enterprises from the immediate control and the routine interference of central economic state bodies, and reducing the tasks of the central planning organs to the drawing up of macro-economic prognoses and general plans, and the setting of goals and priorities for social-economic policy. The hierarchic link between the central government and the actual producers, which had been so essential to the planned economy, was as good as abolished.[120] The Decree contained, moreover, basic fundamentals of measures concerning the preventing, limiting, and halting of monopolistic activity by participants in economic traffic, as well as a general prohibition on unfair competition.[121]

428. On 10 July 1991, the Soviet legislator adopted a Law on the limitation of monopolistic activity in the USSR.[122] This prohibited the abuse of a dominant market position and the conclusion of agreements, which limited

115. See the joint instruction of the Federal Service of Russia on currency and export control, and the Central Bank of the Russian Federation of 10 February 2000, *Rossiiskaia gazeta*, 28 March 2000.
116. On the meaning of "competition" in the planned economy, see Malkov 692-694.
117. Art.34 (2) Const.1993.
118. PSM SSSR, "O merakh po demonopolizatsii narodnogo khoziaistva", 16 August 1990, *SP SSSR*, 1990, No.24, item 114.
119. See, also, PSM, "Voprosy Gosudarstvennogo komiteta RSFSR po antimonopol'noi politike i podderzhke novykh ekonomicheskikh struktur", 10 September 1990, *SP RSFSR*, 1991, No.2, item 12.
120. Feldbrugge 1993, 255.
121. See, also, L.B. Gal'perin and L.A. Mikhailova, "Pravovye aspekty nedobrosovestnoi konkurentsii", *Pravovedenie*, 1991, No.1, 28-29. These authors argue (at 30) for the passing of a separate Law on unfair competition.
122. Zakon SSSR "Ob ogranichenii monopolisticheskoi deiatel'nosti v SSSR", 10 July 1991, *Izvestiia*, 25 July 1991, English translation in *CDSP*, 1991, No.30, 15-18.

competition.The monitoring of compliance with this prohibition was entrusted to an Anti-monopoly committee.[123]

429.This Soviet law did not come into effect in Russia, since on 22 March 1991 Russia passed its own Law on competition and the limitation of monopolistic activity on the goods market, still in force.[124] The ambition of this Law is twofold: to guarantee both the freedom and the fairness of competition.[125] In article 34 (2) Constitution 1993, too, the prohibition of monopoly-formation and of unfair competition are mentioned together.

430.From the Russian law, it transpires, however, that the struggle against the monopolies, entrusted to the State Committee RF for anti-monopoly

123. See, also, Feldbrugge 1993, 255-256.

124. Zakon RSFSR, "O konkurentsii i ogranichenii monopolisticheskoi deiatel'nosti na tovarnykh rynkakh", 22 March 1991, *VSND i VS RSFSR*, 1991, No.16, item 499, as amended on 25 May 1995, *SZ RF*, 1995, No.22, item 1977, and 6 May 1998, *Rossiiskaia gazeta*, 12 May 1998). An amendment of 1992 (*VSND i VS RF*, 1992, No.32, item 1882 and No.34, item 1966) was again cancelled at the end of 1995 (Federal'nyi Zakon RF, 18 December 1995, *SZ RF*, 1995, No.51, item 4974, *Rossiiskaia gazeta*, 26 December 1995). In execution of the (original) Law the CrC 1960 and the Code of administrative violations RSFSR were amended: Zakon RF, "O vnesenii izmenenii i dopolnenii v Ugolovnyi kodeks RSFSR i Kodeks RSFSR ob administrativnykh pravonarusheniiakh", 13 25 May 1995, *SZ RF*, 1995, No.22, item 1977, March 1992, *VSND i VS RF*, 1992, No.16, item 838. For an article-by-article discussion of the original version of this Law, see *Zakonodatel'stvo i Ekonomika*, 1991, No.12, 5-28. For a general discussion, see Braginskii 1993a, 381-382; Dietz 1994a; Hyden; Klein 235-244; Lucas; Malkov; K.-N. Peifer, "Introduction of Unfair Competition Legislation in the Former Socialist States of Central and Eastern Europe", *ICC*, 1995, 535-540; V.S. Shishkina and J. Stuyck, "Competition and limitation of monopolistic activities in Russia", in *Methodius*, Leuven, LICOS, n.d.; Thiel; and different contributions in a special issue of *Zakonodatel'stvo i Ekonomika*, 1995, No.3-4.

125. The anti-monopoly legislation was further developed in: PVS RF, "O tolkovanii otdel'nykh polozhenii stat'i 4 Zakona RSFSR 'O konkurentsii i ogranichenii monopolisticheskoi deiatel'nosti na tovarnykh rynkakh", 17 June 1993, *VSND i VS RF*, 1993, No.26, item 972 (interpretation decree with art.4), repealed by Federal'nyi Zakon RF, 18 December 1995, *Rossiiskaia gazeta*, 26 December 1995; Postanovlenie Prezidiuma Verkhovnogo Soveta RF, "O gosudarstvennom regulirovanii deiatel'nosti predpriiatii-monopolistov", 20 January 1992, *VSND i VS RF*, 1992, No.6, item 254 (monitoring of the price policy of monopolistic enterprises); PP RF, "O Gosudarstvennoi program demonopolizatsii ekonomiki i razvitiia konkurentsii na rynkakh Rossiiskoi Federatsii (osnovnye napravleniia i pervoocherednye mery)", 9 March 1994, *SAPP RF*, 1994, No.14, item 1052, *Rossiiskaia gazeta*, 14 April 1994 (State program for the de-monopolization of the economy and the development of competition on the markets of the Russian Federation: "This is more of a declaration of intent than a worked plan for the de-monopolization of the state sector of the Russian economy", Lucas 200); Federal'nyi Zakon RF, "O estestvennykh monopoliiakh", 17 August 1995, *SZ RF*, 1995, No.34, item 3426, *Rossiiskaia gazeta*, 24 August 1995 (natural monopolies). On 12 March 1993, in the framework of the CIS, an agreement was signed on the coordination of the anti-monopoly policy, including cooperation in the area of the struggle against the unfair competition: Soglashenie "O soglasovanii antimonopol'noi politiki", 12 March 1993, *BMD*, 1993, No.3.

policy,[126] is of primary importance.[127] This concerns the combating of abuse of a dominant market position, agreements, which limit competition and the monitoring of mergers. This is an enormous task if one considers the legacy of the planned economy with its division of labor between large enterprises with each a monopoly (or quasi-monopoly) within their industrial sector[128] ("one product—one producer"[129]).

431. Unfair competition (*nedobrosovestnaia konkurentsiia*) is prohibited by virtue of article 10 of the Anti-monopoly law.[130] In the original version of the law, this crucial term was not defined further, but this was solved by an amendment of 25 May 1995.[131] The unfair competition prohibited is "any action of an economic subject which is aimed at acquiring privileges in entrepreneurial activity, which is contrary to the provisions of the current legislation, customs of trade, requirements of decency (*dobroporiadochnost'*), reasonableness (*razumnost'*) and justice (*spravedlivost'*), and which can cause or has caused damage to economic competitors or which can cause damage to their business reputation."

126. Ukaz Prezidenta RF, "O Gosudarstvennom komitete Rossiiskoi Federatsii po antimonopol'noi politike i podderzhke novykh ekonomicheskikh struktur", 24 August 1992, *VSND i VS RF*, 1992, No.35, item 2008, *Zakonodatel'stvo i Ekonomika*, 1993, No.3/4, 66-67; Ukaz Prezidenta RF, "O Gosudarstvennom komitete Rossiiskoi Federatsii po antimonopol'noi politike i podderzhke novykh ekonomicheskikh struktur", 27 February 1995, *Zakonodatel'stvo i ekonomika*, 1995, No.3-4; point 1 b) Ukaz Prezidenta RF, "O strukture federal'nykh organov ispolnitel'noi vlasti", 14 August 1996, *Rossiiskaia gazeta*, 16 August 1996. Control over this Committee—as with just about all state bodies in 1992—was disputed between the legislative and executive powers, the Constitutional Court on 20 May 1992 finding for the latter: PKS RF, *VSND i VS RF*, 1992, No.27, item 1571.
127. Dietz 1994a, 657 also points out that a report published in 1993 on the activity of the Anti-monopoly committee (A. Podlesnyi, "O deiatel'nosti antimonopol'nogo komiteta", *Zakonodatel'stvo i Ekonomika*, 1993, No.15-16, 4-6) does deal with the struggle against monopoly formation and competition limiting agreements, but does not mention a single case of unfair competition. And Malkov (696) confirms: "Es gibt in Russland nur wenig ernsthafte juristische Verfahren im Bereich des unlauteren Wettbewerbs und benachbarten Gebieten".
128. Hyden 83.
129. V. Capelik, "The Development of Antimonopoly Policy in Russia", *RFE/RL Research Report*, 1992, No.34, 66.
130. See, already, art.20 Law RSFSR on enterprises and the activity of enterprises (*supra*, No.415, note 73); art.5 (3) Fundamentals 1991. See, also, Malkov 694-695. For a thorough discussion of the current legislation on unfair competition in Russia, see O. Dillenz, "Der aktuelle Entwicklungsstand des Rechts gegen den unlauteren Wettbewerb in der Russischen Föderation", *Grur Int.*, 1997, 16-24.
131. Art.1 (5) Federal'nyi Zakon RF, "O vnesenii izmenenii i dopolnenii v Zakon RSFSR 'O konkurentsii i ogranichenii monopolisticheskoi deiatel'nosti na tovarnykh rynkakh'", 25 May 1995, *Rossiiskaia gazeta*, 30 May 1995. For a discussion of this amendment, see T.M. Krüssmann, "Zur Novelle des russischen Antimonopolgesetzes vom 25. Mai 1995", *ROW*, 1996, 225-232.

Apart from this prohibition clause, the same article 10 lists some examples intended to illustrate the meaning of the term.[132] We will later return to the question whether slavish imitation also falls under the term "unfair competition" according to Russian law.[133]

432.The belief in an ability to establish a free market by administrative means seems to be an ever-growing one rather now that not only the monitoring of the freedom of competition[134] but, also, the prevention, limitation, and elimination of unfair competition has been placed in the hands of the Anti-monopoly committee.[135] According to the original version of the law, only the civil-law process was open for claims for damages,[136] but later the Russian legislator ignored—in Dietz's words—"die im Sinne eines 'Selbstreinigungsprozesses' der Marktteilnehmer zu fordernde umfassende Gewährung zivilrechtlicher Sanktionsmöglichkeiten",[137] a regulation which was "äusserst unbefriedigend".[138] This regulation is also a sign of the lack of confidence in the power of law as a lever to help the functioning of market mechanisms.[139]

It is possible that the amendment of 25 May 1995[140] resolved this by introducing a new article 22^1 which holds civil servants of different levels, commercial and non-commercial organizations or their leaders, and citizens, including individual tradesmen, liable in civil law, administrative law and criminal law[141] for unjust actions in violation of the anti-monopoly legislation. In our view, the reference to the civil law not only implies the possibility of demanding damages from unfair competitors, but, also, of bringing suit seeking a cease and desist order with regard to unfair competition.[142]

433.In general, this Law has to be considered too ambitious and too rudimentary.[143] The criteria which the Anti-monopoly committee has to apply in reaching its decisions in the struggle for the de-monopolization of the

132. See, also, Dietz 1994a, 659-664; Thiel 101-107. On unfair competition by foreign investors, see art.18 Federal'nyi zakon RF, "Ob inostrannykh investitsiiakh v Rossiiskoi Federatsii", 9 July 1999, *Rossiiskaia gazeta*, 14 July 1999.
133. *Infra*, No.1062.
134. Art.34 (2) Const.1993 ("Economic activity may not be aimed at monopoly formation or unfair competition") suggests that the greatest danger for monopoly formation comes from private entrepreneurs, whereas in reality the heritage of the state planned economy forms the main problem for the functioning of the market economy (Lippott 206).
135. Art.11 (1) Anti-monopoly law.
136. Art.22 (1) and (2) Anti-monopoly law (original version).
137. Dietz 1994a, 652.
138. Dietz 1994a, 656. See, also, V.I. Eremenko, "Zakonodatel'stvo o presechenii nedobrosovestnoi konkurentsii za rubezhom", *SGiP*, 1991, No.12, 124-125.
139. Hyden 84.
140. *SZ RF*, 1995, No.22, item 1977.
141. See art.178 CrC 1996.
142. Art.12 CC RF.
143. Hyden 84.

Russian economy are vague or even absent, so that in practice there was a lot of skepticism concerning the possibility of implementing this law, and even concerning the *raison d'être* of this legislation in Russia.[144]

Section 5. Privatization Legislation

434. In the changeover from a planned state economy to a market economy, the privatization of the state enterprises takes up a central role. State ownership had to be drastically reduced in favor of private ownership. This could be done on the one hand by allowing new private initiatives in economic life, and on the other hand by transferring part of the public economic sector to private persons. The word "privatization" is usually used particularly in this last sense.

435. In the last days of the Soviet regime, the process of privatization was initiated by a Law of the USSR of 1 July 1991 on the basic fundamentals of de-stating and privatizing enterprises.[145] The Russian declaration of sovereignty[146] meant that it never came into effect in the largest Union Republic of the Soviet Union. It, thus, has a purely symbolical value.

436. Two days after the Soviet parliament, the Supreme Soviet of Russia passed its own privatization law.[147] This law was replaced on 21 July 1997 by a second RF Privatization Law.[148] The technical details of privatization as provided for by this legislation and in a series of executive decrees will be left out of consideration here. We will focus, rather, on the question of whether

144. Lucas 199 puts it thus:

> "Anti-trust law has not lived up to its expectations because its conception was the regulation of enterprises by the state and not the deregulation of anti-competitive activities."

This author refers to further unspecified Russian legal scholars who consider the anti-monopoly legislation a means for the former organs of state to reintroduce state planning by the backdoor:

> "By labeling an enterprise 'a monopoly' the state institution in charge of anti-trust policy could then be involved in the regulation of its activities: its prices could be deemed monopolistic, any price over the state-determined 'market price' could be appropriated to the state budget and any of its contracts which the state wanted to regulate directly could be deemed 'anti-competitive'."

145. Zakon SSSR, "Ob osnovnykh nachalakh razgosudarstvleniia i privatizatsii predpriiatii", 1 July 1991, *VSND i VS SSSR*, 1991, No.32, item 904, *Izvestiia*, 8 August 1991.

146. *Supra*, No.175.

147. Zakon RSFSR, "O privatizatsii gosudarstvennykh i munitsipal'nykh predpriiatii v RSFSR", 3 July 1991, *VSND i VS RSFSR*, 1991, No.27, item 927, amended 5 June 1992, *VSND i VS RF*, 1992, No.28, item 1614.

148. Federal'nyi Zakon RF, "O privatizatsii gosudarstvennogo imushchestva i ob osnovakh privatizatsii munitsipal'nogo imushchestva v Rossiiskoi Federatsii", 21 July 1997, *Rossiiskaia gazeta*, 2 August 1997, *SZ RF*, 1997, No.30, item 3595, amended on 23 June 1999, *Rossiiskaia gazeta*, 30 June 1999. This Law does not apply to the privatization of "objects of a social and cultural purpose", nor of objects of the historical and cultural heritage (art.3).

enterprises and institutions in the cultural sector were also subjected to the privatization movement.

The Russian privatization legislation itself does not speak on this matter. It only states that the successive state privatization programs may contain a list of state enterprises the privatization of which is forbidden.[149]

437.In the first state program for 1992, which was approved by the Supreme Soviet on 11 June 1992,[150] the objects and enterprises were classified in five categories: (1) the objects and enterprises the privatization of which is prohibited; (2) the objects and enterprises the privatization of which can only take place at the decision of the Government of the RF or the Governments of the Republics which are part of the Federation; (3) the objects and enterprises the privatization of which can only take place upon decision of *Goskomimushchestvo*, the State Committee of the RF for the management of state property (*i.e.*, the administrative organ which organizes all the privatization operations[151]) taking into account the opinion of the line ministries; (4) the objects and enterprises the privatization of which can only take place in agreement with local privatization programs; and (5) the objects and enterprises which must be privatized.

In each of these categories, with the exception of the last, we find references to the cultural sector. Objects of the historical and cultural heritage of the people of Russia (unique cultural monuments and objects of culture, including those kept in state museums, archives and libraries *and* the rooms and buildings in which the objects are kept), institutions financed from the budget of the governments of all levels (in other words museums, libraries and archives, etc.) and television and radio broadcasting centers are not eligible for privatization (category 1). The news agencies of the RF Ministry of the press and information, the objects, enterprises and institutions with a socio-cultural destination—irrespective of their administrative subordination—federally owned or owned by the member republics (except the objects which are on the books of enterprises and organizations), and the graphic companies and publishing houses can be privatized by Government decision (category 2). *Goskomimushchestvo* decides on the privatization of the enterprises of artistic handicraft companies (category 3). Other objects, enterprises and institutions of socio-cultural importance can be privatized by the local privatization committees in agreement with local privatization programs (category 4).

In the case of the privatization of enterprises of the second and third category (*i.e.*, by the Government, resp. *Goskomimushchestvo*), *Goskomimushchestvo*

149. Art.3 (3) Privatization law RSFSR; art.4 (3) Privatization Law RF.

150. PVS RF, "O vvedenii v deistvie Gosudarstvennoi programmy privatizatsii gosudarstvennykh i munitsipal'nykh predpriiatii v Rossiiskoi Federatsii na 1992 god", 11 June 1992, *VSND i VS RF*, 1992, No.28, item 1617; English translation in *Financial & Business News*, 3-9 August 1992, 12-14.

151. Art.4 Privatization law RSFSR.

has a right to keep for a period of three years a controlling interest in a privatized enterprise which had been in federal ownership.[152]

438.In a second State privatization program, approved by a Presidential Edict of 24 December 1993,[153] the basic classification was maintained, as well as the division of the different cultural sectors among the possible categories.[154] A number of terms are, however, described in more detail in this second program. The category of the "objects and enterprises of social-cultural destination" (in category 2, decision is with the Government), for example, are theaters, concert halls, exhibition rooms, film studios and film reproduction factories.[155] The category of graphic companies and publishing houses, which can also only be privatized by government consent, is on the one hand expanded by the addition of wholesalers in books, but is on the other hand limited by a provision that it includes only those enterprises under the jurisdiction of the RF Committee for the press, the RF Ministry for the social protection of the populace and the RF Ministry for public health.[156] Graphic enterprises and publishing houses which do not fall under the competence of the said bodies can be privatized by means of a simple *Goskomimushchestvo* procedure, taking into account the opinion of the line ministry involved.[157] This procedure also applied to enterprises which produce specialized installations for cultural institutions[158] and for circus enterprises and organizations which are part of the "Rossiiskii tsirk" ("Russian Circus") association.[159]

439.Specifically with regard to the privatization of publishing houses and graphic companies, the Supreme Soviet on 23 July 1993 passed a Decree prohibiting the privatization of state publishing houses and printing works, until the approval of the State privatization program for 1993,[160] but after the dissolution of the legislative organ in the autumn of 1993 by President El'tsin this Decree was withdrawn "until the Federal Assembly reaches a decision

152. Point 2.3. First State privatization program.
153. Ukaz Prezidenta RF, "O Gosudarstvennoi program privatizatsii gosudarstvennykh i munitsipal'nykh predpriiatii v Rossiiskoi Federatsii", 24 December 1993, *SAPP RF*, 1994, No.1, item 2. See, also, "Osnovnye polozheniia Gosudarstvennoi programmy privatizatsii gosudarstvennykh i munitsipal'nykh predpriiatii v Rossiiskoi Federatsii posle 1 iiulia 1994 goda", *Rossiiskaia gazeta*, 27 July 1994.
154. According to the First State privatization program, artistic handicraft companies could be privatized by *Goskomimushchestvo*, while according to the second program the privatization of such companies, just like the cultural heritage of Russia, was no longer possible. This was probably influenced by the prohibition of privatization of such companies in art.44 para.1 Fundamentals on culture.
155. Point 2.2.11. Second State privatization program.
156. Point 2.2.15. Second State privatization program.
157. Point 2.3.9. Second State privatization program.
158. Point 2.3.16. Second State privatization program.
159. Point 2.3.17. Second State privatization program.
160. PVS RF, "O privatizatsii gosudarstvennykh izdatel'stv, izdatel'sko-poligraficheskikh kompleksov i tipografii", 23 July 1993, *VSND i VS RF*, 1993, No.32, item 1275.

on this issue".[161] The Government, however, did not wait until the Russian parliament had examined the question, and on 1 October 1994 it approved a Decree on the privatization of publishing houses, printing works and bookshops of the RF Committee for the press.[162] Publishing houses and suchlike, which did not fall under the competence of this Committee or which were not federally owned, were not dealt with. The Decree contains two lists in appendix: the first lists the publishing houses, graphic enterprises, and book wholesalers, which were in federal ownership and could not be privatized in the course of 1994 and 1995. The second lists those enterprises, which could be transformed into joint-stock companies (of the open type) but with controlling participation by the government for the period of three years. The remainder of publishing houses, graphic enterprises and book wholesalers, which were in federal ownership and under the competence of the RF Committee of the Press, could be privatized in accordance with the State privatization programs. The Government Decree of 1 October 1994 offered guarantees for a limited employees' participation in the capital of the privatized enterprises and for the preservation of the "profile" of the enterprise after privatization.[163]

Finally, the Russian legislator did manage to intervene in the problem of the privatization of publishing houses and graphic companies, and to this purpose in a Law of 1 December 1995[164] drew up the following rules:

— no privatization of the publishing houses and printing works in federal ownership, in the case of: graphic companies and publishing houses which have a monopoly position across the Russian market of services and goods; graphic enterprises with high-tech equipment for the printing of highly artistic and quality products; enterprises with a monopoly which guarantee the functioning of the graphic branch of industry. These enterprises could,

161. Ukaz Prezidenta RF, "O merakh po zashchite svobody massovoi informatsii v Rossiiskoi Federatsii", 5 December 1993, *SAPP RF*, 1993, No.49, item 4765, *Rossiiskaia gazeta*, 22 December 1993.

162. PP RF, "O privatizatsii izdatel'stv, poligraficheskikh predpriiatii optovoi knizhnoi torgovloi Komiteta Rossiiskoi Federatsii po pechati", 1 October 1994, *SZ RF*, 1994, No.24, item 2641. This Decree was taken in execution of point 6.6. Second State privatization program; and PP RF, "Voprosy obespecheniia izdaniia i rasprostraneniia sredstv massovoi informatsii, produktsii poligraficheskogo proizvodstva", 10 January 1994, *SAPP RF*, 1994, No.3, item 274.

163. Compare art.44 para.2 Fundamentals on culture which allows the privatization of cultural goods—with the exception of cultural heritage—on the condition of: the preservation of the cultural activity as basic activity; the preservation of profile services; the organization of service provision for specific categories of the populace; the assurance of the present number of employment positions and of the social guarantees for the workers (for a period of one year).

164. Federal'nyi Zakon RF, "O gosudarstvennoi podderzhke sredstv massovoi informatsii i knigoizdaniia Rossiiskoi Federatsii", 1 December 1995, *SZ RF*, 1995, No.49, item 4698, *Rossiiskaia gazeta*, 5 December 1995.

at the earliest, be privatized three years after the coming into effect of the law (*i.e.*, after 5 December 1998), and only by a Government decision.

— publishing houses and printing works situated on the territory of the subjects of the Federation, in federal ownership, and with a monopoly with regard to the production of newspapers, periodicals, and books on the territory of that member entity, as well as graphic companies which are part of the system of decentralized newspaper and periodical press, are transformed into joint-stock companies with 25.5% of the shares in federal ownership for three years, 24.5% regular shares are transferred free of charge to the printing works themselves, and 50% goes free of charge to the legal persons such as the editorial teams of the news media and publishing houses which are its customers. The shares of the two last categories can be traded freely and consequently can be used to attract outside investment.

— publishing houses and printing works which are in federal ownership but which are not in a monopoly position, and publishing houses and graphic companies which have been transferred to the ownership of subjects of the Federation can be privatized through regional privatization programs.

440. So far, this whole operation has resulted in rather little. The printing companies are mostly still in state ownership.[165] The Government itself explains this in three ways: (1) the founding of a new printing works requires a large start-up capital; (2) low profit margins and high investment costs for the modernization of obsolete plant does little to attract private investors; (3) 90% of the graphic companies are small enterprises (max. 20 employees), geographically highly dispersed, and often planted in very centrally situated places: considering the high investment cost for the modernization of the technical installation there exists a high risk that with privatization the profile of the enterprise will be altered.

In 1994 more than 7000 publishing houses had the required publishing permit, but in reality only a small portion of these were operative.[166] According to official figures, the share of the state publishing houses in book production was 49.9% of the assortment, 38.8% of the print run, and 35.6% of pages.[167]

165. In the five year plan for the support of the state printing works and book publishing houses in Russia (1996–2001) which was approved by the Government on 12 October 1995, a very interesting analysis was given of the problems in the graphic and publishing sector. See PP R.F, "O federal'noi tselevoi programe 'Podderzhka gosudarstvennoi poligrafii i knigoizdaniia Rossii v 1996-2001 godakh'", 12 October 1995, *SZ RF*, 1995, No.45, item 4312, *Rossiiskaia gazeta*, 22 November 1995. According to the official figures given in this plan, there are 1819 state printing works in Russia, of which 772, or 42%, were transferred to the ownership of subjects of the Federation in the course of 1993-1995. The print capacity of the federal printing works is nevertheless more than 80% of the total printing capacity for books, periodicals and newspapers.

Consequently, the state publishing houses opt in their publishing policy rather for the publication of a larger number of titles, with a smaller size and a smaller print run. This could indicate that they apply themselves particularly to less accessible and less commercial genres.

441. In the film sector, the conditions of privatization are determined by a Law of 22 August 1996,[168] the main principle of which is the preservation of cinematographic activity as the basic activity of the privatized enterprise. Furthermore, the law makes the following distinction:

— Film organizations which specialize in showing films for children, or which are the only organization in a certain population center which screens films cannot be privatized.
— A decision of the government of the RF can privatize producers of films and film chronicles who are registered in Russia and are in federal ownership, and organizations which carry out works or provide services relating to the production of films and film chronicles, by transforming them into joint-stock companies of the closed or open type; 25.5% of the regular shares or "a golden share" remains in federal ownership for four years, 5% of the regular shares is transferred free of charge to the administration of the privatized enterprise, 3% of the regular shares is transferred free of charge to freelance workers on the creative teams, whereas 43% of the regular shares is divided among the creative and the technical personnel in salaried employment. The remaining shares can be sold freely. The dividends on the shares in federal ownership are capitalized and used for technical equipment and the improvement of the production capacity of the privatized enterprise.
— Enterprises in federal ownership which multiply films can only be privatized by a RF Government decision.
— Enterprises in federal ownership, which produce film equipment and film materials, can be privatized by a decision of *Goskomimushchestvo*.
— Cinematographic enterprises, which are owned by subjects of the Federation, are privatized in accordance with regional programs, and in accordance with this law.

166. Only about 150 are traditional publishing houses; the other publishing houses are founded by individual citizens, publish one or two books and disappear again: M. Gurevich, "Kniga—istochnik trevog", *Rossiiskaia gazeta*, 30 August 1995 (interview with I.D. Laptev, at that time Chair of the RF Committee for the press).
167. PP RF, "O federal'noi tselevoi program 'Podderzhka gosudarstvennoi poligrafii i knigoizdaniia Rossii v 1996-2001 godakh'", 12 October 1995, *Rossiiskaia gazeta*, 22 November 1995.
168. Arts.16-20 Federal'nyi Zakon RF "O gosudarstvennoi podderzhke kinematografii Rossiiskoi Federatsii", 22 August 1996, *SZ RF*, 1996, No.35, item 4136, *Rossiiskaia gazeta*, 29 August 1996. For a general discussion, *infra*, No.511.

At present, a number of film studios, part of the state distribution network and the municipal film halls have already been privatized. For the film industry, it has become all but inevitable to attract foreign investors. Thus, a German investor already showed interest in obtaining 10 to 15% of the shares in Mosfil'm, once it would be privatized (49% of the shares would remain in the hands of the City of Moscow Government).[169]

442. The non-commercial cultural institutions in state ownership are not privatized. Objects with a cultural destination of state enterprises (*e.g.*, a cultural center, a company library) can be privatized together with the state enterprise or separately.[170]

Conclusion

443. The political turn-about of the past decade contains a clear economic-legal component. The modernization of civil law was not an aim in itself, but an attempt to develop a legal framework in which a civil society could grow. This was considered necessary to legitimate the new political system and to let it function. Therefore, the reform of civil law in the first place served a political goal.

Naturally, this does nothing to detract from the fact that a real economic-legal revolution took place. In recognizing every citizen's economic freedom, a legal framework was built for setting up a market economy, with important reforms in property law, enterprise law, the fight against monopolies, and privatization.

The instrumental way in which leaders used the law to achieve their political goals does entail that it is the political class which determines the limits within which the transformation takes place, and which controls all of the transformation process from above through permits, property laws, and administrative monitoring of the functioning of the market. Certainly in the cultural sector, the government maintains a prominent presence, both as an active participant and in the capacity of monitoring body. In the Russian economic order of 2000, Adam Smith's "Invisible hand" and the Russian president's "Visible hand" restrain one another, but it is at present not clear whether they clasp or crush one another.

169. "Russkoe kino: skromno, no s razmakhom", *Rossiiskaia gazeta*, 2 April 1999.

170. Ukaz Prezidenta RF, "Ob ispol'zovanii ob"ektov sotsial'no-kul'turnogo i kommunal'no-bytovogo naznacheniia privatiziruemykh predpriiatii", 10 January 1993, *SAPP RF*, 1993, No.3, item 168. A regulation was also worked out for the further financing of these objects with a cultural destination (PSMP RF, "O finansirovanii ob"ektov sotsial'no-kul'turnogo i kommunal'no-bytovogo naznacheniia, peredavaemykh v vedenie mestnykh organov ispolnitel'noi vlasti pri privatizatsii predpriiatii", 23 December 1993, *SAPP RF*, 1993, No.52, item 5091).

TITLE IV
THE TRANSFORMATION OF CULTURAL POLICY

Introduction

444. From our discussion of the freedom of artistic creation and of the general cultural policy of the Russian authorities, it has become clear that the artistic and economic freedom of the individual is one of the basic principles of policy, with no state ideology being enforced. At the same time, the Russian authorities have retained a strong hold on the mediators of artistic and literary traffic, either by themselves acting as cultural brokers through the many (non-privatized) state companies still active in the cultural sector or as the body competent for the registration or licensing of art brokers.

The cultural field was thrust relatively unprepared into a budding market economy, and thus remained greatly dependent on government support. The specific cultural policy of the Russian authorities is aimed at encouraging or supporting the conservation, the production, or the dissemination of certain cultural expressions by issuing particular rules for one or more artistic sectors or by creating particular facilities.

First, we will investigate the fate of the old cultural administrations, and the functions of the presently existing cultural apparatus (Chapter I). Then we will ask what legal instruments and budgetary means the authorities have made available for supporting the cultural sector (Chapter II). Finally, we will give a brief overview of the specifically cultural measures, which have been taken in the past decade (Chapter III).

Chapter I. Cultural Administration

Introduction

445. At the beginning of *perestroika*, the central cultural administrations were thought of as accessories to the cultural sclerosis which manifested itself under Communism. They became subject to continual reorganizations, changes of name, fusions and divisions, apparently in the then prevailing Communist view that administrative reorganization was the solution to every problem. Now, however, more was going on: camouflaged by the many restructurings, a real change in function took place. We will study both the formal and the substantial changes.

Section 1. Changing the Government Organization

446. Some changes to the Statutes of a few local cultural administrations aside[1] there were no major administrative reforms in the cultural sector until the early nineties. From 1990, however, there was a rapid series of reorganizations

of the four main cultural administrations:[2] the Ministry of Culture, the State Committee for the printed press and the publishing, printing and distribution of books, the State Committee for cinematography, and the State Committee for television and radio broadcasting. The causes of this were the changed economic context, the repeated attempts to improve the functioning of the bureaucratic apparatus, the disintegration of the USSR and the political struggle for control of the media. In this regard, it is to be remarked that the initiative for reform came from the Russian Republic rather than from the federal centers of power.

447. Thus, *Goskomizdat* RSFSR was transformed into the RSFSR Ministry of the Press and Mass Information,[3] the main tasks of which were to monitor compliance with media legislation, to manage of all state publishers and distributors of periodicals and books, and to assist publishing houses in the transition to a market economy through the elaboration of a legal framework for economic relations, including copyright relations.

In 1988 the RSFSR State Committee for Cinematography had been disbanded. Its powers had been transferred to the Ministry of Culture,[4] as had already been done in various other Union Republics. At the end of 1990, a RSFSR Council of Ministers State Fund for the Development of Cinematography was established (*Goskinofond*),[5] to which all film companies and organizations under the management of the RSFSR Ministry of Culture were transferred.

The functions of the Russian Ministry of Culture were redefined early in 1991.[6] Particularly noticeable new tasks were the introduction of democratic forms of organization and management in the cultural companies and institu-

1. See, *e.g.*, PSM RSFSR, "Ob utverzhdenii Polozheniia ob upravlenii kinofikatsii ispolnitel'nogo komiteta kraevogo, oblastnogo Soveta narodnykh deputatov", 20 June 1985, *SP RSFSR*, 1985, No.16, item 77; PSM RSFSR, "Ob utverzhdenii Polozheniia ob upravlenii izdatel'stv, poligrafii i knizhnoi torgovli ispolnitel'nogo komiteta kraevogo, oblastnogo Soveta narodnykh deputatov", 6 November 1985, *SP RSFSR*, 1986, No.8, item 50; PSM RSFSR, "Ob utverzhdenii Polozheniia ob upravlenii kul'tury ispolnitel'nogo komiteta kraevogo, oblastnogo Soveta narodnykh deputatov", 20 May 1986, *SP RSFSR*, 1986, No.18, item 134.
2. *Supra*, No. 37.
3. PSM RSFSR, "Voprosy Ministerstva pechati i massovoi informatsii RSFSR", 17 October 1990, *SP RSFSR*, 1991, No.3, item 32.
4. Ukaz Prezidiuma Verkhovnogo Soveta RSFSR, "Ob uprazdnenii Gosudarstvennogo komiteta RSFSR po kinematografii", 9 August 1988, *VVS RSFSR*, 1988, No. 32, item 1027.
5. Postanovlenie Soveta Ministrov RSFSR, "Voprosy Gosudarstvennogo fonda razvitiia kinematografii pri Sovete Ministrov RSFSR", 28 September 1990, *SP RSFSR*, 1990, No.22, item 161.
6. PSM RSFSR, "Voprosy Ministerstva kul'tury RSFSR", 1 February 1991, *SP RSFSR*, 1991, No.11, item 152.

tions, the right of the Ministry of Culture to act as founder of a joint-stock company and to establish institutions, and the duty of formulating a proposal with regard to the list of activities in the cultural sphere for which a license was to be required. Remarkably enough, no reference was made to any powers in the film sector.

448. A USSR Law of 1 April 1991,[7] which contained a list of all ministries and other central USSR state bodies, mentioned the Ministry of Culture of the USSR and the Ministry of Information and the Press of the USSR, but was notably silent about *Gosteleradio* USSR and *Goskino* USSR. The executive decree accompanying this Act[8] did recommend that the Cabinet of Ministers of the USSR set up a USSR Committee for Cinematography. One might deduce from this that *Goskino* no longer had any independent existence at the level of the USSR, and its functions were probably exercised by the Ministry of Culture of the USSR. Nevertheless, *Goskino* USSR was only officially abolished by a Decree of the USSR Council of Ministers dated 14 November 1991.[9]

449. By that time, the process of disintegration had speeded up considerably. The functions and businesses of the abolished *Goskino* USSR were not transferred to another Soviet body, but to the Russian Ministry of Culture. This ministry also absorbed the Interstate Committee of Culture, the former Ministry of Culture of the USSR,[10] and its enterprises and organizations.[11]

For its part, the Russian Ministry of the Press and Information (no longer "mass information") absorbed the Soviet ministry of the same name,[12] which had been disbanded a few days earlier.[13]

7. Zakon SSSR, "O perechne ministerstv i drugikh tsentral'nykh organov gosudarstvennogo upravleniia SSSR", 1 April 1991, *Pravda*, 10 April 1991.
8. PVS SSSR, "O vvedenii v deistvie Zakona SSSR 'O perechne ministerstv i drugikh tsentral'nykh organov gosudarstvennogo upravleniia SSSR'", 1 April 1991, *Pravda*, 10 April 1991.
9. Postanovlenie Gosudarstvennogo Soveta SSSR, "Ob uprazdnenii ministerstv i drugikh tsentral'nykh organov gosudarstvennogo upravleniia SSSR", 14 November 1991, *VVS SSSR*, 1991, No.50, item 1421.
10. Postanovlenie Gosudarstvennogo Soveta SSSR, "K voprosu ob uprazdnenii ministerstv i drugikh tsentral'nykh organov gosudarstvennogo upravleniia SSSR", 27 November 1991, *VVS SSSR*, 1991, No.50, item 1422. See, also, Ukaz Prezidenta SSSR, "O Ministerstve kul'tury SSSR", 7 September 1991, *VVS SSSR*, 1991, No.37, item 1094; Postanovlenie Gosudarstvennogo Soveta SSSR, "Ob uprazdnenii ministerstv i drugikh tsentral'nykh organov gosudarstvennogo upravleniia SSSR", 14 November 1991, *VVS SSSR*, 1991, No.50, item 1421.
11. Ukaz Prezidenta RSFSR, "O reorganizatsii tsentral'nykh organov gosudarstvennogo upravleniia RSFSR", 28 November 1991, *VSND i VS RSFSR*, 1992, No.5, item 234.
12. Ukaz Prezidenta RSFSR, "O reorganizatsii tsentral'nykh organov gosudarstvennogo upravleniia RSFSR", 28 November 1991, *VSND i VS RSFSR*, 1992, No.5, item 234.
13. Postanovlenie Gosudarstvennogo Soveta SSSR, "Ob uprazdnenii ministerstv i drugikh tsentral'nykh organov gosudarstvennogo upravleniia SSSR", 14 November 1991, *VVS SSSR*, 1991, No.50, item 1421.

450.Even after the dismemberment of the USSR, there was a flood of administrative reforms at the level of the Russian Federation, often against the background of the political struggle between President and Parliament for control over the printed and electronic mass media.

451.As early as 5 February 1992, a new separate film administration was set up, the Committee for Cinematography of the Government of the Russian Federation,[14] comprised of the Russian Ministry of Culture's inheritance from *Goskino* USSR and the simultaneously disbanded RSFSR Council of Ministers' State Fund for the Development of Cinematography (*Goskinofond* RSFSR).[15] The Statutes of this RF Committee for Cinematography—in 1996 renamed State Committee for Cinematography of the RF,[16] or *Goskino Rossii* for short[17]—were approved by a Government decree of 6 January 1993,[18] and were replaced by new ones, approved by the government on 26 June 1998.[19]

452.In March 1992, the RSFSR Ministry of Culture became a Ministry of Culture and Tourism of the RF,[20] only to become, six months later, the Ministry of Culture of the RF, with a separate RF Committee for Tourism hived off.[21] The Ministry of Culture then functioned on the basis of Statutes, which were approved by the Council of Ministers on 21 January 1993.[22] In

14. Ukaz Prezidenta RF, "O Komitete kinematografii pri Pravitel'stve Rossiiskoi Federatsii", 5 February 1992, *VSND i VS RF*, 1992, No.7, item 355. See, also, the interview with the Chair of the Committee for Cinematography of the Government of Russia, A. Medvedev, L. Maksimova, "Krupnym planom—o tom chto za ekranom", *Kuranty*, 24 March 1992. This Committee was later renamed Committee for Cinematography of the Russian Federation: Ukaz Prezidenta RF "O strukture tsentral'nykh organov federal'noi ispolnitel'noi vlasti", 30 September 1992, *VSND i VS RF*, 1992, No.41, item 2279.
15. See with regard to the staff of the new Committee: PSMP RF, "Voprosy Komiteta Rossiiskoi Federatsii po kinematografii", 12 February 1993, *SAPP RF*, 1993, No.7, item 608.
16. Point 1 Ukaz Prezidenta RF, "O strukture federal'nykh organov ispolnitel'noi vlasti", 14 August 1996, *Rossiiskaia gazeta*, 16 August 1996.
17. Rasporiazhenie Administratsii Prezidenta RF i Apparata Pravitel'stva RF, No.2868/1027, 10 December 1996, *Rossiiskaia gazeta*, 18 December 1996.
18. PP RF, "Ob utverzhdenii Polozheniia o Komitete Rossiiskoi Federatsii po kinematografii", 6 January 1993, *SAPP RF*, 1993, No.2, item 108.
19. PP RF, "Voprosy Gosudarstvennogo komiteta Rossiiskoi Federatsii po kinematografii", 26 June 1998, *Rossiiskaia gazeta*, 31 July 1998.
20. Ukaz Prezidenta RF, "Ob obrazovanii Ministerstva kul'tury i turizma Rossiiskoi Federatsii", 27 March 1992, *VSND i VS RF*, 1992, No.15, item 784.
21. Ukaz Prezidenta RF, "O strukture tsentral'nykh organov federal'noi ispolnitel'noi vlasti", 30 September 1992, *VSND i VS RF*, 1992, No.41, item 2279.
22. PSMP RF, "Ob utverzhdenii Polozheniia o Ministerstve kul'tury Rossiiskoi Federatsii", 21 January 1993, *SAPP RF*, 1993, No.5, item 390; 9 March 1994, *SAPP RF*, 1994, No.11, item 858. These replaced earlier Statutes, dating from 3 August 1992 (PSMP RF "Ob utverzhdenii Polozheniia o Ministerstve kul'tury Rossiiskoi Federatsii", 3 August 1992, *SAPP RF*, 1992, No.6, item 327). With regard to the staff of the Ministry of Culture RF, see: PSMP RF, "Voprosy Ministerstva kul'tury Rossiiskoi Federatsii", 25 February 1993, *SAPP RF*, 1993, No.9, item 795.

1994 another separate Russian Federal Service for the conservation of cultural treasures (*Federal' naia sluzhba Rossii po sokhraneniiu kul' turnykh tsennostei*) was set up,[23] in the framework of the fight against the illegal exportation of Russian cultural goods, but this was dissolved again as early as 1996, and its powers were transferred to the Ministry of Culture.[24] As a consequence, the Government approved new Statutes for the Ministry of Culture in 1997.[25]

453. On 25 December 1992, the Russian Ministry of the Press and Information suddenly found itself competing with the Federal Information Center of Russia, founded by Presidential edict.[26] This FIC was, among other things, to co-ordinate state policy with regard to the periodical press, information activity, television and radio broadcasts, and to ensure that detailed and accurate information about the course of the reforms in Russia was made available via the press and mass media in a timely fashion and on a large scale. The FIC was given complete control over the electronic media and the ITAR news agency.[27] This was not however to the taste of the Russian parliament. On 29 March 1993, it passed a motion suspending the Edict of 25 December 1992.[28] This suspension was declared constitutional by the Constitutional Court on 27 May 1993.[29]

23. Ukaz Prezidenta RF, "O Federal'noi sluzhbe Rossii po sokhraneniiu kul'turnykh tsennostei", 28 November 1994, *SZ RF*, 1994, No.32, item 3331; PP RF, "Voprosy Federal'noi sluzhbe Rossii po sokhraneniiu kul'turnykh tsennostei", 30 December 1994, *SZ RF*, 1995, No.2, item 156, *Rossiiskaia gazeta*, 17 January 1995.
24. Point 1 Ukaz Prezidenta RF, "O strukture federal'nykh organov ispolnitel'noi vlasti", 14 August 1996, *Rossiiskaia gazeta*, 16 August 1996.
25. PP RF, "Ob utverzhdenii Polozheniia o Ministerstve kul'tury Rossiiskoi Federatsii", 6 July 1997, *Rossiiskaia gazeta*, 22 July 1997.
26. Ukaz Prezidenta Rossiiskoi Federatsii, "O Federal'nom informatsionnom tsentre Rossii", 25 December 1992, *VSND i VS RF*, 1992, No.52, item 3149.
27. See, also, Rasporiazhenie Soveta Ministrov–Pravitel'stva Rossiiskoi Federatsii, 16 February 1993, *Rossiiskaia gazeta*, 2 March 1993. That great importance was attached to this control, is evident from the fact that the head of the FIC was given the status of first vice-premier. According to Poltarinin, appointed head of FIC by El'tsin, the FIC was to support the overburdened Ministry of the Press and Information with regard to policy preparation, the registration of the media, the monitoring of compliance with media legislation, the issuing of licenses for frequencies and publishing activities, etc. (*Izvestiia*, 28 December 1992; *CDPSP*, 1992, No.52, 24).
28. Postanovlenie S"ezda narodnykh deputatov Rossiiskoi Federatsii, "O merakh po obespecheniiu svobody slova na gosudarstvennom teleradioveshchanii i v sluzhbakh informatsii", 29 March 1993, *Rossiiskaia gazeta*, 3 April 1993.
29. PKS RF po delu o proverke konstitutsionnosti postanovleniia deviatogo (vneocherednogo) S"ezda narodnykh deputatov Rossiiskoi Federatsii ot 29 marta 1993, "O merakh po obespecheniiu svobody slova na gosudarstvennom teleradioveshchanii i v sluzhbakh informatsii", 27 May 1993, *VSND i VS RF*, 1993, No. 30, item 1182; *Rossiiskaia gazeta*, 19 June 1993.

In fact, many of the functions of the FIC were also exercised by the Ministry of the Press and Information. According to its Statutes of 18 May 1993 this ministry was, among other things, empowered to draft measures for the development of television and radio broadcasting, for the registration of the electronic media, and for the issuing of broadcasting licenses.[30]

Only at the end of 1993 would the President put the Constitutional Court's decision into effect. The administrations for the written press and the electronic media were again strictly separated through establishing the RF Press Committee on the one hand and the Federal Service for Television and Radio Broadcasting on the other.[31] Exeunt the Ministry of the Press and Information and the Federal Information Center.

454. The main purpose of the RF Press Committee—in 1996 renamed RF State Publishing Committee (*Gosudarstvennyi Komitet RF po pechati*,[32] abbreviated *Goskompechat' Rossii*[33])—was to give shape to state policy relating to the periodic press, book publishing, graphics companies, and the book industry. Furthermore, the Committee was ordered to "protect the freedom of the word and the independence of the press",[34] a provision which has to be understood as a reaction to the earlier policy of censorship.

455. The Federal Service of Russia for Television and Radio Broadcasting (*Federal'naia sluzhba Rossii po televideniiu i radioveshchaniiu*, abbreviated *FSTR Rossii*)[35] was a central body of federal power.[36] According to its Statutes, as approved by the Government on 7 May 1994,[37] this Service had as its basic tasks

30. PSMP RF, "Ob utverzhdenii Polozheniia o Ministerstve pechati i informatsii Rossiiskoi Federatsii", 18 May 1993, *SAPP RF*, 1993, No.21, item 1914. See also Ovsianko 121-123.
31. Ukaz Prezidenta RF, "O sovershenstvovanii gosudarstvennogo upravleniia v sfere massovoi informatsii", 22 December 1993, *SAPP RF*, 1993, No.52, item 5067; *Rossiiskaia gazeta*, 23 December 1993, amended by Edict of 6 April 1999, *Rossiiskaia gazeta*, 8 April 1999. The Statutes of the Ministry for the Press and Information RF of 18 May 1993 were rescinded in execution of this Ukase: PP RF "O priznanii utrativshimi silu nekotorykh normativnykh aktov po voprosam gosudarstvennogo upravleniia v sfere massovoi informatsii", 6 October 1994, *SZ RF*, 1994, No.25, item 2708.
32. Point 1 Ukaz Prezidenta RF, "O strukture federal'nykh organov ispolnitel'noi vlasti", 14 August 1996, *Rossiiskaia gazeta*, 16 August 1996.
33. Rasporiazhenie Administratsii Prezidenta RF i Apparata Pravitel'stva RF, No.2868/1027, 10 December 1996, *Rossiiskaia gazeta*, 18 December 1996.
34. PP RF, "Voprosy Komiteta Rossiiskoi Federatsii po pechati", 3 March 1994, *SAPP RF*, 1994, No.10, item 796.
35. Rasporiazhenie Administratsii Prezidenta RF i Apparata Pravitel'stva RF, No.2868/1027, 10 December 1996, *Rossiiskaia gazeta*, 18 December 1996.
36. This formulation leaves unspecified whether the Service is subject to the executive or the legislative power: see the comment of Baturin, one of the authors of the NMA RF, in *Izvestiia*, 29 December 1993.

such things as coordinating the activities of central and regional state television and radio broadcasting organizations; contributing to the objective informing of the Russian and international communities concerning the political, economic and social-cultural life of Russia; maintaining a consistent state policy in solving production-technical and financial issues; and exercising all competences formerly held by the Ministry of the Press and Information with regard to the electronic media, namely the registration of, and the issuing of broadcasting licenses to, public and private television and radio broadcasters.

456. Five years after the demise of the USSR, cultural policy seemed to finally have a more or less stabilized organizational framework, with one ministry (of Culture), two State Committees (for cinematography, and for the press), one federal service (for radio and television broadcasting)—or in fact two federal services, if one includes the Federal Archive Service. The whole structure was reconfirmed in Presidential Edicts of 9 July 1997,[38] 30 April 1998,[39] and 22 September 1998.[40]

457. However, on 6 July 1999 President El'tsin signed a Decree establishing a Ministry for Press, Television and Radio Broadcasting, and Means of Mass Communications, absorbing the State Publshing Committee and the Federal Service for Television and Radio Broadcasting. The new Ministry was made responsible for the development and implementation of state policy on the mass media, mass communications, and advertising as well as control over the use of broadcast frequencies and upgrading technology.[41] Its Statutes were adopted in September 1999.[42]

458. The last restructuring of the cultural administrations—for the time being—came with the Presidential Edict of 17 May 2000. Under this legislation, the State Committee for Cinematography was liquidated and its functions

37. Postanovlenie Pravitel'stva Rossiiskoi Federatsii, "O Federal'noi sluzhbe Rossii po televideniiu i radioveshchaniiu", 7 May 1994, *SZ RF*, 1994, No.3, item 240; *Rossiiskaia gazeta*, 19 May 1994.
38. Ukaz Prezidenta RF, "O priznanii utrativshimi silu nekotorykh ukazov Prezidenta Rossiiskoi Federatsii i vnesenii izmenenii v strukturu federal'nykh organov ispol'nitel'noi vlasti, utverzhdennuiu ukazom Prezidenta Rossiiskoi Federatsii ot 14 avgusta 1996 g. No.1177", 9 July 1997, *Rossiiskaia gazeta*, 15 July 1997.
39. Ukaz Prezidenta RF, "O strukture federal'nykh organov ispolnitel'noi vlasti", 30 April 1998, *Rossiiskaia gazeta*, 7 May 1998.
40. Ukaz Prezidenta RF, "O strukture federal'nykh organov ispolnitel'noi vlasti", 22 September 1998, *Rossiiskaia gazeta*, 23 September 1998.
41. Ukaz Prezidenta RF, "O sovershenstvovanii gosudarstvennogo upravleniia v oblasti sredstv massovoi informatsii i massovykh kommunikatsii", 6 July 1999, *SZ RF*, 1999, No.28, item 3677. See, also, Ukaz Prezidenta RF, "O strukture federal'nykh organov ispolnitel'noi vlasti", 17 August 1999, *Rossiiskaia gazeta*, 18 August 1999.
42. PP RF, "Voprosy Ministerstva Rossiiskoi Federatsii po delam pechati, teleradioveshchaniia i sredstv massovykh kommunikatsii", 10 September 1999, *Rossiiskaia gazeta*, 15 September 1999.

transferred—notwithstanding loud protests from a number of famous film directors, including Nikita Mikhalkov[43]—to the Ministry of Culture.[44] Within the administration of the Ministry of Culture, a new department on cinematography was created; moreover, an advisory council on cinematography was established with the Ministry of Culture.[45] The Ministry of Culture's Statutes were amended in order to cover its new functions.[46]

459. As the last specifically cultural administration we still have to mention the Russian State Archive Service (*Gosudarstvennaia arkhivnaia sluzhba Rossii*, or *Rosarkhiv* for short), which controls and maintains the country's archives.[47] Since our study concentrates on current cultural creation, and the archives are clearly committed entirely to cultural conservation, this sector will be left out of consideration in what follows here below.

460. These cultural administrations are further assisted by committees of experts, advisory bodies and so forth.[48]

461. Finally, it is self-evident that not only administrations specifically for culture have a role in cultural policy. To some degree the ministries of Finance, Economy, Domestic and Foreign Affairs, the State Committee for Urban De-

43. See, *e.g.*, *Izvestiia*, 23 May 2000; V. Molodtsova, "Vse khotiat svoe kino", *Rossiiskaia gazeta*, 26 May 2000.
44. Ukaz Prezidenta RF, "O strukture federal'nykh organov ispolnitel'noi vlasti", 17 May 2000, *SZ RF*, 2000, No.21, item 2168, *Rossiiskaia gazeta*, 20 May 2000.
45. PP RF, "Voprosy Ministerstva kul'tury Rossiiskoi Federatsii", 16 June 2000.
46. PP RF, "O vnesenii izmenenii i dopolnenii v polozhenie o ministerstve kul'tury Rossiiskoi Federatsii", 2 December 2000.
47. Ukaz Prezidenta RF, "Ob utverzhdenii Polozheniia ob Arkhivnom fonde Rossiiskoi Federatsii i Polozheniia o Gosudarstvennoi arkhivnoi sluzhbe Rossii", 17 March 1994, *SAPP RF*, 1994, No.12, item 878, *Rossiiskaia gazeta*, 24 March 1994; *SZ RF*, 1996, No.15, item 1575; *Rossiiskaia gazeta*, 9 December 1998; PP RF, "Ob utverzhdenii Polozheniia o Federal'noi arkhivnoi sluzhbe Rossii", 28 December 1998, *Rossiiskaia gazeta*, 11 February 1999.
48. Thus the President is assisted by a presidential advisory council for culture and art: Ukaz Prezidenta RF, "Ob utverzhdenii Polozheniia o Sovete pri Prezidente Rossiiskoi Federatsii po kul'ture i iskusstvu i ego sostava", 14 October 1996, *Rossiiskaia gazeta*, 22 October 1996. This council was instituted in execution of Point 2 Ukaz Prezidenta RF, "O merakh po usileniiu gosudarstvennoi podderzhki kul'tury i iskusstva v Rossiiskoi Federatsii", 1 July 1996, *SZ RF*, 1996, No.28, item 3358, *Rossiiskaia gazeta*, 9 July 1996.

    An earlier Russian Language Council attached to the office of the President of the Russian Federation was again dissolved, and the Council for Culture and Art was ordered to assess the likely effectiveness of setting up a committee for the development and dissemination of the Russian language: Ukaz Prezidenta RF, "Ob uporiadochenii sistemy soveshchatel'nykh i konsul'tativnykh organov pri Prezidente Rossiiskoi Federatsii", 23 May 1997, *Rossiiskaia gazeta*, 3 June 1997. With the merger of the Ministry of Culture and the Cinematography committee, the Federal Council of Culture and the Federal Council of cinemas and film business have equally been merged into a Coordination council of culture and cinema.

velopment and Architecture, etc., influence cultural policy, sometimes to a large extent. However, this is not an issue into which we can go more deeply.

462. In brief, then, ten years of administrative reforms in independent Russia has finally lead to a simplified structure, consisting of two governmental administrations (three, if one takes the State Archive Service into account) being involved in the preparation and implementation of Russian cultural policy.[49] The Ministry of Culture has competence over stage and visual arts, fine arts and museums, cinematography, cultural information, cultural conservation and export licensing for works of art; the Ministry for Press, Television and Radio Broadcasting, and Mass Communications over the written news media, the book trade, and the electronic media. The seemingly never-ending process of administrative transformations in the past decade have certainly hindered continuity in conducting the cultural policy, and have certainly disadvantaged the cultural and media sector as a whole in its ongoing quest for structural and occasional support from the state. Yet the end result is certainly more rational than all previous models. And what is even more important, the altered political and economic context has had far-reaching consequences for the functions and tasks of these cultural administrations.

Section 2. Changing the Role of Governmental Bodies

463. In their Statutes both the Ministry for Press, Television and Radio Broadcasting, and Mass Communications and the Ministry of Culture are identified as federal bodies of the executive branch, realizing state policy in their respective fields of competence. Moreover, they have a coordinating task between all federal state bodies of the executive branch in these fields. They cooperate with these federal state bodies, with executive bodies of the subjects of the Federation, with local authorities and social organizations. The Ministries may also establish advisory bodies.

464. The introduction of the market economy has put the direct control of cultural enterprises by the state administration in the shade of aid programs, investment policy and proposals to encourage private investment in the cultural sector by fiscal means, to be developed and implemented by the cultural administrations, each for the sectors of their respective competence. All-embracing control was replaced by systems of registration and licensing of activities in such fields. Just as in the Soviet period, state bodies have an important duty to strengthen the material-technical base of the enterprises, institutions, and organizations, which actively produce or disseminate cultural goods, and also

49. One should mention also the fact that the President received his own advisory body, the Council for Culture and Art with the President of the Russian Federation, Ukaz Prezidenta RF, "Ob utverzhdenii Polozheniia o Sovete pri Prezidente Rossiiskoi Federatsii po kul'ture i iskusstvu i ego sostava", 14 October 1996, *Rossiiskaia gazeta*, 2 October 1996.

to develop and extend of international contacts. Furthermore, government resources continue to underpin the sector.

465. The administrations further play an important role in cultural life through continuing state ownership of hundreds of cultural institutions and enterprises. Both ministries have countless state-owned enterprises, institutions, and organizations, which they manage directly or by way of subsidiary administrative bodies: libraries, houses and palaces of culture, clubs, cinemas, film studios, factories for film equipment, circuses, museums, theaters, state-owned publishing houses, printing works, paper factories and suchlike, the federal and regional state broadcasters. The state bodies each finance the institutions and organizations under them in whole or in part, and monitor the effective use of the funds allocated.

In contrast with earlier times, this economic management no longer takes place within the framework of a state-planned economy, which in the first instance means that these state enterprises have much greater economic (and artistic) autonomy, and moreover that the right of these state bodies to take initiatives is no greater than that of any other natural or legal person. The all-embracing control over cultural life has thus fallen away.

466. Furthermore, there is the new vista of the privatization of cultural enterprises. Remarkably enough, the cultural ministries have been given no role at all in this privatization process. This does not mean that no privatizations can take place in those sectors—only that the cultural administrations have little to say in decisions concerning such privatization. An important component of cultural policy, thus, remains beyond their power.

467. Finally, both Ministries have a duty of formulating proposals concerning the introduction or improvement of a legal framework within which the sector in question is to operate. It is, however, remarkable that in this regard there is no explicit mention of copyright in any of the Statutes, and this in contrast to what was formerly the case.[50]

Section 3. Some Final Remarks

468. From the preceding overview, we can clearly see the extent to which cultural policy in Russia has been prepared (and executed) in a piecemeal fashion. This carries a risk of inconsistencies and inefficient use of resources.

50. In point 5, Statutes of the Ministry of the Press and Information of the Russian Federation of 18 May 1993, the development and implementation of measures concerning the prevention and stopping of illegal uses of objects of copyright and related rights in the sphere of the press and mass information was given as one of its functions, Postanovlenie Soveta Ministrov—Pravitel'stva R.F, "Ob utverzhdenii Polozheniia o Ministerstve pechati i informatsii Rossiiskoi Federatsii", 18 May 1993, *SAPP RF*, 1993, No.21, item 1914.

Not without reason did the Council of Europe advise Russia to centralize the powers with regard to culture in a dynamic, unified Ministry of Culture.[51]

Let us at once add that, in the author's view, it is not an unwelcome development that those in power in Russia have maintained their own cultural administration, namely a Ministry of Culture. It is certainly conceivable that one reaction to the Soviet authorities' totalitarian control of cultural life could have been to liberate art and culture from any form of government interference and to bury the cultural administrations under a mountain of liberal market mechanisms. Thankfully, this did not happen. Culture remains a primary concern of the public sector. The specific interests of the government's cultural institutions will be better promoted by a specialized administration than by other ministries. In this regard, moreover, it is regrettable that the cultural administrations have barely any say in the process of privatization. Even where private economic initiative becomes firmly based in the cultural sectors, structural and/or selective government support remains necessary, especially while sponsoring, patronage, and suchlike are much too weakly developed as alternative sources of financial support.[52]

Finally, this overview of the central cultural administrations should not make us forget that an important part of Russia's cultural policy takes place at the level of the subjects of the Russian Federation.

51. Renard 16-18.
52. *Ibid.*, 14.

Chapter II. Legal and Budgetary Means for Culture-Specific State Intervention

Section 1. The Legal Instruments for Government Intervention

469. Where active government intervention is deemed necessary, the question arises of the legal instruments of which the Russian authorities can make use to implement specifically cultural policy. For a general perspective on this, let us return to the 1992 Fundamentals of Russian Federation Legislation on Culture, discussed above.[1]

470. In many cases, the Fundamentals are completely silent regarding the legal means to be used to achieve particular ends. Mostly, it is limited to a listing of the duties of the authorities, without indicating how these duties are to be carried out. This is done with the simple information that something "is safeguarded by the state"[2] or that "the Russian Federation stimulates [...], guarantees [...], promotes [...], completes [...], supports [... and], extends the possibility [...]".[3] Occasionally, reference is made to other normative acts in which the content, form, and manner of safeguarding, achieving, stimulating, etc. are to be specified in detail.[4]

471. One legal instrument is repeatedly put forward to alleviate the pressure of the market economy on the cultural sector, and that is fiscal measures, whether or not combined with price regulation and measures for the provision of cheap credit. In the Fundamentals on culture, these measures are only formulated as a statement of intent.[5] Putting these into practice through tax legislation was to follow later.[6]

472. Other legal instruments are the priority allocation of capital investments to strengthen and develop the material-technical basis of culture;[7] the charging of low rents by local authorities for the use of halls and spaces made available for studios, workshops, laboratories and suchlike;[8] the exemption of cultural state organizations, non-profit-making private cultural organizations, and creative unions from the obligation to relinquish part of their currency earnings to the authorities, on condition that the currency be used for the statutory purpose of these organizations, for developing of the cultural heritage

1. Zakon RF, "Osnovy zakonodatel'stva Rossiiskoi Federatsii o kul'ture", 9 October 1992, *VSND i VS RF*, 1992, No.46, item 2615. See *supra*, Nos.336 ff.
2. See, *e.g.*, art.26 Fundamentals on culture: "The completeness of the All-Russian library, museum, archive, film, photograph and other analogous collections, the manner of their conservation, functioning and development are safeguarded by the state."
3. Art.27 Fundamentals on culture. *E.g.*, sponsorship in the cultural sphere is "promoted" by granting an honorary diploma: see the procedure for presenting and examining requests for he granting of such diplomas for reason of active well-doing and sponsorship activities in the sphere of culture and art, approved by the Council for Culture and Art with the President RF on 5 June 1999, *Rossiiskaia gazeta*, 1 September 1999.
4. See, *e.g.*, art.33 Fundamentals on culture, which, with regard to the specification of the duty of the authorities to protect new talent, refers to "the state programs for maintaining and developing culture".

or for strengthening the material-technical basis of culture;[9] a regime of price regulation for products of enterprises which produce cultural and informative goods and have a monopoly position on the market for these goods;[10] minimum levels of royalties for authors;[11] unspecified special measures concerning employment and pensions for artists, authors, and cultural workers.[12]

473. The measures mentioned are an attempt by the authorities to stimulate the cultural sphere. This should not let us forget that besides external measures of support and stimulation, the Russian state itself is also an active participant in the cultural sphere as owner of cultural enterprises and institutions. Article 30 Fundamentals on culture provides for the financing of cultural state organizations out of the budget, but, also, for the state participating financially in private organizations. This can be understood as an option for the state to maintain a "cultural" industrial policy, but, also, as a way for the state to retain its power over privatized enterprises working in the cultural sphere through holding the controlling shares.

474. The development of culture also gains from intensive international contacts,[13] not only between states[14] but, also, between cultural enterprises and organizations in different states without government involvement. Such

5. Thus, the Fundamentals on culture accept in principle a lower tax band for the profits of enterprises owned by the creative unions (art.28 para.4); fiscal and price measures to encourage the activity of citizens introducing children to creative and cultural development, to undertaking creative work, to art appreciation and to the crafts (art.30 para.2); tax benefits, combined with credit provision, and the priority transfer of property to encourage the foundation of cultural organizations (art.30 para.2); quotas and import duties on foreign cultural products, a licensing system and differentiated VAT tariffs to protect national cultural products (art.34); a separate method for taxing the profits of non-commercial organizations (art.45 para.5); unspecified tax benefits for enterprises and organizations which financially invest in culture (art.45 para.6); tax benefits and credit provision as a stimulus to private organizations to participate in the creation of new techniques and technologies (art.50 para.2); tax benefits for artists who work with or in specially installed technical equipment, buildings and rooms, as well as for people who dedicate part of their house to a private museum, library or cultural organization open to the public (art.50 para.6).
6. See, *e.g.*, Federal'nyi zakon RF "O vnesenii izmenenii i dopolnenii v Zakon Rossiiskoi Federatsii 'O naloge na dobavlennuiu stoimost'", 1 April 1996, *Rossiiskaia gazeta*, 9 April 1996.
7. Art.48 para.1 Fundamentals on culture.
8. Art.50 para.5 Fundamentals on culture.
9. Art.51 para.2 Fundamentals on culture.
10. Art.52 para.3 Fundamentals on culture. Similar price regulation is not provided for folk-art manufacturers.
11. Art.54 para.6 Fundamentals on culture.
12. Art.55 Fundamentals on culture.
13. On Russia's "cultural diplomacy", see K.N. Mozel', "Rossiia v poiskakh novoi kul'turnoi politiki za rubezhom", *Diplomaticheskii vestnik*, 1995, No.11, 65-70.

cultural exchanges between private individuals are encouraged according to the Fundamentals on culture, but no mention is made of how this encouragement is to occur.[15] In its international cultural policy, Russia gives priority to the joint production of cultural goods; the restoration of unique historic and cultural memorials; training and internships for cultural workers; the creation and the importation of new technologies, technical methods and installations for cultural activities; the exchange of methods, of study programs and textbooks;[16] and permanent cultural contacts with Russians abroad.[17] One of the measures in this policy is government support for the foundation, or actual government foundation, of Russian cultural centers abroad to promote Russian cultural products.[18]

14. See, *e.g.*, the bilateral cultural agreements made by the Russian Federation, both with Western countries (*e.g.*, the Republic of Germany: "Soglashenie mezhdu Pravitel'stvom Rossiiskoi Federatsii i Pravitel'stvom Federativnoi Respubliki Germanii o kul'turnom sotrudnichestve", 16 December 1992, *BMD*, 1993, No.6, 50-57; the Kingdom of Spain: "Soglashenie mezhdu Rossiiskoi Federatsiei i Korolevstvom Ispaniia o sotrudnichestve v oblasti kul'tury i obrazovaniia", 11 April 1994, *BMD*, 1994, No.9-10, 13-16; the United Kingdom of Great Britain and Northern Ireland: "Soglashenie mezhdu Pravitel'stvom Rossiiskoi Federatsii i Pravitel'stvom Soedinennogo Korolevstva Velikobritanii i Severnoi Irlandii o sotrudnichestve v oblasti obrazovaniia, nauki i kul'tury", 15 February 1994, *BMD*, 1994, No.5-6, 21-23), and with other CIS states (*e.g.*, with Ukraine: PP RF "O podpisanii Soglasheniia mezhdu Pravitel'stvom Rossiiskoi Federatsii i Pravitel'stvom Ukrainy o sotrudnichestve v oblasti kul'tury, nauki i obrazovaniia", 24 May 1994, *SZ RF*, 1994, No.7, item 780; and the Republic of Moldova: "Soglashenie mezhdu Pravitel'stvom Rossiiskoi Federatsii i Pravitel'stvom Respubliki Moldova o kul'turnom i nauchnom sotrudnichestve", 17 August 1994, *Diplomaticheskii vestnik*, 1994, Nos.17-18, 27). In the framework of the CIS a multilateral agreement on cultural co-operation was signed at Tashkent on 15 May 1992 by all but one member (Azerbaidzhan) of the CIS ("Soglashenie o sotrudnichestve v oblasti kul'tury", 15 May 1992, *BMD*, 1994, No.6, 12).
15. Art.56 para.2 Fundamentals on culture.
16. Art.57 para.2 Fundamentals on culture.
17. Art.58 Fundamentals on culture.
18. Art.60 Fundamentals on culture. On the establishment of Russian cultural centers abroad, see Ukaz Prezidenta RF "O rossiiskikh tsentrakh nauki i kul'tury za rubezhom", 21 May 1993, *SAPP RF*, 1993, No.21, item 1904, *Rossiiskaia gazeta*, 4 June 1993; PP RF "Ob organizatsii deiatel'nosti rossiiskikh tsentrov nauki i kul'tury za rubezhom", 29 August 1994, *SZ RF*, 1994, No.19, item 2215 (on the status of such cultural centers). See also PP RF "Ob obrazovanii Rossiiskogo tsentra mezhdunarodnogo nauchnogo i kul'turnogo sotrudnichestva", 8 April 1994, *Rossiiskaia gazeta*, 15 April 1994; PP RF "Ob utverzhdenii Polozheniia o Rossiiskom tsentre mezhdunarodnogo nauchnogo i kul'turnogo sotrudnichestva pri Pravitel'stva Rossiiskoi Federatsii", 9 July 1994, *SZ RF*, 1994, No.13, item 1523; PP RF, "Voprosy Rossiiskogo tsentra mezhdunarodnogo nauchnogo i kul'turnogo sotrudnichestva pri Pravitel'stva Rossiiskoi Federatsii", 23 May 1994, *SZ RF*, 1994, No.5, item 493. On the establishing of foreign cultural centers in Russia, see PP RF "Ob utverzhdenii Polozheniia o poriadke uchrezhdeniia i usloviiakh deiatel'nosti inostrannykh kul'turno-informatsionnykh tsentrov na territorii Rossiiskoi Federatsii", 24 July 1995, *SZ RF*, 1995, No.31, item 3133, *Rossiiskaia gazeta*, 10 August 1995.

According to the "Basic guidelines of cultural co-operation of the Russian Federation with foreign countries", approved by the government as a sort of policy priorities plan on 12 January 1995,[19] international cultural co-operation for Russia is "called to contribute to the creation of a favorable climate so that the Russian Federation can successfully undertake foreign policy actions, both multilateral and bilateral, for the growth of mutual understanding and the building of trust between nations". Cultural co-operation is, in other words, seen not so much as a goal in itself, rather as an instrument for further international détente. It is, however, not so certain that the other countries of the CIS also see signs of the dissipation of political tension in such Russian priorities as "supporting the cultural and educational needs of our compatriots abroad, including maintaining their cultural distinctiveness and language, as well as developing contacts with the local intelligentsia",[20] and the promotion of the Russian language abroad (including the "near abroad").[21]

475. The policy options concerning culture are generally formulated in several-year plans, the so-called federal, regional, and local targeted programs.[22] The most important federal programs are the program "Development and Conservation of the Culture and Art of the Russian Federation" (first for the period 1993-1995, extended to 1996, thereafter for the period 1997-1999),[23] which fixed priorities for those sectors resorting under the competence of the Ministry of Culture, the State Committee of Cinematography, the Russian State Archive Service or the Russian State Circus Company, the program "The Support of the State Printers and Publishers of Russia in 1996-2001"[24] and the Program "Concept for the development of the cinematography of the

19. PP RF "Ob osnovnykh napravleniiakh kul'turnogo sotrudnichestva Rossiiskoi Federatsii s zarubezhnymi stranami", 12 January 1995, *SZ RF*, 1995, No.4, item 293. For the draft drawn up by the Ministry of Foreign Affairs, see *Diplomaticheskii vestnik*, 1994, Nos.17-18, 60-61.
20. Point 3 Basic guidelines for cultural co-operation.
21. Point 4 Basic guidelines for cultural co-operation. See also PP RF "Ob utverzhdenii federal'noi tselevoi programmy 'Russkii iazyk'", 23 July 1996, *Rossiiskaia gazeta*, 8 August 1996.
22. Art.29 Fundamentals on culture. See, also, arts.6, 7, 22, 31 para.1, 33, 37, 38, 39, 40, 50 para.1 and 57 para.1. Between 1992 and 1994, the Altai Republic and the Kostroma, Omsk, Pskov, Smolensk and Tver areas developed regional programs for cultural development. Targeted programming was a means to prepare more substantial projects to be financed from local budgets and to request funds from the ministry of Culture. Interestingly, after local administrations approved these programs, the share of local budgets allocated to culture increased, *e.g.*, in the Tver area from 2.3% in 1993 to 4.6% in 1994 (Razlogov *et para.* 55).
23. PP RF "O federal'noi tselevoi program 'Razvitie i sokhranenie kul'tury i iskusstva Rossiiskoi Federatsii (1997-1999 gody)", 19 June 1996, *Rossiiskaia gazeta*, 27 July 1996. See *Cultural Policies in Europe: a Compendium of Basic Facts and Trends: Russia*, Council of Europe, Ch.4.1, at: <www.culturalpolicies.net>.

Russian Federation until 2005".[25] These targeted programs have the form of a government decree but with no normative force. They contain an analysis of the current problems, and indicate the direction in which solutions are sought and what the costs are likely to be. The ambitions apparent in the federal, regional, and local programs are, however, unlikely to be achieved while the state provides the cultural sector with insufficient funds.[26] This is the theme of the following section.

Section 2. Public Cultural Expenditure: Amount and Structure

476. By virtue of the Fundamentals on culture, the federal authorities are obliged to dedicate 2% of their budget to conserving and developing culture, while for the member entities of the Russian Federation this obligation is 6%.[27]

In reality the federal budget of 1993 reserved only 0.34% of planned expenditure to culture, and that of 1994 only 0.52%.[28] For 2000 Culture Minister Vladimir Egorov announced that just 0.54% of the federal budget would be devoted to expenditures on culture.[29] The figure of 2% has not been achieved in any country and has a purely symbolic significance; with current percentages Russia—which still has a very extensive public cultural sector—is still a long way from countries such as Finland (over 1%), France (0.93% in 1994) or Sweden (0.73% in 1990).[30] Furthermore, in the last few years, the financial resources actually allocated to culture have been substantially below the sums earmarked in the budget. Thus, in 1995, the Ministry of Culture only received

24. PP RF "O federal'noi tselevoi program 'Podderzhka gosudarstvennoi poligrafii i knigoizdaniia Rossii v 1996-2001 godakh'", 12 October 1995, *SZ RF*, 1995, No.45, item 4312, *Rossiiskaia gazeta*, 22 November 1995. For an example of a targeted program in the field of cultural heritage, see PP RF "Ob utverzhdenii federal'noi tselevoi programmy 'Sokhranenie i razvitie istoricheskogo tsentra g. Sankt-Peterburga'", 16 May 1996, *Rossiiskaia gazeta*, 7 July 1996.
25. PP RF "O Kontseptsii razvitiia kinematografii Rossiiskoi Federatsii do 2005 goda", 18 December 1997, *Rossiiskaia gazeta*, 3 February 1998.
26. The Government had to admit that this is the case in its annual report for 1994 on the basic guidelines for social policy (PP RF "Ob utverzhdenii Osnovnykh napravlenii sotsial'noi politiki Pravitel'stva Rossiiskoi Federatsii na 1994 god", 6 May 1994, *Rossiiskaia gazeta*, 3 June 1994). At the same time the Government welcomed the beginnings of a market in cultural services, as well as the existence of programs for the development of culture in most regions. The chief priority in the government's social policy is the maintenance of a minimal (*i.e.*, no lower than existing, either in extent or quality) provision of services in a rationalized network of cultural institutions, with simultaneous development of commercial service provision.
27. Art.45 para.2 and 3 Fundamentals on culture. The significance of this provision is naturally limited, since a later federal law, including a budget law, may simply set aside this provision.
28. Renard 24.
29. *RFE/RL Newsline*, Part I, 28 June 1999.
30. Renard 25.

68% of the amount it could have expected according to the budget. In 1997 the financing of culture reached the minimum level of 12% of the approved budget, which deprived many cultural projects of all financing and reduced most budgets below the minimum level,[31] making it even difficult to pay the loans of the staff of the federal cultural institutions. Naturally, the financial crisis makes a consistent and sustained cultural policy almost impossible.[32]

477. For the regional and local authorities, the percentage of 6% is also much too high—2.41% of local and regional expenditure went to culture in 1992, 2.56% in 1993 and 2.68% in 1994[33]—but the 6% rule in any case did not come into immediate effect.[34] We should, however, remark that the trend of the actual percentage is upwards, and that the overall regional and local budget for culture accounts for no less than 4/5 of total government spending on culture. With less than 20% of cultural expenditure coming from the federal budget, the State thus relinquishes primary responsibility for cultural life to the subjects of the Federation. Given, however, that a large share of local tax income has to be passed on to the regional and especially the federal level, and the remainder is generally insufficient to cover local expenditure, local authorities are obliged to apply to the federal Ministry of Finance for subsidies. The granting of these subsidies only takes place after the Ministry of Finance has checked and approved the local or regional budget and its various spending plans (including that for culture). Federal cultural authorities do not participate in this process. Therefore, the allocation of funds for culture in local budgets is in many ways dependent on the Ministry of Finance, which holds no substantial position on cultural policy.[35]

478. If we turn to the structure of the expenditures of the federal Ministry of Culture, it is immediately apparent that the heritage component, relating to museums, libraries, and historic monuments, is preponderant, representing over 55% in 1994. It is also rapidly increasing year by year, due to the inflation of the museum component by current restoration and renovation of buildings. The conservation of historic monuments is, to a great extent, included in the budget allocated to museums and libraries. Moreover, conservation represents between 50% and 70% of 'targeted programs', *i.e.*, 6% to 8% of the total. In order to alleviate this situation, in April 1998 the federal authorities decided to transfer a number of federal museums and historic monuments to the regional and local level.[36]

31. *Cultural Policies in Europe: a Compendium of Basic Facts and Trends: Russia*, Council of Europe, Ch.6.1, at: <www.culturalpolicies.net>.
32. Renard 26.
33. Renard 27.
34. Point 1 PVS RF "O poriadke vvedeniia v deistvie Osnov zakonodatel'stva Rossiiskoi Federatsii o kul'ture", 9 October 1992, *VSND i VS RF*, 1992, No.46, item 2615.
35. Razlogov *et al.* 51; Renard 26-27 and 97.
36. "Chesti mnogo. Deneg malo", *Rossiiskaia gazeta*, 11 November 1998.

The creation component, which concerns new creative work and living artists, receives less than conservation. Performing arts organizations only accounted for 13.3% of total outlay in 1994, and their share is diminishing year by year. In the "Miscellaneous" category, which came to 8.5% in 1994, 6.2% goes towards purchases of works of art of all kinds, and support for cultural events, exhibitions, competitions, and festivals. What could be described as the "non-institutional" sector, thus, receives very little aid.[37]

The largest share of the expenses of the Ministry of Culture goes to the almost 200 cultural institutions under its direct control, including the Russian State Library (the former Lenin Library), the Bol'shoi Theater, the Hermitage Museum and the Tret'iakov Gallery. Almost two-thirds of these institutions are in Moscow or St. Petersburg.[38] Since 1993 the moneys available in each budget year appear to have been much more limited than in the budget forecast. Understandably, the Ministry of Culture has reacted to this financial crisis by giving absolute priority to maintaining the running of its own cultural institutions. This naturally means that other budgeted expenses, such as those for the targeted programs, were hit harder.[39]

479. At a regional and local level, about one-fifth of the available funds are spent on art education and training, about a one-quarter goes to clubs and cultural and recreation centers (to support amateur arts and socio-cultural activities) and another quarter goes to museums and libraries. Here, too, the creation component receives little support. Performance organizations only receive 13.5% of the total.[40]

480. Of the State Committee's budget for film, only 5% goes to distribution, 8% to training, and more than one-half to film production. Within this last category, the share of feature films is growing at the expense of documentaries and animated films.[41] Here, too, the budgetary crisis can be felt: in 1995 the State Committee for Cinematography of the Russian Federation received only 78% of the amount provided for in the budget.[42]

37. Renard 27-28.
38. Renard 29.
39. Razlogov *et al.* 55.
40. Renard 29-30.
41. Razlogov *et al.* 56-57.
42. Renard 88-89.

Chapter III. Government Measures Specific to Culture

Introduction

481. In this section, we will give a brief overview of the most important specifically cultural measures which the Russian authorities have taken in recent decades, often at the request of the cultural sectors or the cultural workers themselves.[1] Individual measures will be left out of consideration,[2] just as will conservation measures. We will concentrate on the general measures relating to current cultural production. These measures can be aimed at the cultural creators, the cultural mediators, or the cultural consumers. This division is adopted for its usefulness as a methodological tool, but in practice measures in each category inevitably have repercussions for the other two. This applies, for instance, to most of the measures aimed at supporting the creative unions, which besides important economic activity in the cultural sector, also provide important material and social support to their members through their funds.

482. The specifically cultural policy of the Russian authorities has to be placed against the background of the deep economic slump, which has also hit the cultural sector during the 1990s. The staff of cultural institutions, such as archivists, librarians, but, also, performing artists such as actors and musicians, are among the lowest paid professional groups,[3] so that on the one hand less qualified staff are attracted; on the other hand, talented young people are drawn to the commercial sector in Russia or to the cultural sector in the West. The increased costs of culture also mean a massive loss of access among lower income groups and the disappearance of cultural availability in the countryside and in the small towns.[4] Finally, a clear commercialization of cultural life has taken place, with less marketable genres as the immediate victims.[5]

Section 1. Support of Creative Artists

483. A first method of encouraging artistic and literary talent is the awarding of prizes. President El'tsin instituted the annual State Prizes of the Russian Fed-

1. G. Onufrienko, "Na pereput'e. Razvitie kul'tury i mekhanizmy vlasti", *Svobodnaia mysl'*, 1991, No.15, 62. See also Hübner 1991, 38-39.
2. Almost all measures with regard to the electronic media are individual measures. Furthermore, the issues involved in the legal status of public as against commercial broadcasters are so specific that they require separate study. Therefore, they will not be discussed here.
3. The salaries of cultural sector employees in 1994 amounted to about 62% of the average salary in Russia. This is not only very low in absolute terms, but is, furthermore, the worst figure for all the so-called "soft sectors" (*e.g.*, health care and scholarly research: 77%; education 71%) (Razlogov *et al.* 58-59).
4. Hübner 1991, 28-29.
5. For a snapshot of the problems in the cultural sector in de USSR in 1991, see Hübner 1991, 23-37; and in 1994 in various Eastern European countries including Russia: J. Neeven and H. Kruyzen, "Culturele catharsis", *Oost-Europa-Verkenningen*, December 1994, No.136, 3-15; G. Snel and G. Groot Koerkamp, "Op de drempel van een nieuwe tijd", *Oost-Europa-Verkenningen*, December 1994, No.136, 16-23.

eration for literature and art, awarded "for the most talented work of literature and art to distinguish itself for innovation and originality that has acquired social recognition and makes a significant contribution to the artistic culture of Russia, and for leading educational activities in the field of literature and art",[6] as well as the Pushkin Prize for poetry, which is awarded to "authors of poetic works, the creation of which continues the finest traditions of Russian verbal arts".[7] The authors and artists concerned have to be proposed by government bodies of the executive power of all levels, enterprises, organizations, and institutions, social associations, study institutions, editorial boards of newspapers and periodicals, and in the case of the Pushkin Prize, by the Jubilee Commission for the Pushkin bicentenary. Although it is the President who awards the prizes, the choice of recipients—both for the State Prizes and the Pushkin Prize—is left to committees of experts whose decision is to be justified according to the stated artistic criteria. The principles of quality and independence in the cultural policy of the Russian authorities come through strongly: in the awarding of artistic prizes, the State has cut the connection between paying the piper and calling the tune.

484. Furthermore, a system of state-awarded stipends has been worked out which should enable some artists to dedicate themselves entirely to their art. For both eminent workers in the fields of culture and art and young talents, 500 stipends have been established[8] for the creation of new works of literary, cinematic, design, architectural, visual, decorative-applied, musical, theater, circus and performance and other arts. A simple individual application does not

6. Ukaz Prezidenta RF, "O Gosudarstvennykh premiiakh Rossiiskoi Federatsii v oblasti literatury i iskusstva", 10 November 1993, *SAPP RF*, 1993, No.46, item 4448, *Rossiiskaia gazeta*, 17 November 1993, amended 9 October 1995, *Rossiiskaia gazeta*, 12 October 1995; Ukaz Prezidenta RF, "Ob uchrezhdenii premii Prezidenta Rossiiskoi Federatsii v oblasti literatury i iskusstva", 10 April 1996, *SZ RF*, 1996, No.16, item 1831; 1997, No.52, item 5913; *Rossiiskaia gazeta*, 3 September 1998; Ukaz Prezidenta RF, "Ob obrazovanii podrazdelenii Administratsii Prezidenta Rossiiskoi Federatsii. Polozhenie ob Otdele Administratsii Prezidenta Rossiiskoi Federatsii po obespecheniiu deiatel'nosti Komissii pri Prezidente Rossiiskoi Federatsii po Gosudarstvennym premiiam Rossiiskoi Federatsii v oblasti literatury i iskusstva", 13 August 1996.
7. Ukaz Prezidenta RF, "Ob utverzhdenii Polozheniia o Pushkinskoi premii v oblasti poezii", 13 September 1994, *SZ RF*, 1994, No.21, item 2303, *Rossiiskaia gazeta*, 17 September 1994.
8. Ukaz Prezidenta RF, "O dopolnitel'nykh merakh gosudarstvennoi podderzhki kul'tury i iskusstva v Rossiiskoi Federatsii", 12 November 1993, *SAPP RF*, 1993, No.46, item 4449, *Rossiiskaia gazeta*, 18 November 1993, amended on 6 January 1999, *Rossiiskaia gazeta*, 19 January 1999; Ukaz Prezidenta RF, "O merakh po usileniiu gosudarstvennoi podderzhki kul'tury i iskusstva v Rossiiskoi Federatsii", 1 July 1996, *SZ RF*, 1996, No.28, item 3358, *Rossiiskaia gazeta*, 9 July 1996. See, also, V. Vishniakov, "Kul'ture dan 'zelenyi svet'", *Rossiiskaia gazeta*, 13 November 1993. For 1994, there were around 600 stipends: N. Uvarova, "Stipendii deiateliam kul'tury i iskusstva", *Kul'tura*, 9 July 1994.

suffice: the candidates have to be nominated by the collective leading bodies of the creative unions, by other associations of cultural and artistic workers, or by the collegiate bodies of experts advising the Ministry of Culture and the Committee for Cinematography, on the basis of applications submitted by the competitors indicating their plans for the creation of new work. The decision is ultimately the Ministry of Culture's, but the criteria to be applied in reaching this decision are not specified.[9]

485. In addition, each year subsidies go to 100 projects concerned with conserving, creating, disseminating, and studying cultural treasures in the fields of literature, visual art and design, architecture, music, choreography, theater or circus arts, film, museum and library science, the crafts and folk arts, education, and scientific research.[10]

Besides these, there are annual prizes for the author or collective authors of the most talented work published in the press and having great social resonance. There also are stipends available for two young journalists to complete work on a socially significant project.[11]

486. Talented "representatives of Russian art" are to be encouraged by providing them with the option of postponing military service.[12] A whole series of individually named artists are to receive lifelong payments on the basis of their exceptional services to the Russian Federation in the fields of culture and art.[13]

487. The awarding of prizes and stipends, in any case, benefits only a small number of creative workers. In supporting the cultural sector, the attention of

9. PP RF, "O gosudarstvennykh stipendiiakh dlia vydaiushchikhsia deiatelei kul'tury i iskusstva Rossii i dlia talantlivykh molodykh avtorov literaturnykh, muzykal'nykh i khudozhestvennykh proizvedenii", 6 May 1994, *SZ RF*, 1994, No.4, item 366.
10. PP RF, "O grantakh Prezidenta Rossiiskoi Federatsii dlia podderzhki tvorcheskikh proektov obshchenatsional'nogo znacheniia v oblasti kul'tury i iskusstva", 9 September 1996, *Rossiiskaia gazeta*, 23 October 1996; Para.4 Ukaz Prezidenta RF, "O merakh po usileniiu gosudarstvennoi podderzhki kul'tury i iskusstva v Rossiiskoi Federatsii", 1 July 1996, *SZ RF*, 1996, No.28, item 3358, *Rossiiskaia gazeta*, 9 July 1996.
11. Ukaz Prezidenta RF, "Polozhenie o premii Prezidenta Rossiiskoi Federatsii v oblasti pechatnykh sredstv massovoi informatsii i o grantakh (stipendiiakh) Prezidenta Rossiiskoi Federatsii dlia podderzhki naibolee znachimykh tvorcheskikh proektov molodykh zhurnalistov", 9 January 1997, *Rossiiskaia gazeta*, 15 January 1997; Rasporiazhenie Pravitel'stva RF, "Polozhenie o grantakh Pravitel'stva Rossiiskoi Federatsii v sfere sredstv massovoi informatsii", *Rossiiskaia gazeta*, 15 June 1996; "Chek pod interesnyi proekt", *Rossiiskaia gazeta*, 31 January 1997.
12. Ukaz Prezidenta RF, "O predostavlenii otsrochki ot prizyva na voennuiu sluzhbu naibolee talantlivym predstaviteliam rossiiskogo iskusstva", 9 June 1993, *SAPP RF*, 1993, No.24, item 2234.
13. Rasporiazhenie Prezidenta RF, "O dopolnitel'nom material'nom obespechenii grazhdan za osobye zaslugi pered Rossiiskoi Federatsiei", 21 November 1996, *Rossiiskaia gazeta*, 3 December 1996.

the authorities is directed primarily not at the creators of art, but at its transmitters, the cultural mediators.

Section 2. Support of Cultural Mediators

§ 1. Intersectoral Measures

488. The creative unions, their cultural and social funds,[14] and their enterprises are supported by the authorities. In the Soviet period, this was initially through measures intended to improve their material-financial basis and their publishing activities and the building of 'houses of creativity';[15] later by tax exemptions, both at the level of the USSR[16] and that of the RSFSR.[17] This support of the creative unions bore witness to a double attitude towards these organizations on the part of the authorities. On the one hand, they are a remnant of the old regime, advocates of Socialist Realism,[18] and preferential treatment is a flagrant breach of the freedom of association, of the freedom of art, and of the principle of equality. On the other hand, they are the only cultural associations which can provide basic material facilities to their members and which have the expertise needed to represent their interests effectively in the future. A number of creative unions now receive state subsidies for their "social and creative needs".[19]

14. A number of creative unions which did not dispose over such funds have since set them up: a Cinematographic Fund of the USSR and various theater funds (Postanovlenie TsK KPSS i SM SSSR, "Ob uluchshenii uslovii deiatel'nosti tvorcheskikh soiuzov", 14 February 1987, *SP SSSR*, 1987, No.16, item 61), the Literary Fund of the Writers' Union of the RSFSR (PSM RSFSR, "Ob obrazovanii Literaturnogo fonda RSFSR i Vserossiiskogo biuro propagandy khudozhestvennoi literatury Soiuza pisatelei RSFSR", 22 March 1988, *SP RSFSR*, 1988, No.10, item 41) and the USSR Photographers' Union's Fund for photographic art (PSM SSSR, "Voprosy Soiuza fotokhudozhnikov SSSR", 26 July 1990, *SP SSSR*, 1990, No.18, item 95).
15. Postanovlenie TsK KPSS i SM SSSR, "Ob uluchshenii uslovii deiatel'nosti tvorcheskikh soiuzov", 14 February 1987, *SP SSSR*, 1987, No.16, item 61.
16. Ukaz Prezidenta SSSR, "O pervoocherednykh merakh po sotsial'no-ekonomicheskoi zashchite deiatelei literatury i iskusstva v usloviiakh perekhoda k rynochnym otnosheniiam", 14 February 1991, *VSND i VS SSSR*, 1991, No.8, item 191, *Pravda*, 15 February 1991, *Izvestiia*, 15 February 1991. For commentary, see "I rublem podderzhat' kul'turu", *Izvestiia*, 15 February 1991; Hübner 1991, 41-42.
17. PPVS RSFSR, "O merakh po sotsial'no-ekonomicheskoi zashchite kul'tury i iskusstva v usloviiakh perekhoda k rynochnym otnosheniiam", 19 April 1991, *VSND i VS RSFSR*, 1991, No.17, item 522. The request for tax exemptions was later repeated by the creative unions, see, *e.g.*, "Mikhail Ul'ianov: 'My popali v ekonomicheskii taifun...' ", *Kul'tura*, 14 November 1992, and A. Glagolev, "Kak vybrat'sia iz dolgovoi iamy?", *Kul'tura*, 3 April 1993 (Union of theater workers).
18. M. Chechodaeva, "Edinomyslie ne sostoialos'", *Kul'tura*, 25 January 1992.
19. Rasporiazhenie Pravitel'stva RF, 17 May 1996, *Rossiiskaia gazeta*, 23 May 1996; Rasporiazhenie Pravitel'stva RF, 1 December 1997, *Rossiiskaia gazeta*, 11 December 1997.

489. The *fiscus* also provides an instrument to encourage private investment in the cultural sector. Thus, an Edict of 12 November 1993 provided for exemption from taxes on company profits for up to 5% of the profits of enterprises (3% for banks and insurance companies) for gifts to *state* institutions and organizations for culture and art, cinematography, archive services, to creative unions and other associations of creative workers.[20] This Edict also provided for the refunding to the creative unions and their local sections of VAT paid by the enterprises of the creative unions, on condition that these funds are used for the social and creative needs of the union concerned.[21]

Still, the main obstacle for successful public-private collaboration on an institutional level remains the absence of *real* economic incentives (tax shelter) for sponsors and even charities. The provisions in the Law on Charities (limited to 1% of the profits) are clearly insufficient.[22]

490. In a later Edict, a number of explicitly named state institutions and organizations were granted exemption from the forced sale of part of the foreign currency earnings from their economic activities, on condition that the thus-exempted currency was used for the development and strengthening of their material-technical base.[23]

491. Finally, the Russian authorities approved and gave financial and fiscal support to the establishment of a number of new cultural funds operating independently of the existing creative unions.[24]

20. Ukaz Prezidenta RF, "O dopolnitel'nykh merakh gosudarstvennoi podderzhki kul'tury i iskusstva v Rossiiskoi Federatsii", 12 November 1993, *SAPP RF*, 1993, No.46, item 4449, *Rossiiskaia gazeta*, 18 November 1993. This Edict further provides for subsidization of transport expenses for the State Circus, and recommends local authorities to provide beneficial rates for rents and council services to cultural organizations, creative unions, their enterprises, archive services, film organizations etc. For the prior history to the fiscal measure introduced by this Presidential Edict, see, *inter alia*, L. Kononova, "I kul'turu spasti, i biudzhet ne rastriasti", *Kul'tura*, 1 August 1992; G. Onufrienko, "Davaite delat' to, chto mozhem (razmyshleniia o kul'ture)", *Kul'tura*, 30 April 1993. For the application of all these measures in Moscow, see, *inter alia*, PP Moskvy, "O realizatsii Ukaza Prezidenta Rossiiskoi Federatsii ot 12 noiabria 1993 g.", *Vestnik merii Moskvy*, 1994, No.13, item 19.
21. Almost a year after this Edict was issued, the Presidents of all the creative unions complained in an open letter to President El'tsin that the Ministry of Finances had refused to put this order into effect ("Minfin protiv kul'tury", *Kul'tura*, 15 October 1994).
22. *Cultural Policies in Europe: a Compendium of Basic Facts and Trends: Russia*, Council of Europe, Ch.7.2., at: <www.culturalpolicies.net>.
23. Ukaz Prezidenta RF, "Ob osvobozhdenii federal'nykh uchrezhdenii i organizatsii kul'tury i iskusstva, kinematografii, arkhivnoi sluzhby, tsirkovykh predpriiatii i organizatsii ot obiazatel'noi prodazhi chasti valiutnoi vyruchki", 27 June 1994, *Rossiiskaia gazeta*, 30 June 1994.

§ 2. Sector-Specific Measures

492. A whole series of measures have been targeted at the economic support of specific cultural sectors. We will briefly discuss them here. The electronic media sector will not, however, be dealt with at this juncture. A good case can be made that a separate, in-depth investigation would be necessary to do justice to the complexity of the sector-specific issues, including technical issues, as well as the fact that those to whom such measures are addressed are very few in number, and measures of external economic aid (which can certainly be justified for these expensive media by the need to stimulate the plurality and the quality of cultural production) are, more so than in the other sectors, intertwined with issues of ownership (and thus control) of the broadcasters and the guarantees of the independence of program makers.

2.1. The Written Press and the Publishing Industry

493. A large part of the publishing and printing trade in Russia is suffering an acute economic depression due to a combination of the enormous increase in production and distribution costs, and the collapsing demand for books, newspapers, and periodicals resulting from the great fall in purchasing power among the populace. Especially since the financial crisis of August 1998, the private publishing sector has been going through a deep crisis.

With regard to *production costs* the first point to be made is the lamentable state of the supply firms, such as paper factories and graphics companies. Russian paper mills are in no position to deliver quality (limited assortment), their obsolete plant produces ever less, and part of the privatized enterprises are owned by foreigners who export the paper produced. As a result, expensive foreign currency must be laid out to import paper.[25] The printing companies are still very largely state-owned.[26] They maintain *de facto* regional monopo-

24. See, *e.g.*, PSM SSSR, "O deiatel'nosti na territorii SSSR sovetsko-amerikanskogo fonda 'Kul'turnaia initsiativa'", 23 February 1989, *SP SSSR*, 1989, No.13, item 42 and PP RF, "O Mezhdunarodnom nauchnom fonde i Mezhdunarodnom fonde 'Kul'turnaia initsiativa'", 26 May 1994, *SZ RF*, 1994, No.5, item 498 (International Fund 'Cultural initiative'); PP RF, "Ob obrazovanii Fonda natsional'no-kul'turnogo vozrozhdeniia narodov Rossii", 25 May 1994, *SZ RF*, 1994, No.6, item 608. See also Rasporiazhenie Pravitel'stva RF, 12 August 1994, *SZ RF*, 1994, No.17, item 2008 (Fund for national and cultural renaissance of the peoples of Russia); Rasporiazhenie Prezidenta RF, 4 July 1994, *SZ RF*, 1994, No.11, item 1282, *Rossiiskaia gazeta*, 9 July 1994 (Russian Fund for Culture); Postanovlenie Soveta Federatsii Federal'nogo Sobraniia RF, "Ob obrashchenii Soveta Federatsii Federal'nogo Sobraniia Rossiiskoi Federatsii k Pravitel'stvu Rossiiskoi Federatsii, organam gosudarstvennoi vlasti sub"ektov Rossiiskoi Federatsii 'O podderzhke initsiativy Mezhdunarodnoi blagotvoritel'noi programmy 'Novye imena'", 12 July 1994, *Rossiiskaia gazeta*, 23 July 1994 (International charitable program 'New names').

25. M. Gurevich, "Kniga—istochnik trevog", *Rossiiskaia gazeta*, 30 August 1995 (interview with I.D. Laptev, President of the RF Commission concerning press affairs since July 1995).

26. *Supra*, No.440.

lies, which enable them to hike up the prices for their services and products exorbitantly.[27]

With regard to *distribution costs*, reference must be made to the sharp rise in postal charges and in the cost of transport, which is so vital in Russia. Currently, books hardly circulate outside the town where they are published, and the central newspapers can barely manage to distribute issues throughout the country. At the level of distribution, privatization has led to the disappearance of many bookshops.

Finally, there is the *reduced demand* for books, newspapers, and periodicals resulting from the falling purchasing power of the average Russian.[28] Raising the price of the newspaper or periodical is therefore no solution for rising costs, and advertising revenue can only partly make up the shortfall.[29]

494. Increased production and distribution costs on the one side, and falling demand on the other, have led to a sharp decline in the print-runs of newspapers and magazines, and to a fall in the number of titles and the print-run of books.[30] Furthermore, the disastrous state of the supply companies, but, also, the financial position of the news media, have led to repeated interruptions in the periodicity of magazines and newspapers, sometimes lasting days, sometimes weeks, even months.[31]

27. See, *e.g.*, "Proshchaite glasnost', svoboda slova i voobshche pechat'" *Izvestiia*, 13 December 1991. Increasingly, Russian editions are being printed abroad (particularly in Finland), and shipped back to Russia: N. Vachurina, "Monopolii biurokratov konkurenty ne trebuiutsia", *Rossiiskaia gazeta*, 1 June 1995 (interview with M. Poltoranin, President of the State *Duma* Commission for information policy and communication). In 1998, 56% of Russian magazines and 15% of newspapers were printed abroad (*RFE/RL Newsline*, Part I, 19 October 1998).
28. In 1993, subscriptions to daily newspapers were at 52% of 1992 levels, and those to monthlies and weeklies at 32% (Razlogov *et para.* 124).
29. In December 1992, advertising revenue had outstripped subscription income at 8 of the 15 biggest newspapers and magazines: *Moskovskie Novosti*, 31 January 1993; *CDPSP*, 1993, No.5, 24. The publicity departments of the Russian newspapers and magazines are often run in co-operation with a Western advertising agency: L.P. Michel, "Moskau Goes West. Kapitalistische Werbung in sowjetischen Medien", *Medium*, 1990, No.2, 60-62.
30. The circulation of most newspapers and magazines has collapsed in recent years. Thus, *Trud* still had a print-run of 21.5 million in 1990, which had fallen to 1.5 million in 1995; in the same period *Izvestiia* fell from 10.5 to 0.8 million, *Argumenty i Fakty* from 33.2 (with mention in *The Guinness Book of Records*) to 4.2 million (Skorov 29-30). According to official figures (PP RF, "O federal'noi tselevoi program 'Podderzhka gosudarstvennoi poligrafii i knigoizdaniia Rossii v 1996-2001 godakh'", 12 October 1995, *SZ RF*, 1995, No.45, item 4312, *Rossiiskaia gazeta*, 22 November 1995), only 62% as many different books and brochures appeared in 1994 as in 1990, the collective print-run was only 35%, and the total number of pages 45%. Even between 1993 and 1994, the central (local) newspapers lost 60 (19)%, and magazines 65 (12.5)% of subscribers. See, also, V. Babenko, "Book economy in Russia and the effects of an imperfect book policy", in C. Keane, (ed.), *Legislation for the book world*, Council of Europe publishing, 1997, 323-328.

495. For the sake of completeness, we must here mention that even in the heavily hit sector of books, newspapers, and periodicals, a number of subsectors have successfully adapted to market conditions. A number of new privately-owned book publishers make fast profits with translations of old foreign bestsellers in the crime and fantasy genres, management handbooks, and erotic literature.[32] On the other hand, specialized academic literature, books for small ethnic groups, textbooks, and children's literature are going through difficult times.[33] In the magazine world, publications specializing in economic information manage to appeal to a specialized readership with purchasing power.[34]

496. The overall view is, however, gloomy, so that the call for state aid grows louder. The state itself (and initially the CPSU) stood to benefit from aiding publishers and in particular the news media, once *glasnost'* and *perestroika* had been instigated from above, and the establishment of a civil society with a pluriform press as one its most important elements proclaimed a policy program.

497. In the first years of *perestroika*, state aid was largely directed towards improving the planned economy,[35] and to subsidizing needy companies or loss-making publications.[36] The subsidies first went to publications for children and young people, and to cultural, academic, medical, and educational periodicals; what was left went to general magazines and newspapers.[37] The distribution of the funds took place on the basis of an expert inquiry carried out by economists, considering the print-run, the stability of the subscription

31. Various printed media have at some time been unable to pay their electricity and/or telephone bills, so that power and telephone connections were shut off. In the first six months of 1995, 1520 titles were hit by temporary delays in publication due to financial problems or supply problems with basic raw materials such as paper or ink at the printing works (Skorov 29-30).
32. Thus, in 1992, the works of Agatha Christie were published in a run of 2.3 million, those of Alexandre Dumas even in a run of 9.5 million (G. Onufrienko, "Davaite delat' to, chto mozhem (razmyshleniia o kul'ture)", *Kul'tura*, 30 April 1993). See, also, N. Condee and V. Padunov, "Perestroika Suicide: Not By *Bred* Alone", *New Left Review*, 1991, No.189, 80-85, who speak of "de-elitizing the cultural consumption". Between 1989 and 1993, the number of books translated into Russian rose by 327%, and the print-runs of translated works rose by 260%. Literature in English makes up over one-half of the titles translated and one-third of the print run (Renard 80).
33. G. Onufrienko, "Davaite delat' to, chto mozhem (razmyshleniia o kul'ture)", *Kul'tura*, 30 April 1993.
34. Skorov 30-31.
35. See, *e.g.*, PSM SSSR "O merakh po dal'neishemu uluchsheniiu dostavki periodicheskoi pechati naseleniiu, ukrepleniiu material'no-tekhnicheskoi bazy gazetno-zhurnal'nogo proizvodstva, ekspedirovaniia i dostavki periodicheskikh izdanii", 22 August 1987, *Svod zakonov SSSR*, vol.8, 412-413; PVS RSFSR, "O sostoianii i perspektivakh razvitiia material'no-tekhnicheskoi bazy respublikanskikh sredstv massovoi infomatsii RSFSR", 27 February 1991, *VSND i VS RSFSR*, 1991, No.10, item 259.

base, and the frequency of publication, although these criteria were nowhere mentioned in the legislation itself. The subsidy took the form of compensation for the costs of paper and printing and sometimes for part of the distribution costs.[38] The ultimate decision belonged to the Minister for the Press,[39] who used the possibility of selective subsidization to reward newspapers loyal to the government and to punish others.[40]

498. Gradually, the realization dawned that only de-monopolization of the supply and distribution firms could bring down the costs of the printed press and the publishers[41] and that the market had to be allowed greater play.[42] In the printed media itself, arguments were put forward for general fiscal measures and measures to stimulate the creation of financial structures prepared to invest money in newspapers at their conversion to joint-stock companies,[43] but the authorities seemed reluctant to abandon direct subsidization of the media, albeit only as a means of rewarding the working out of a financial plan for the economic transfer of the medium.[44]

499. The draft of a federal law on state support of the news media and book publishing which was adopted by the State *Duma* at its first reading, retained the system of state orders, *i.e.*, whereby the state would place orders for a

36. Thus, subsidies were granted to those press organs which maintained permanent foreign correspondents (PPVS RSFSR, "O korrespondentskikh punktakh rossiiskikh gazet v zarubezhnykh stranakh", 21 October 1991, *VSND i VS RSFSR*, 1991, No.44, item 1462), or for the publishing of children's literature and study books (Postanovlenie Soveta Natsional'nostei Verkhovnogo Soveta RSFSR, "O gosudarstvennoi podderzhke vypuska uchebnoi, detskoi i nekotorykh vidov khudozhestvennoi literatury i literaturno-khudozhestvennykh izdanii na iazykakh narodov RSFSR na period stabilizatsii rynka (1992-1993 gody)", 25 December 1991, *VSND i VS RSFSR*, 1992, No.4, item 144; Ukaz Prezidenta RF, "O dopolnitel'nykh merakh pravovoi i ekonomicheskoi zashchity periodicheskoi pechati i gosudarstvennogo knigoizdaniia", 20 February 1992, *VSND i VS RF*, 1992, No.9, item 441).
37. *Izvestiia*, 21 April 1992; *CDPSP*, 1992, No.16, 26-27.
38. *Izvestiia*, 26 August 1993; *CDPSP*, 1993, No.34, 27-28. In 1992, 511 publications were subsidized: *Nezavisimaia gazeta*, 9 February 1993; *CDPSP*, 1993, No.7, 31-32.
39. See, also, PVS RF, "Ob ekonomicheskoi podderzhke i pravovom obespechenii deiatel'nosti sredstv massovoi informatsii", 17 July 1992, *VSND i VS RF*, 1992, No.31, item 1838; Ovsianko 123.
40. R. Koven, "Media laws in Eastern Europe: the meddler's itch", *Conference for Security and Cooperation in Europe. Office for Democratic Institutions and Human Rights. Bulletin*, 1995, 11.
41. See, also, PVS RF, "Ob ekonomicheskoi podderzhke i pravovom obespechenii deiatel'nosti sredstv massovoi informatsii", 17 July 1992, *VSND i VS RF*, 1992, No.31, item 1838.
42. *E.g.*, purchase of school books on the free market: PP RF "O merakh po obespecheniiu uchebnoi literaturoi obrazovatel'nykh uchrezhdenii", 2 July 1994, *SZ RF*, 1994, No.11, item 1297.
43. *Izvestiia*, 26 August 1993; *CDPSP*, 1993, No.34, 27-28.
44. This policy should lead to a drop in the number of subsidized publications: *Nezavisimaia gazeta*, 9 February 1993; *CDPSP*, 1993, No.7, 31-32.

guaranteed number of copies of newspapers or books for the needs of the state (*e.g.*, for libraries), or cheap investment credit was provided to printers or the news media, or credits were provided for the publication of literature for the needs of the state.[45] Furthermore, provision was made for setting up a National Fund for the development of the news media, the most important function of which was to be the accumulation and investment of funds for the development of the material-technical base of the news media and the book trade.[46] The media however feared a return to arbitrary and increased state control,[47] and the federal legislator apparently responded to such fears, since in the Law on state aid to the news media and book publishers of the RF as finally passed on 1 December 1995,[48] the sections on state orders and the National Fund for the development of the news media had been dropped. For the period 1996-1998 (later prolonged to 1 January 2002), the only remaining measures of support for the news media (including press agencies and partially the electronic media), book publishers and printers, were a few (generally neutral) fiscal benefits,[49] as well as reduced rates for transport and post, exemption from the obligation to exchange foreign currency profits made from the sale of educational, academic, or cultural books, newspapers and magazines, or radio and video products for rubles, on condition that these currency profits were used to modernize the

45. According to official figures, 47 milliard rubles were spent in 1994 to publish 830 titles of school books, 1287 academic publications, 147 dictionaries and reference works. In total the government supported 2,230 publications by 253 Russian publishers: see above No.1003, note 67.
46. "Proekt Federal'nogo Zakona "O gosudarstvennoi podderzhke sredstv massovoi informatsii i knigoizdaniia Rossiiskoi Federatsii", *Rossiiskaia gazeta*, 2 November 1994. For an earlier draft, see: "Proekt Federal'nogo Zakona "O gosudarstvennoi podderzhke sredstv massovoi informatsii Rossiiskoi Federatsii", *Rossiiskaia gazeta*, 18 June 1994 (drawn up by the RF State *Duma*'s Commission for information policy and communication).
47. See, *e.g.*, E. Rodnevskaia, "Gazety s molotka?", *Rossiiskaia gazeta*, 25 October 1994; I. Iakovenko, "O svobode real'noi i mnimoi", *Kul'tura*, 6 August 1994.
48. Federal'nyi Zakon RF, "O gosudarstvennoi podderzhke sredstv massovoi informatsii i knigoizdaniia Rossiiskoi Federatsii", 1 December 1995, *SZ RF*, 1995, No.49, item 4698, *Rossiiskaia gazeta*, 5 December 1995, as amended by Federal Law of 22 October 1998, *Rossiiskaia gazeta*, 24 October 1998.
49. See, also, Federal'nyi Zakon RF, "O vnesenii izmenenii i dopolnenii v otdel'nye zakony Rossiiskoi Federatsii o nalogakh", 30 November 1995, *Rossiiskaia gazeta*, 6 December 1995, as amended on 16 November 1998, *Rossiiskaia gazeta*, 18 November 1998; PP RF, "O poriadke predostavleniia tarifnykh l'got na osnovanii Federal'nogo zakona o vnesenii dopolneniia v Zakon Rossiiskoi Federatsii o tamozhennom tarife", 11 April 1996, *Rossiiskaia gazeta*, 17 April 1996. See, also, the relevant orders of the state tax service and the State Excise Committee RF of 22 January 1996 and 24 January 1996 respectively, both published in *Rossiiskaia gazeta*, 31 January 1996, the undated clarification of the state tax service in *Rossiiskaia gazeta*, 17 April 1996, and the clarification of the State tax inspectorate on the application of tax benefits with regard to the mass media and book production on 7 June 1996, *I.S.*, 1996, Nos.7-8, 77-79.

infrastructure of production of said products (until 1 January 1999),[50] reduced rents on the use of rooms in federally owned buildings,[51] and all this irrespective of the form of ownership of the enterprise concerned.[52] These measures were further elaborated and complemented by similar laws of several subjects of the Russian Federation.[53]

500. In this way, the Russian authorities seemed to discard those types of support that allowed the privileging of individual publications favorable to the government. By opting for a system of generally neutral measures, the Russian authorities act in greater accordance with the principles of free expression and economic activity.

501. This positive development does, however, have to be put in perspective. The attempt to revive state control of the central printed media may have failed at that time, but a week before the Law of 1 December 1995 (discussed above) was passed, a Federal Law on economic aid for regional and city newspapers was adopted.[54] This law cast the system of federal state aid to local newspapers in the form of a system of subsidies[55] for the development of the material-technical base and for the payment of production and distribution costs. These subsidies are only granted to those newspapers included in a Federal register of regional and city newspapers. The decision concerning inclusion in the register lies with the Russian government, on proposal by regional committees composed of representatives of the legislative and executive power of the subjects

50. Such an exemption already existed for press agencies: Ukaz Prezidenta RF, "Ob osvobozhdenii Informatsionnogo telegrafnogo agentstva Rossii i Rossiiskogo informatsionnogo agentstva 'Novosti' ot obiazatel'noi prodazhi chasti valiutnoi vyruchki, postupaiushchei ot rasprostraneniia informatsii i uslug", 22 November 1994, *Rossiiskaia gazeta*, 30 November 1994.
51. See, also, PVS RF, "Ob ekonomicheskoi podderzhke i pravovom obespechenii deiatel'nosti sredstv massovoi informatsii", 17 July 1992, *VSND i VS RF*, 1992, No.31, item 1838.
52. For a first commentary on this Law, see the introductory article of M.V. Shishigin in M.V. Shishigin and I.P. Mateichuk, (eds.), *Pravovaia zashchita pressy i knigoizdaniia. Sbornik normativnykh aktov*, Moscow, Izd. Norma, 1996, V-XI. This compilation also contains the texts of all relevant legal acts granting the said privileges to the mass media (see in particular 50-237).
53. See, *e.g.*, Decree No.970 of the Government of Moscow of 10 December 1996, the Law of 16 July 1996 of Altai, and comparable bills of Rostov and St. Petersburg of 1996, all containing measures on the support of mass media and book publishing, and the texts of which were published in *Zakonodatel'stvo i praktika sredstv massovoi informatsii*, February 1997.
54. Federal'nyi Zakon RF, "Ob ekonomicheskoi podderzhke raionnykh (gorodskikh) gazet", 24 November 1995, *SZ RF*, 1995, No.48, item 4559, *Rossiiskaia gazeta*, 29 November 1995, amended by Federal Law of 2 January 2000, *Rossiiskaia gazeta*, 6 January 2000.
55. A maximum level of subsidization was set, expressed as a percentage of the real costs of printing, paper and post, going from 50% for newspapers in regional urban centers to 80 and 90% for regional or urban papers in the Far North, the Far East or the North Caucasus.

of the RF, of regional branches of the Journalists Union, and of social associations. An important limitation is that only one newspaper can be entered in the register for each region or city.[56] In the case of more than one application for subsidization, the elected organs and the heads of local self-government of the region or city together with the regional branches of the Journalists Union select one of the competing newspapers, taking the following criteria into account: largest print-run, the support of the readers, and the distribution of the print-run over the largest area of the region.[57]

Even though article7 (1) of this Law clearly states that there can be no intervention on the part of organs of state power or organs of local self-government in the professional activities of these newspapers during the allocation of the subsidies, many questions can be raised concerning the selection procedure, the competition criteria, and the composition of the organs, which propose newspapers for subsidization. Countless manipulations seem possible. The political goal of this legislation seems to be to encourage a number of alliances between the local authorities and the press and the creation of a pool of regional media, which can be controlled by the federal authorities, which at the same time disadvantages the independent regional press.[58] One should not forget that in the battle for readers, it is precisely the high distribution costs of the national press, which works to the advantage of the regional press. Furthermore, in such a large country, local coverage has a particular appeal. So there is no call for surprise at the fact that the circulation of the regional press has fallen far less sharply, and that it plays an increasingly large role in the shaping of public opinion. However, Russia's financial crisis of August 1998 seriously hit the privately owned local press that was unable to react effectively by lack of managerial experience, lack of cash, and a serious drop in advertising revenues.[59]

502.Let us finally remark that a few central newspapers and magazines are still directly financed by the authorities, which puts the issue of possible unfair competition in a particularly sharp light.[60] Moreover, in the Russian

56. On average, 30 to 40 local newspapers are published on the territory of each "subject of the RF" (Skorov 36).
57. No subsidies can be given to newspapers of political parties and movements, or the specialized, informative, recreational, advertising and erotic press, and newspaper digests.
58. A. Nivat, "The Vibrant Regional Media", *Transition*, 18 October 1996, 66-69; Skorov 36. According to a study published at the end of 2000 on the state of media freedom in 87 of the 89 regions of Russia "each region violates media freedom differently, but each of them does so" (*RFE/RL Newsline*, Part I, 26 January 2001). Moreover, one should note that local authorities own significant chunks of the regional press, *e.g.*, 45% in the Adygei Republic, 52% in Dagestan, 53% in Kalmykia, and 33% in Karelia (*RFE/RL Newsline*, Part I, 1 March 1999).
59. P. Goble, "Russia's financial crisis threatens regional press", *RFE/RL Newsline*, Part I, 22 October 1998.

Security Council's new information security doctrine it is stated that Russia's state-owned media must be consolidated and expanded.[61]

503. To complete our picture, of the measures of support, we must refer to the five year plan for the support of state-owned printing companies and book publishers which the Government approved on 12 October 1995,[62] which provided for the prioritization of the granting of subsidies for the publication of children's and school books on the one side,[63] and on the other the production of art books and books of high intellectual or academic value (*e.g.*, a new Great Russian Encyclopedia).

504. All this enables us to conclude that on the one hand there has been an entirely favorable development towards the fixing of general benefits for the whole sector, but that on the other hand no clear criteria for direct government aid have been laid down in such a way as to exclude discrimination on, for instance, political grounds in the allocation of subsidies.[64] With regard to the subsidization of book production, it is to be applauded that priority has been given to socially vulnerable publications.

2.2. Film

505. Film production is—certainly in times of rapidly rising production costs—an activity, which devours capital, and requires a high-quality technological infrastructure. There is little money for such investments in Russia's antiquated film industry, so that total production of films has been halved in a few years time,[65] according to one source even decimated.[66] According to press reports,

60. The clearest example is the *Rossiiskaia gazeta*, a newspaper first published by the Supreme Soviet, and after the dissolution of parliament in the autumn of 1993 by the government of the RF (PSMP RF, "O pravopreemstve polnomochii Verkhovnogo Soveta Rossiiskoi Federatsii v otnoshenii sredstv massovoi informatsii", 23 September 1993, *SAPP RF*, 1993, No.39, item 3632), and which contains an 'official part' in which the most important laws and decrees are published. See also PP RF "o redaktsii 'Rossiiskoi Gazety'", 23 October 2000, *Rossiiskaia gazeta*, 5 November 2000.
61. "Doktrina informatsionnoi bezopasnosti Rossiiskoi Federatsii", *Rossiiskaia Gazaeta*, 28 September 2000.
62. PP RF, "O federal'noi tselevoi program 'Podderzhka gosudarstvennoi poligrafii i knigoizdaniia Rossii v 1996–2001 godakh'", 12 October 1995, *SZ RF*, 1995, No.45, item 4312, *Rossiiskaia gazeta*, 22 November 1995.
63. At present, school books are provided free, *i.e.*, at the state's expense.
64. It is also remarkable that in Russia the discussion concerning direct aid to the media is not conducted in terms of supporting a range of views in the media, assuring that all important points of view are represented in the press, including the media of political minorities which cannot attract enough readers to be profitable.
65. According to Renard, 87, 200 films were produced in 1992, 140 in 1994, and in 1995 probably between 76 and 80.
66. That is, from 300 film dramas in 1991 to 29 in 1994 (T. Bulkina, "Kolechko zolotoe, buket iz alykh roz", *Rossiiskaia gazeta*, 21 June 1995), and 20 in 1997, then increasing again slowly (*Cultural Policies in Europe: a Compendium of Basic Facts and Trends: Russia*, Council of Europe, Ch.4.2.9., at: <www.culturalpolicies.net>).

82 feature films were made in Russia in 1994, as against 137 in 1993.[67] The strong decline in total numbers has everything to do with the fact that private investors, whose backing was responsible for over 100 films in 1993, have lost their naive assumption that films are a way of making a quick buck and have withdrawn from film production.[68] The number of full-length feature films subsidized by the state is, however, increasing (26 in 1993, 32 in 1994), so that films financed by the state have risen strongly as a proportion of total production (from 11% in 1992 to 30% in 1994).[69]

A further disturbing development for the Russian film industry is the almost total severing of the connection between film production (which takes place federally), film distribution (in large regional distribution structures), and film screening (in the local cinema network). Russian films barely make it to the cinema screens. The cost of making a copy of an original film for cinema screening is now so high that a run of 70 copies has become exceptionally large, where once a run of 1700 to 1800 copies of one film was not unusual.[70] At the same time, the Russian market and the cinemas are awash with cheap foreign films, generally pirated copies of American "B" films.[71]

The reduced purchasing power of the populace, tickets becoming more expensive all the time, the increasing feeling of insecurity on city streets, and the shrinking number of cinemas[72] has drastically reduced the number of cinema-goers: from 2.5 billion visits in 1991 to 280 million in 1994.

This drastic shrinkage of the Russian film industry has naturally hit the film makers themselves. Many directors can no longer find work because of the crisis.[73] Furthermore, the Film Makers' Union is in financial crisis and has had to screw back social provision for its members.[74]

67. Documentaries and animated films are hardly made at all any more: Renard 88.
68. A. Vystorobets, "Fil'my est', a smotret' ikh negde", *Rossiiskaia gazeta*, 18 March 1995.
69. Razlogov *et para.* 57.
70. The largest film studios in the country, Mosfil'm, have been described as "cinematic jam factories": O. Goriachev, "Fabrika 'kinokonservov'", *Argumenty i Fakty*, 1994, No.15.
71. A. Vystorobets, "Fil'my est', a smotret' ikh negde", *Rossiiskaia gazeta*, 18 March 1995. Of the films screened in Russia, 73% are of American origin, against 8% from Russia herself (Renard 87).
72. From 3000 urban cinemas in 1992 to 2000 in 1995, of which only half were actually in operation and only 100 economically viable. The 50 to 70 thousand rural projection halls once subsidized by the federal and local authorities, now have little chance of survival. Many have been converted to clothing shops, restaurants etc. (T. Bulkina, "Ochen' novoe kino: nashi kinoteatry prevrashchaiutsia v kazino i torgovye tsentry", *Rossiiskaia gazeta*, 3 June 1997; Renard 87-88).
73. "Russische Filmindustrie in Schwierigkeiten", *Süddeutsche Zeitung*, 7 April 1992.
74. M. Martin, "Le grand désarroi des cinéastes russes", *Le Monde Diplomatique*, April 1992, 4-5.

In this context, it is clear that at least in the period of transition to a market economy the film industry in Russia cannot survive without state aid.[75] The Russian authorities have reacted with protectionist measures, direct aid to the Russian film industry, and anti-piracy measures.

506. The great reform of the film industry in the period of *perestroika* took place through a Decree of the Council of Ministers of the USSR of 18 November 1989,[76] the economic aspects of which have already been discussed above.[77] Here, it will suffice to indicate that by virtue of this Decree, the film studios were entitled to retain a portion of their foreign currency earnings from film export and were exempted from the payment of import duties on film materials and equipment brought into the country by virtue of an agreement with foreign partners as a contribution to joint film production and which remained at the disposal of the Soviet film studio.

507. By an Order of the Committee for Cinematography of 10 August 1992,[78] a legal framework was developed within which government financing of part or all of the creation and distribution of cinema and video films was made possible, irrespective of the form of ownership of the film studio. Such financing was to contribute to the development of Russian film art, to the acquisition of the cultural heritage of Russia and to the stimulation of both eminent masters of the nation's film art and first-time film makers. The decision concerning the granting of subsidies is made by the leadership of the Committee for Cinematography, on recommendations from a "committee of creative experts".

508. A Government decree of 28 April 1993,[79] besides instituting an obligatory deposit for films,[80] introduced a separate registration requirement for all Russian, foreign and internationally co-produced films (not including television films). Such registration is to be made with the Committee for Cinematography prior to the distribution, renting, public screening, or cable TV transmission

75. "Konei na pereprave ne meniaiut?", *Kul'tura*, 10 July 1993; V. Vystorobets, "Sergei Bondarchuk: "Mosfil'm"—eto edinstvenno i nepovtorimo", *Rossiiskaia gazeta*, 25 January 1994 (interview with the well-known director S. Bondarchuk).
76. PSM SSSR, "O perestroike tvorcheskoi, organizatsionnoi i ekonomicheskoi deiatel'nosti v sovetskoi kinematografii", 18 November 1989, *SP SSSR*, 1990, No.1, item 5.
77. *Supra*, No.384.
78. Prikaz Komiteta kinematografii pri Pravitel'stve RF, "Ob utverzhdenii polozheniia o sozdanii i prokate kino-videoproduktsii, osushchestvliaemykh pri gosudarstvennoi finansovoi podderzhke, i poriadke ee realizatsii", 10 August 1992, *BNA RF*, 1993, No.3, 30-32.
79. PSMP RF, "O registratsii kino- i videofil'mov i regulirovanii ikh publichnoi demonstratsii", 28 April 1993, *SAPP RF*, 1993, No.18, item 1607. See also G. Belostotskii, "Kinoliubiteli s bol'shoi dorogi", *Rossiiskaia gazeta*, 12 January 1993; P. Kuz'menko, "Prostranstvo kino na fone infliatsii", *Rossiiskaia gazeta*, 28 January 1993; M. Murzina, "Fil'mov v Rossii snimaetsia vse men'she, zato vozmozhnostei uvidet' ikh—vse bol'she", *Izvestiia*, 31 March 1993.

of these films on the territory of the Russian Federation. After registration a rental certificate is issued, with a recommendation concerning age category for public access to the film.[81] Registration can be refused if the formal requirements for the application for certification were not met, as well as "in other cases provided for by the legislation of the Russian Federation". With this Decree of the Council of Ministers, the Russian authorities attempted to kill three birds with one stone: building up a collection of all films ever produced or screened in Russia, monitoring the morality of films by recommending an age category, and intensifying the struggle against the dissemination of pirated versions of films.

509. From 1994, the Russian authorities openly opted for a protectionist policy with regard to film production. In a presidential Edict of 15 April 1994,[82] support for national cinematography was listed as "one of the most important points in cultural policy" (point 1). The Government was ordered to work out a full program of protectionist measures in favor of the production and distribution of Russian film and video products.

510. In execution of this Edict, a whole series of measures has already been taken (or at least the development of such measures has been initiated):

— A Government decree of 30 July 1994[83] orders *Goskomimushchestvo*, the state body which organizes the whole process of privatization, to ensure that in the privatization of cinemas and film rental organizations the purpose of the enterprises and organizations be retained. The Government undertakes to finance 50 projects for the production and rental of artistic cinema and video films annually, as well as to maintain the production and rental of documentary, popular-scientific, educational, and animated films at 1992 levels. The Ministry of Economy is obliged to invest annually in federal enterprises and organizations cinematography "in accordance with their needs". Furthermore, a procedure is laid down for the importation

80. See, also, the earlier PSM SSSR, "O povyshenii effektivnosti ispol'zovniia obshchesoiuznogo gosudarstvennogo fonda kinofil'mov v usloviiakh rynochnoi ekonomiki", 9 August 1991, *SP SSSR*, 1991, No.24, item 97. The obligatory deposit is to be made to the State Fund of Cinema Films of the RF: PP RF, "O Gosudarstvennom fonde kinofil'mov Rossiiskoi Federatsii", 30 December 1994, *SZ RF*, 1995, No.2, item 155, *Rossiiskaia gazeta*, 17 January 1995, superseded by PP RF, "Ob utverzhdenii Ustava Gosudarstvennogo fonda kinofil'mov Rossiiskoi Federatsii", 2 April 1997, *Rossiiskaia gazeta*, 16 May 1997.

81. The organs of the executive power of the member bodies of the Russian Federation can clarify this recommendation concerning age categories on the basis of local traditions, customs and ethnic composition of the region , and specify the manner of public screening of the film in their region.

82. Ukaz Prezidenta RF, "O protektsionistskoi politike Rossiiskoi Federatsii v oblasti otechestvennoi kinematografii i meropriiatiiakh v sviazi so 100-letiem mirovogo i rossiiskogo kinematografa", 15 April 1994, *SAPP RF*, 1994, No.16, item 1375.

83. PP RF, "O pervoocherednykh merakh po realizatsii protektsionistskoi politike Rossiiskoi Federatsii v oblasti otechestvennoi kinematografii", 30 July 1994, *SZ RF*, 1994, No.15, item 1794, *Rossiiskaia gazeta*, 17 August 1994.

of foreign films from non-CIS countries. The question whether import duties can be lowered on products with a production-technical purpose imported for the requirements of national film-making, and whether the film producers can be granted tax advantages, is forwarded to the competent authorities for further investigation.

— On 16 January 1995, a Federal Fund for the social and economic support of national cinematography was set up.[84] Its purpose is to give financial aid to national film and video production and rental, as well as to film workers, and also to attract Russian and foreign investors to finance the production and rental of Russian films.[85]

— On 28 October 1995, the Government passed a Decree[86] which essentially ordered the competent state bodies to develop further measures for the maintenance and the development of the rental of national films and for increasing the level of cinema facilities to the populace.[87] In this way, the Government hopes to bridge the above mentioned divide between the production, the distribution, and the screening of films and get Russian films back into the cinemas.[88]

511. On 22 August 1996 President El'tsin signed the Federal Law on state aid to cinematography of the Russian Federation.[89] This law lists, among others, the following priorities for recipients of state aid: the creation of national

84. PP R.F, "O Federal'nom fonde sotsial'noi i ekonomicheskoi podderzhki otechestvennoi kinematografii", 16 January 1995, *SZ RF*, 1995, No.4, item 307, *Rossiiskaia gazeta*, 25 January 1995.
85. Chernysheva 1995, 116-117; A. Vystorobets, "Protektsiia dlia kino", *Rossiiskaia gazeta*, 25 January 1995.
86. PP R.F, "O merakh po sokhraneniiu i razvitiiu prokata otechestvennykh fil'mov i povysheniiu urovnia kinoobsluzhivaniia naseleniia", 28 October 1995, *SZ RF*, 1995, No.45, item 4315, *Rossiiskaia gazeta*, 21 November 1995.
87. Measures with regard to (1) the development of the material-technical base of the film network and film rental, the strengthening of the fund for national films and their distribution; (2) the creation of conditions for investment credits, for the modernization of the film network and film rental, the improvement of the provision of film services to the public and the setting up of centers of Russian cinematography; (3) creation of a normative basis for the copying, distribution, rental and public showing of films by airwave, cable or satellite television; (4) establishment and application of tax benefits in the area of cinematography, and maintenance of a register of cinemas listing their sources of finance; (5) the privatization of organizations and enterprises and the property of the film industry; (6) the refinement of the mechanism for settling with copyright holders for cinema and video films, including films made before 1993, for repeated sale for public display by means of any image or sound medium. Furthermore, the executive organs of the member entities of the R.F are recommended to safeguard the financial independence of film rental and cinemas, and to put a stop to the illegal use of films.
88. A. Vystorobets, "Fil'my est', a smotret' ikh negde", *Rossiiskaia gazeta*, 18 March 1995.
89. Federal'nyi Zakon R.F, "O gosudarstvennoi podderzhke kinematografii Rossiiskoi Federatsii", 22 August 1996, *SZ RF*, 1996, No.35, item 4136, *Rossiiskaia gazeta*, 29 August 1996.

films, including films for children and young people, and films by first-time film-makers, the maintenance and development of the material-technical basis for cinematography, and the creation of favorable conditions for the rental and screening of national films in Russia. A federal organ of the executive power for cinematography can, taking into account the opinion of a committee of experts,[90] decide to subsidize a national film[91] to a maximum of 70% of the total production or rental costs. Full financing of the production of a national film is only possible in exceptional cases justified by the artistic and cultural significance of a film project. Furthermore, a whole series of tax benefits and exemptions (a portion of which expired at the end of 2001) have been proposed for film enterprises. However, none of such advantages were enforced, as the corresponding tax legislation was never changed. The Law finally also determines the conditions for the privatization of film enterprises.[92]

512. One of the richest film archives in the world, *Gosfil'mofond*, containing the whole collection of Soviet films, was reorganized twice in 1994 and in 1997[93] and was registered in the State list of especially valuable objects of cultural heritage of the peoples of the Russian Federation.[94]

513. Finally, on 18 December 1997 the Government approved a policy document, called "Concept of development of cinematography of the Russian Federation until 2005."[95] It analyzes the situation in Russian cinematography and considers that it is of the utmost importance to revise the system of state financing of cinematographic production, to encourage international co-

90. The principle of independence of the authorities in the reaching of decisions on direct subsidization thus appears to come through here. See, also, the interview with the President of Kinokomitet, A. Medvedev, in G. Melikiants, "Kino i zakon. V chem drama samogo massovogo iz iskusstv", *Izvestiia*, 9 April 1993.

91. By national film, the Law understands: a film produced by a citizen of the RF or a legal person registered in the RF; the authors [director, scriptwriter, composer] of the film are citizens of the RF; no more than 30% of the film crew (director, technicians, actors etc.) are foreign; the film is shot in Russian or a minority language of the RF; at least half of the production, reproduction, rental and screening of the film is organized by cinematographic enterprises registered in Russia; foreign investment in the film is not exceeding 30%. See also Order No.7-1-19/37 by the Chairman of Goskino of 17 June 1999 approving the regulations on the national film, *Rossiiskaia gazeta*, 27 August 1999.

92. *Supra*, No. 441.

93. PP RF, "O Gosudarstvennom fonde kinofil'mov Rossiiskoi Federatsii", 30 December 1994, *SZ RF*, 1995, No.2, item 155; PP RF, "Ob utverzhdenii Ustava Gosudarstvennogo fonda kinofil'mov Rossiiskoi Federatsii", 2 April 1997, *Rossiiskaia gazeta* , 16 May 1997.

94. Ukaz Prezidenta, No.1847 of 6 November 1993.

95. PP RF ,"O Kontseptsii razvitiia kinematografii Rossiiskoi Federatsii do 2005 goda", 18 December 1997, *Rossiisksia gazeta*, 3 February 1998. In fact this was a further elaboration of the subprogram "Development of national cinematography" in the Federal Special-purpose Program "Development and preservation of culture and art of the Russian Federation (1997–1999)".

productions and to find other, *i.e.*, private, means for film production. In this context, the importance of the struggle against piracy is stressed. Moreover, the exploitation of older films in which the copyright has expired, is seen as one of the means to extend substantially the financial basis for Russian cinematography. This might be a reference to a system of a *paying public domain*, to which the 1993 Copyright Law also refers.[96]

2.3. The Stage Arts and the Music Industry

514. The 450 or so theaters have the status of "cultural institutions" so that their personnel are indirectly paid by the state.[97] The subsidization of productions is judged case-by-case, which naturally does little for the independence of the theaters. In many regards, the current subsidization policy with regard to theaters aims at the preservation of existing theaters. The subsidizing body is increasingly less often the federal government.[98] By far, the greater part of theaters is now financed by the regional and local authorities.

Beside this official network of theaters, there are now about a thousand independent private theaters and (often experimental) theater groups without a fixed base. They receive no subsidies, unless occasionally from regional or local authorities.[99] Commercial concert organizers have also been set up.[100]

515. In the podium landscape major shifts in both supply and demand are discernible. The number of theaters (but, also, philharmonic orchestras) increased by about one-fifth in the first half of the nineties, but the number of performances fell by about one-quarter (the number of musical concerts even halved) and the number of tickets sold fell by about 40% (for concerts more than 60%).[101] More theaters and musical ensembles are thus providing fewer performances for shrinking audiences. This divergent development naturally does the financial position of the theaters no good at all.

An increase in the price of tickets is no solution, given the reduced purchasing power of the Russian populace.[102] Thanks to the greater autonomy given

96. See *infra*, No.748.
97. As a rule, theaters in Russia directly employ not only administrative and technical personnel, but, also, actors, ballet dancers, choir and orchestra, with all the resulting pros (stability, permanent employment, attachment to the institution etc.) and cons (artistic conservatism, lack of flexibility etc.).
98. The theaters and concert organizations subsidized by the federal authorities (for a list, see Renard 157-158), are in any case almost all based in Moscow and St-Petersburg.
99. Renard 55.
100. M. Ignat'eva, "Kommersant s muzykal'nym uklonom", *Kul'tura*, 30 April 1993. The former state *body Goskontsert* was itself turned into the share company A/O GOSKO (I. Kosminskaia, "Po Sen'ke i korona", *Kul'tura*, 3 October 1992; L. Goldin, "Goskontsert is dead, long live GOSKO !", *Moscow News*, 1992, No.31).
101. Renard 55-57 and 60.
102. Or the extra income from increased prices goes to intermediaries operating on the black market: A. Selezneva, "Rekviem po teatral'noi mafii", *Vechernaia Moskva*, 8 July 1998.

theaters in the late eighties, they can also turn to alternative sources of finance, but this appears to take place largely through non-theater-related activities, such as renting out halls to commercial organizations and not, for instance, through renting out the theater to independent travelling troupes. Thus, it is possible for a number of theaters to have relative financial security without developing cultural activities of any significance.[103] The Ministry of Culture seems unwilling to meet the independent theater companies part way.

516. Just before independence, the RSFSR Government adopted the first protective measures in support of the theater and theatrical organizations,[104] but these measures were recently overhauled by a Governmental Decree of 25 March 1999 on state support for the theater art in Russia.[105] According to this Decree, the Ministry of Culture is ordered to take supportive measures in the theater field, taking into three main priorities:

(i) Conserving the best traditions of Russian repertoire theaters;
(ii) Organizing the exchange of theater groups, *i.e.*, the touring of theater companies throughout Russia and the countries of the CIS;
(iii) Ensuring a stable financial economic situation for theaters, creating of favorable conditions for attracting new personnel to the theater companies, and the creation of a social security system for all collaborators.

More concretely, the Ministry of Culture is to extend the practice of ordering itself new dramatic works and stage performances, including for children and the youngsters, to grant the necessary means for guaranteeing the exchange of theater companies between the capitals and provincial cities, the organization of theater festivals and seminars, to elaborate measures for attracting private financial means, improving the qualifications of actors and directors, and supporting theatrical periodicals, etc. The Government, furthermore, expects from the public broadcasting organizations that they would spend more broadcasting time to theater art, and formulates a number of recommendations for the authorities of the subjects of the Federation, and for the local authorities. More important, the Decree approves the general Statutes of theaters subordinate to the federal bodies of the executive power, in which the legal status, tasks and rights, the management structure, etc. are laid down. Finally the Decree determines some principles of financing state and municipal theaters in Russia.

103. I. Surzhenko, "Russia's theatrical system is against independent theaters", *Financial & Business News*, 13-19 August 1993.
104. PSM RSFSR. "O sotsial'no-ekonomicheskoi zashchite i gosudarstvennoi podderzhke teatrov i teatral'nykh organizatsii RSFSR", 31 May 1991, *Zak.Ek.*, 1991, No.10, 60.
105. PP RF "O gosudarstvennoi podderzhke teatral'nogo iskusstva v Rossiiskoi Federatsii", 25 March 1999, *SZ RF*, 1999, No.13, item 1615. This was just a few days after the Union of Theater Workers had held a conference to lament over the financial difficulties of the theaters, see *Kul'tura*, 4-10 March 1999.

517. In the recording industry, the monopoly of the state enterprise *Melodiia* has been broken and its activities have been greatly reduced—retaining a market share of at most 10%, with only 10 to 12 new recordings per year, as against 1,500 formerly. Naturally, the enterprise still has an impressive back catalogue, which should keep it economically viable after privatization.[106] Competition is primarily from foreign and pirate recordings rather than from competing Russian record companies. The Ministry of Culture does not intervene in this sector.

2.4. The Visual Arts

518. With regard to the visual arts, few specific measures have been taken.[107] State policy is primarily limited to the commissioning or purchasing of works of fine art from individual artists (*i.e.*, direct support of creative workers),[108] but this state patronage does not amount to much for budgetary reasons.[109] Reduced purchasing power has also left little demand among Russian private buyers.[110] Furthermore, there are far too few exhibition spaces where contemporary artists are given the opportunity to exhibit their work. All this means that the social and economic position of visual artists has got much worse.[111]

519. The beginnings of an art market can be discerned in the big cities, inasmuch as private galleries have been set up in order to sell contemporary art.[112] Their economic position, however, is highly precarious, their financial base extremely fragile and their professionalism at times questionable, so that all too often they fail to survive.[113] The activities of domestic and foreign auction houses in Russia do show that there is some demand for old and contemporary Russian visual art.[114]

520. Of the roughly 1,600 museums, 219 are devoted to the visual arts, but none of these to contemporary art. The museums are institutions directly

106. Renard 92.
107. See, however, in the early days of *perestroika*: PSM SSSR. "O merakh po ukrepleniiu proizvodstvennoi i material'no-tekhnicheskoi bazy izobrazitel'nogo iskusstva", 21 August 1986, *SP SSSR*, 1986, No.32, item 167. In this Government Decree 10 annual prizes for works of visual art were set up, and money provided for the building of exhibition rooms, studios, etc.
108. "Dialog 'Ministerstvo–soiuz'", *Kul'tura*, 3 April 1993.
109. Renard 61-62. Experts in the Department of Fine Arts at the Ministry of Culture and the State Committee of Experts select works for purchase which are then distributed by the Museum Department of ROSIZO, the State Museum and Exhibition Center. As a result, museums have no say in the purchasing of works for their own collections (Razlogov *et para.* 66).
110. T. Rykhlova, "Test na vyzhivanie", *Kul'tura*, 16 January 1993.
111. D. Gorbuntsov, *Pravda*, 18 December 1991, English translation in *CDSP*, 1991, No.51, 30-31.
112. L. Lunina, "Art without commerce", *Moscow News*, 1992, No.11; G. Onufrienko, "Davaite delat' to, chto mozhem (razmyshleniia o kul'ture)", *Kul'tura*, 30 April 1993.
113. Renard 61.

financed by the authorities.[115] We have already seen that an important part of government cultural spending goes to this sector. The subsidies which museums receive are intended mainly for personnel and running costs as well as the maintenance or refurbishment of buildings, and only to a very small extent for business expansion (*e.g.*, temporary exhibitions) or the purchase of new works of art.[116] All too often these subsidies are insufficient for the museums to work under normal conditions.[117] They often seek, therefore, income from non-cultural activities such as the rental of museum rooms.[118] Occasionally, a new museum is established, such as the Russian state museum for the Arctic and Antarctic regions in St. Petersburg.[119] Sporadically successful attempts have been made by museums to acquire additional funds from commercial activities (*e.g.*, museum shops)[120] or to attract private sponsorship for special events.[121]

521. A Federal Law on the museum fund of the Russian Federation and on museums in the Russian Federation, signed into Law by President El'tsin on 26 May 1996,[122] mainly regulates ownership questions in the museum collections and introduces a duty to register and catalogue all museum pieces. Museums are to be established in the form of non-commercial institutions, with the aim of conserving, collecting, studying, and presenting the museum collec-

114. P. Michgelsen, "Anatoli Zverjev. De Russische Van Gogh", *Rusland Monitor*, 1991-92, No.6, 8 (on the first Sotheby's auction in Moscow, July 1987); J. Whalen, "Christie's Bets Rich Russians Will Buy Art", *The Moscow Times*, 8 October 1997. With regard to the most important Russian auction house, Alfa-Art, see *inter alia* E. Grigor'eva and V. Turchin, "Kommertsiia, sud'ba, iskusstvo...", *Nezavisimaia gazeta*, 23 February 1993; N. Danilevich, "95.000 dollarov za Vasnetsova", *Kul'tura*, 9 October 1993.
115. The first private museum for modern art has been founded in Moscow (T. Rykhlova, "Dela na 'Marse'", *Kul'tura*, 3 October 1992).
116. Renard 73.
117. See, *e.g.*, "Tretyakov gallery short of funds", *RFE/RL Newsline*, Part I, 10 June 1997.
118. See PP RF, "Ob utverzhdenii Poriadka ucheta v dokhodakh federal'nogo biudzheta arendnoi platy za ispol'zovanie federal'nym nedvizhimym imushchestvom, zakreplennym za nauchnymi organizatsiiami, obrazovatel'nymi uchrezhdeniiami, uchrezhdeniiami zdravookhraneniia, gosudarstvennymi muzeiami, gosudarstvennymi uchrezhdeniiami kul'tury i iskusstva, i ee ispol'zovaniia, 24 June 1999, *Rossiiskaia gazeta*, 9 July 1999.
119. PP RF, "O sozdanii Rossiiskogo gosudarstvennogo muzeia Arktiki i Antarktiki", 2 February 1998, *Rossiiskaia gazeta* 13 February 1998.
120. E. Konchin, "Polmilliona v god", *Kul'tura*, 1 August 1992.
121. See, *e.g.*, the experience of Tret'iakov Gallery in attracting foreign sponsorship for the organization of specific exhibitions: "'Zolotoi fond' Tret'iakovki", *Rossiiskaia gazeta*, 7 June 2000.
122. Federal'nyi zakon RF, "O muzeinom fonde Rossiiskoi Federatsii i muzeiakh v Rossiiskoi Federatsii", 26 May 1996, in B. Bukreev, *Zakonodatel'stvo Rossiiskoi Federatsii o kul'ture*, M., Izd. Aksamit-Inform, 1999, 115-130. See also PP RF, "Ob utverzhdenii polozhenii o Muzeinom fonde Rossiiskoi Federatsii, o Gosudarstvennom kataloge Muzeinogo fonda Rossiiskoi Federatsii, o litsenzirovanii deiatel'nosti muzeev v Rossiiskoi Federatsii", 12 February 1998, *Rossiiskaia gazeta*, 5 March 1998.

tions to the public. The Russian legislator in this way requires that museums fulfill the four functions which are also at the international level (especially by the International Council of Museums, ICOM) considered to be essential for museums. The establishment of a museum is subject to prior licensing, which implies control by the authorities over the quality of the museums. Licenses are only granted if there are: (a) sufficient and, from a historical and cultural point of view, valuable museum pieces and collections to allow their exhibition; (b) rooms which are adapted for the conservation and exhibition of the exhibits; and (c) permanent sources for financing the activity of the museum which is to be established.

2.5. Craft Manufacture

522. Craft manufacturers face economic difficulties: the number of foreign tourists has declined, and the old export networks have disintegrated, so that their income from both the home and foreign markets has fallen.[123]

523. An Edict of 7 October 1994 provided measures for state aid to folk art and craft manufacturers,[124] in expectation of the passing of a federal law on the matter.[125] The Edict determines that at the bankruptcy and sale of such enterprises, the buyer is obliged to retain the main business of the enterprise. Local authorities are advised to keep down rents for points of purchase of craft products, as well as to keep down local taxes. Finally, a Fund for folk art enterprises in the Russian Federation was set up, which was allocated 1 billion rubles for the second half of 1994, for the maintenance, renaissance, and development of folk art enterprises. Additional measures were taken by the Government through elaborating of a targeted aid program, providing compensation for the elevated transport and energy costs, organizing exhibitions, supporting education in craftsmanship, providing aid for the publication of books on folk art, etc.[126] Finally early 1999, a new law was signed into law, ordering the executive powers of the subjects of the Federation the establishment of artistic advisory

123. Renard 75.

124. Ukaz Prezidenta RF, "O merakh gosudarstvennoi podderzhki narodnykh khudozhestvennykh promyslov", 7 October 1994, *SZ RF*, 1994, No.24, item 2602, *Rossiiskaia gazeta*, 15 October 1994, as amended by Edict of 11 January 2000, *Rossiiskaia gazeta*, 18 January 2000.

125. This Law is to provide measures with regard to exemption from taxes on real estate and from VAT on imported raw materials and equipment for the production of craft objects, as well as beneficial charges for the use of electricity, advantageous credits for the purchasing of equipment and raw materials, and subsidies amounting to no more than half the costs of transporting finished products.

126. PP RF, "O dopolnitel'nykh merakh gosudarstvennoi podderzhki narodnykh khudozhestvennykh promyslov Rossiiskoi Federatsii", 28 August 1997, *Rossiiskaia gazeta*, 12 September 1997. See also Prikaz Ministra Ekonomiki RF, "Ob utverzhdenii Polozheniia o predostavlenii subsidii organizatsiiami narodnykh khudozhestvennykh promyslov", 3 November 1999, *Rossiiskaia gazeta*, 7 December 1999.

bodies on folk art, products. Their main task is to ensure that no products are presented as being works of local folk art if they are not made according to the traditional models or with the traditional means of manufacture.[127]

§ 3. Encouragement of Cultural Consumption

524. Article 27 para.2 Fundamentals on culture provides that the Russian Federation is to promote the growth of social and private demand for works of art so that the possibilities of creative workers obtaining paid work are extended. The encouragement of cultural consumption, however, barely found a place in the cultural policy of the former Soviet authorities[128] or the current Russian authorities.[129] The most important instrument could be the aesthetic education of the populace, but no such movement can be discerned in the general legislation on education.[130] In practice, subjects such as song and drawing are only obligatory for primary pupils between the ages of 6 and 9; thereafter, they are only offered as optional courses.[131] A subject aesthetics or art history does not appear to exist in general education although aspects of such subjects can be touched on in history lessons. Literature, however, is a separate subject for six years, and it is probably no exaggeration to say that few peoples know their national literature as well as do the Russians.

Conclusion

525. In general specifically cultural policy, the broad application of general, neutral measures for support is a positive development in the light of the concept—generally accepted in political discourse and anchored in the Constitution of 1993—of the rule of law. The cultural sector is thus supported as a whole, without the government being able to make financial aid dependent on the

127. Federal'nyi zakon RF "O narodnykh khudozhestvennykh promyslakh", 6 January 1999, *SZ RF*, 1999, No.2, item 234, *Rossiiskaia gazeta*, 15 January 1999.

128. The one exception worth mentioning is the encouragement of the use of design in industrial products and utensils: PSM SSSR, "O merakh po dal'neishemu razvitiiu dizaina i rasshireniiu ego ispol'zovaniia dlia povysheniia kachestva promyshlennoi produktsii i sovershenstvovaniia ob"ektov zhiloi, proizvodstvennoi i sotsial'no-kul'turnoi sfery", 3 November 1987, *SP SSSR*, 1988, No.1, item 1.

129. In order to attract young visitors to the museums, the government obliged all museums (including private ones) to make it possible for minors under 18 to visit museums one day each month without an entrance fee: Federal'nyi zakon RF "O vnesenii izmeneniia i dopolenii v Zakon RF "Osnovy zakonodatel'stva RF o kul'ture", 23 June 1999, *SZ RF*, 1999, No.26, item 3172, *Rossiiskaia gazeta*, 2 July 1999; PP "O poriadke besplatnogo poseshcheniia muzeev litsami, ne dostigshimi vosemnadtsati let", 12 November 1999, *Rossiiskaia gazeta*, 3 December 1999.

130. Zakon RF, "Ob obrazovanii", *VSND i VS RF*, 1992, No.30, item 1797, amended 13 January 1996, *Rossiiskaia gazeta*, 23 January 1996 (full, amended text). For a discussion of the original version of this Law, see J. De Groof, (ed.), *Comments on the Law on Education of the Russian Federation*, Leuven, Acco, 1993.

131. Renard 52.

opinions expressed. In essence, these are policy instruments conforming to the market, namely measures, which stimulate the market.

At the other extreme, the Russian authorities have also instituted market-replacing measures, through the direct financing of non-commercial institutions, such as theaters, museums, and libraries, which would simply disappear from society if left to market forces. The authorities hereby seek to safeguard the diversity of cultural supply by themselves ensuring the presence of provision. The benefits of such market-replacing instruments lie primarily in the government, as an institute of authority which does not have to be guided entirely by the demands of direct profitability, being able to guarantee lasting cultural functions.

526. Between the two extremes are those government measures which take the market as their point of departure, but supplement this market by direct state subsidization of a selection of mediators between the author or artist and the consumer, or the subsidization of the creation and dissemination of certain cultural products, or the placing of state orders with particular artists or art mediators. The state, thus, intervenes when the market cannot autonomously ensure a multiplicity of supply. Here, we think of support for particular publications (children's literature, school books, etc.), particular film projects, and support of the press.

527. The use of such market-supplementary measures can, however, only be reconciled with freedom of expression and artistic freedom if the criteria for the granting of subsidies conform to the principles of equality, plurality, and quality. In judging in particular the criterion of supporting the plurality of expression and the criterion of quality, a certain objectivity is to be expected of the authorities.

This idea also seems gradually to be sinking into the specifically cultural policy of the Russian authorities, now that government decisions on whether or not subsidize particular expressions of art or opinion are increasingly informed by the advice of independent committees of experts. Only with regard to the sector of the news media are serious reservations in order. Certainly with regard to the regional press, there is no guarantee that subsidization could be decided on the basis of political, discriminatory motives, The urge to control this sector still appears to be strong in the minds of Russia's political leaders. The Russian authorities seem to be guided in their choice of market-supplementary measures for the press not so much by the desire to guarantee the multiplicity of opinions on offer, but rather precisely by the desire to destroy such multiplicity.

Furthermore, it is still a fact that the authorities not only provide external aid to the cultural sector, but, also, participate internally as an actor and as a cultural mediator itself competing with the emerging private sector. The Russian authorities have, thus, not entirely taken the step from managing to regulat-

ing the cultural market. The *de facto* state monopoly on printing companies in particular can be seen as problematic for publishers and the news media.

528. Given the seriousness of the recession, it is only to be expected that the cultural sector will for a long time to come be entirely or partially dependent on government aid which itself, for budgetary reasons, is shrinking.

At the same time, the social facilities traditionally provided to their members by the creative unions are contracting. The writers and artists are among the most important victims of the economic and social crisis accompanying the process of transformation. The specifically cultural measures aimed at the cultural creator can only alleviate this in a limited and selective fashion. The writers and artists are, thus, ever more dependent on finding their own artistic, social, and economic way through the market in cultural goods. The primary policy instrument for regulating this market is copyright law.

PART III

A COPERNICAN REVOLUTION IN COPYRIGHT LAW?

529. In the constantly altering context of the political, economic, social, and cultural system transformation, the Russian legislator was faced with a great challenge when drafting a new copyright law. Account had to be taken of the fact that the myth of the harmonious reconciliation of interests could no longer be maintained in a developing civil society in which a multitude of interests, sometimes opposed to one another, could be articulated, nor in a budding market economy, in which looking out for one's own interests was considered the motivation for all economic exchange. Copyright could no longer be an expression of a falsely presupposed harmony of interests between author, the person who will exploit the work, and end user, but had to be understood as an instrument by which the *fundamentally opposed* interests of these three actors were reconciled in a balanced fashion.

In practice, this meant that there were two tasks for the legislator: on the one hand, recognizing the market-oriented function of copyright by restoring its exclusivity; on the other hand, adapting the law of copyright to the technological revolution, or, in the words of Dietz, the simultaneous *transformation* and *modernization* of copyright law.[1]

Dozortsev, too, has argued that the reform of the whole field of intellectual rights was not merely a response to the need to adjust the legislation to technological developments which had given rise to new subject matters worthy of protection and new manners of exploitation.[2] This is, indeed, a task with which every legislator is confronted. In Dozortsev's opinion the system transformation, which was typical of Russia (and the other Central and Eastern European countries), also demands: (1) a system of protection which is relevant to the market economy and which allows the results of intellectual activity to be brought into the economic traffic; (2) a higher level of protection, with which a reasonable compromise has to be found between the freedom of market traffic on the one hand and the social function which the exclusive rights have to fulfill on the other; (3) the development of strict remedies against piracy; (4) the adjustment of national legislation to the relevant international treaties; and (5) the legal-technical perfection of the legislation.[3] Only in this manner—writes Boguslavskii[4]—can favorable juridical conditions for creative activity be created in the new society and can Russia participate to the full in the world copyright community.

In this Part, we will thoroughly examine what the influence the system transformation in the Soviet Union and in Russia had, and still has, on the law of copyright. First, we will sketch the chronology of the copyright reforms and the pressure which was brought to bear from abroad (Title I). Then, we will

1. Dietz 1994b, 131-133; Dietz 1997, 4.
2. Dozortsev 1994, 33-35 and 48.
3. Dozortsev 1994, 45-49.
4. Boguslavskii 1992, 346. This author also sees a new copyright law as a condition for the prevention of the emigration of creative talent. Also in that sense: Vermeer 168.

analyze the technical legal aspects of current copyright legislation (Title II). Finally, we will analyze the theoretical aspects of the transformation of copyright in Russia, with regard to the legal nature and contents of the copyright law, as well as the place of copyright law in the complex of legal norms regulating creation and enterprise in the cultural sector (Title III).

TITLE I
THE TRANSFORMATION OF COPYRIGHT

Chapter I. The Changing International Copyright Environment

Section 1. Russia, International Organizations and Multilateral Treaties

Introduction

530. The task facing Russia in the reform of its copyright law was not simple. Not only did Russia have to ensure that in the law of copyright, as elsewhere, the old robes of ideological and planned-economic hue were flung aside, the move towards modernization also implied an adjustment of the legislation to the quickly developing opinions and tendencies in copyright law at a European and global level.

The Soviet Union and later the Russian Federation played no role, or an extremely limited one, in the determination of the direction in which international copyright law would evolve at the end of the twentieth century. One of Gorbachev's political aims was, however, the integration of the Soviet economy in European and worldwide trade networks and the continuing recognition of the Soviet Union as a global superpower. This policy was also continued by Russia. This meant, in practice, that Russia tried to escape its marginalized position in the World Intellectual Property Organization (WIPO) by joining the Berne Convention; that it sought membership of a typically capitalist organization such as GATT/WTO, or an organization of western, democratic countries such as the Council of Europe; and that it sought, via bilateral agreements, a rapprochement with the United States, but especially also with the European Union. These bilateral contacts will be dealt with in a separate Section (2).

§ 1. WIPO

531. The pre-eminent international body to play a determining role in the development of copyright law and intellectual property laws in general over the course of the past quarter of a century is the World Intellectual Property Organization (WIPO), founded by the Treaty of Stockholm of 14 July 1967, a Treaty which was also ratified by the USSR.[5] The USSR's membership of WIPO was continued by the Russian Federation.[6]

532. The international copyright legal showpiece which is administratively managed by the WIPO, the Convention of Berne for the protection of literary and artistic works (hereinafter: "The Berne Convention" or "BC"),

5. UPVS SSSR, "O ratifikatsii Stokgol'mskogo akta Parizhskoi Konventsii po okhrane promyshlennoi sobstvennosti i konventsii, uchrezhdaiushchei Vsemirnuiu organizatsiiu intellektual'noi sobstvennosti", 19 September 1968, *VVS SSSR*, 1968, No.40, item 363.

has flourished remarkably in the past two decades. Not only has the number of members risen, from 62 at the beginning of 1973 (*i.e.*, at the moment the USSR decided to join the UCC)[7] to 147 at the end of 2000,[8] but these new members include the US and the People's Republic of China. This fact alone put Russia under great pressure not to be one of the few countries of the northern hemisphere to stand aloof. As we will discuss later,[9] Russia finally joined the Berne Convention (Paris, 1971) on 9 December 1994, with 13 March 1995 as the date on which membership became effective.[10]

533. The success of the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (hereinafter: "The Rome Convention" or "RC") is perhaps less spectacular, but still very real. At the end of 2000, 67 States had joined, most of them European countries.[11] Russia has not yet joined the Rome Convention, but it has joined the Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms (hereinafter: "The Geneva Convention" or "GC").[12]

534. On 20 December 1996, a Diplomatic Conference in Geneva accepted two more treaties: the WIPO Copyright Treaty[13] and the WIPO Performances and Phonograms Treaty.[14] Since the approval of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society,[15] the European Union and its Member States are preparing the accession to both conventions. It is expected that Russia will also sign both treaties in the short to medium term.

6. In a letter of 26 December 1991, the Minister of Foreign Affairs of the Russian Federation communicated to the Director General of WIPO that the USSR's membership of WIPO and all its organs, as well as the participation to all conventions, agreements and other international legal instruments signed in the framework of WIPO or under its auspices by the Russian Federation are continued (*Copyright*, February 1992, 28). These conventions which were continued by the Russian Federation, include, according to the Director General of WIPO, the Convention of Paris for the protection of industrial property and the Convention on the dissemination of program-bearing signals transmitted by satellite.
7. *DA*, January 1973, 18-21. Incidentally, at that time the UCC also had 62 (slightly different) members: *DA*, January 1973, 30.
8. WIPO Press Release PR/98/121.
9. *Infra*, Nos.628, 819 ff. and 826 ff.
10. *Industrial Property and Copyright*, 1995, 43. Except for Uzbekistan and Turkmenistan all former Republics of the USSR have acceded to the Berne Convention.
11. *Industrial Property and Copyright*, 1996, 21. On 6 December 1995 Moldova became the first and for the time being sole member-state of the CIS to accede to the Convention of Rome.
12. *Infra*, Nos.628 and 835.
13. Doc. CRNR/DC/89/eng.
14. Doc. CRNR/DC/90/eng.
15. *OJ*, L 167/10 of 22 June 2001.

535. Apart from its activities with regard to drawing up international standards on copyright, WIPO has also taken on the role, towards individual countries, of an advisory body which supports governments, members of parliament, and representatives of authors' associations in the modernization of their national copyright legislation. In the course of the last five years, special attention has been given to countries which found themselves in a transition to a market economy.[16] WIPO was repeatedly consulted in the course of Russia's parliamentary activities for the drafting of a new copyright law which was to enable it to join the Convention of Berne.[17]

§ 2. GATT/WTO

536. In the past decade, apart from WIPO, a powerful, new forum originated for the discussion of problems concerning intellectual property, including copyright and neighboring rights: the General Agreement on Tariffs and Trade, GATT for short. This Agreement was signed after the Second World War to stimulate the free worldwide trade in goods. In the course of the Uruguay round of talks, which started in 1986, services and intellectual property rights[18] were included in GATT for the first time. The Uruguay round resulted in the Agreement to found the World Trade Organization, WTO, signed on 15 April 1994 in Marrakech. The text of the Agreement on Trade-Related Aspects of Intellectual Property Rights, TRIPS for short, can be found in Appendix 1C.[19] It is the most ambitious and far-reaching agreement on intellectual property at a global level so far, not only in breadth (*all* intellectual property rights find a place in it), but, also, in depth (the high degree of protection and obligations for the treaty states with regard to enforcement and the prevention and settlement of inter-state disputes).

16. These activities are reported in the official publications of WIPO, *Copyright* and *Industrial Property*, and later in *Industrial Property and Copyright*, under the heading "Activities of WIPO in the field of Copyright [Industrial Property] Specially Designed for European Countries in Transition to Market Economy".
17. See, *e.g.*, "De auteur heeft recht…", *Rusland Monitor*, September-October 1989, No.4, 24, translated from *Sovetskaia Kul'tura*, 13 May 1989 (visit of top WIPO functionaries to the USSR to discuss possible accession to the BC).
18. Intellectual property was, however, mentioned in a general indemnity clause (art.XX GATT): "Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: (d) necessary to secure [...] the protection of patents, trade marks and copyrights. [...]" See also Waters 947.
19. *OJ*, L 336/3 of 23 December 1994; *Grur Int.*, 1994, 128-140 (text of the original Agreement of Geneva of 15 December 1993); *I.L.M.*, 1994, 1157 ff. For a discussion of the TRIPS-Agreement, see a.o. H. Cohen-Jehoram, "Auteursrecht in TRIPS", *Informatierecht/AMI*, 1995, 123-128; P. Katzenberger, "TRIPS und das Urheberrecht", *Grur Int.*, 1995, 447-468; A. Kerever, "Le GATT et le droit d'auteur international: l'accord sur les 'aspects des droits de propriété intellectuelle qui touchent au commerce'", *RTD com.*, 1994, 629-644.

537.Apart from the explicit endorsement of the principles of national treatment[20] and Most-Favored-Nation Treatment,[21] TRIPS also makes special provisions concerning copyright and related rights.[22] We would draw particular attention to the rule that the provisions of article 18 of the Berne Convention (*i.e.*, the principle of retroactivity) shall also apply, *mutatis mutandis*, to the phonographic rights of performers and producers of phonograms.[23] Its importance will become clear in the discussion of the enforcement of protection of foreign works and other protected subject matter in Russia.

538.The results of the Uruguay round, such as the TRIPS-agreement, have been signed by 122 states; Russia, however, is not one of them. In 1986 the Soviet Union formally asked to participate in the Uruguay round, which was then starting, as an observer, but this request was refused by the western countries.[24] The official reason was the absence in the USSR of a free market economy,[25] but this fails to convince, as Hungary, Poland, Romania, and Yugoslavia *were* members of GATT.[26] In reality, the West feared that the Soviet Union wanted to use GATT for political reasons.[27]

In 1989 the Soviet Union formally applied for membership of GATT, but again met with rejection because the results of the *perestroika*-policy were still too unclear.[28]

After the collapse of the USSR, the West's resistance disappeared, and on the contrary it encouraged the Russian Federation's entry into GATT.[29] On 4 June 1993, the Government of Russia again took the decision to apply to enter GATT. This application was formalized in February 1994 by the submission of a memorandum on the international trade policy of the Russian Federation to the GATT headquarters, the first formal step towards GATT membership.[30] In 2001, however, Russia's accession to WTO was postponed (indefinitely).

539.Russia's accession to TRIPS is made easier by the transitional provisions of this Agreement. In general, the provisions of the TRIPS agreement come

20. Art.3 TRIPS.
21. Art.4 TRIPS. The *most-favored-nation clause* (MFN) provides that any advantage, favor, privilege or immunity granted by a Member of the World Trade Organization to the nationals of any other Member State, shall be accorded immediately and unconditionally to the nationals of all other Members. Exempted from this obligation are any advantage etc. accorded by a Member, inter alia in accordance with the Conventions of Berne and Rome (*e.g.*, reciprocity for the resale right).
22. Arts.9-14 TRIPS.
23. Arts.(6) and 70 (2) TRIPS.
24. Kennedy 419.
25. Kennedy 419-420.
26. Kennedy 28-33.
27. Kennedy 24.
28. M. Jennewein, "Implikation des EG-Binennmarktes fur die Sowjetunion", *Osteuropa Wirtschaft*, 1991, 11.

into effect one year after the Agreement setting up the World Trade Organization comes into effect. This period is, however, extended by four years for states transforming their economy from directed to free market and reforming their intellectual property law.[31] Russia is counting on being able to put this transition period to use, but the US and the EU are reluctant to grant a grace period on a number of important points (enforcement, retroactive protection of works, and phonograms).[32]

§ 3. The Council of Europe

540. The Council of Europe has also, in the past decades, made attempts to get its finger into the international copyright pie. It has been particularly active in the electronic media sector and in combating of audiovisual piracy. As early as 1986 the Committee of Ministers accepted a Resolution concerning the principles of copyright in the field of satellite and cable television.[33] After overcoming many obstacles, this initiative finally resulted in a European Convention on copyright and related rights with regard to cross-border satellite broadcasts (Strasburg, 11 May 1994).[34] The contents of this Treaty barely differ from Directive 93/83/EEC of 27 September 1993 for the co-ordination

29. From the common political declaration of 9 December 1993 on partnership and cooperation between the Russian Federation and the European Union ("Sovmestnaia politicheskaia deklaratsiia o partnerstve i sotrudnichestve mezhdu Rossiiskoi Federatsiei i evropeiskim soiuzom", 9 December 1993, *Diplomaticheskii Vestnik*, 1994, Nos.1-2, 15-16), it is apparrent that the Parties consider the Partnersip and Cooperation Agreement (*infra*, Nos.551 ff.) a sign of the European Union's support for Russia's entry to GATT. In the Common Declaration on the principles and aims for the development of trade, economic and investment cooperation between the Russian Federation and the US of 28 September 1994 ("Sovmestnoe zaiavlenie o printsipakh i tseliakh razvitiia torgovogo, ekonomicheskogo i investitsionnogo sotrudnichestva mezhdu Rossiiskoi Federatsiei i Soedinennymi Shtatami Ameriki", 28 September 1994, *Diplomaticheskii vestnik*, 1994, Nos.19-20, 16-17) the US also granted Russia its full support for entry to the newly formed World Trade Organization (WTO).
30. *Izvestiia*, 23 February 1994; PP RF, "Ob utverzhdenii Memoranduma o vneshnetorgovom rezhime Rossiiskoi Federatsii dlia napravleniia v Sekretariat General'nogo soglasheniia po tarifam i torgovle (GATT)", 19 February 1994, *SAPP RF*, 1994, No.10, item 825. The entry is prepared by an Interdepartemental Committee for GATT/WTO founded by the Government in 1993: PSMP RF, "O Mezhvedomstvennoi komissii po GATT", 22 February 1993, *SAPP RF*, 1993, No.9, item 739, amended 12 January 1996, *SZ RF*, 1996, No.3, item 191. By mid-1995 the negotiations within the authorized working group for Russia's entry (but, also, *e.g.*, the Ukraine, Belarus, Armenia and Moldova) appeared not to have progressed very much: M. Lücke, "The Impact of Accession to GATT on the Trade-Related Policies of CIS Countries", *JWT*, 1995, 165-166.
31. Art.65 (3) TRIPS.
32. See, *e.g.*, the Memorandum of the European Comission on the protection of intellectual property in Russia, 12 May 1997.
33. Recommendation No.R (86) 2 on principles relating to copyright law questions in the field of television by satellite and cable.

of certain provisions concerning copyright and related rights with regard to satellite broadcasting and cable transmission,[35] albeit that in the Treaty there are no provisions regarding cable television. The advantage of the Treaty is its greater territorial applicability: not only can all members of the Council of Europe join, the Treaty is also open to non-members.

Furthermore, the Council of Europe has set up a whole series of cooperation and support programs for the media, specifically aimed at Central and Eastern European states.[36]

541. As set out above, Russia—after repeated delays—was admitted to the Council of Europe as the thirty-ninth member early in 1996.[37] When Russia was still awaiting admittance, it sought to create a favorable climate for its full membership of the Council of Europe by ratifying a number of treaties in the field of culture and the media.[38] Firstly, the USSR joined the 1985 Convention for the protection of the architectural heritage of Europe[39] as well as the 1969 European Convention on the protection of the archaeological heritage.[40] On 21 February 1991 the USSR also joined the European Cultural Convention of 19 December 1954,[41] whereby each Party to the Treaty undertakes "insofar as possible to facilitate the freedom of movement and the exchange of both people and objects of cultural value".[42] Russia continues the USSR's membership of the three abovementioned Conventions and has, additionally, signed the 1992

34. European Convention relating to questions of copyright and neighboring rights in the framework of crossborder satellite broadcasting, Strasburg, 11.V.1994, *European Treaty Series—Série des traités européens*, No.153.
35. *OJ*, L 248/15, 6 October 1993. See *infra*, No.549.
36. For an overview of the activities between 1990 and 1993: *Council of Europe co-operation and assistance* programs *in the media field for the Central and East European Countries*, DH-MM (93) 5.
37. *Supra*, No.252.
38. Oleg Chernyshev, Vice-President of the then Commission of the Soviet of Nationalities USSR for the development of culture, language, ethnical and internationalistic traditions and the protection of the historic heritage, said in a round table conference in 1989:
    > "We have to think about joining the Council of Europe, an aim which is at the moment unreachable. We do not have an open society ... The most probable sphere of cooperation between us and the Council of Europe are cultural links. They could afterwards help us to open a road to Europe. The Council has a lot of conventions of a humanitarian nature, which we could join."

    ("Soviet culture in the world", *International Affairs*, February 1990, 8).
    On Russia's effective entry of the Council of Europe, see *supra*, No.252.
39. Konventsiia "Ob okhrane arkhitekturnogo naslediia Evropy", *SP SSSR*, otdel vtoroi, 1991, No.4, item 7; *European Treaty Series*, No.121.
40. Evropeiskaia Konventsiia "Ob okhrane arkheologicheskogo naslediia", *SP SSSR*, otdel vtoroi, 1991, No.4, item 8; *European Treaty Series*, No.066. This Convention was in the meantime revised in Valletta on 16 January 1992: European Convention on the Protection of the Archaeological Heritage (revised), *European Treaty Series* No.143.
41. *European Treaty Series* No.18; *Izvestiia*, 22 February 1991; *CDSP*, 1991, No.8.

European Convention on cinematographic co-production.[43] Accession to the important 1989 European Convention on Transfrontier Television[44] is also to be expected.

Section 2. Russia and Bilateral Treaties

Introduction

542. Early this century, Czarist Russia concluded various bilateral trade treaties with Western European countries. These always included a clause whereby the parties to the treaty undertook to initiate negotiations for the conclusion of a bilateral agreement concerning the mutual recognition of copyright within a set time.[45]

Ninety years later bilateral trade agreements are again in fashion, although now with another goal. While the bilateral treaties at the beginning of the century were a cheap substitute for Russia's accession to the Berne Convention, today's bilateral treaties now serve to draw outsiders, such as Russia, into the Berne Union and force them to modernize their national legislation.

543. The two most important agents to engage in bilateral undertakings with Russia are the European Union and the US. As will become apparent, the approaches of these two powers differ fundamentally. The European Union's relationship with the Russian Federation must be placed in the context of attempts to integrate Central and Eastern Europe in the common European Home, while the American perspective can only be understood as part of its foreign trade policy as a whole and of a quest for new export markets. But for both the EU and the US, there is a continued need to pursue intellectual property rights matters bilaterally as long as countries as Russia have not acceded to WTO.[46]

§ 1. Russia–European Union

544. In its Green Paper on Copyright, published on 7 June 1988,[47] the European Commission maintained the position that—in addition to work in the

42. Accession to the European Cultural Convention can be considered the atrium of choice for membership of the Council of Europe. By accession to this Convention, for example, also other treaties of the Council of Europe become accessible. Moreover, the acceding state is given the opportunity of participating in the decision-making of the Council of Europe on cultural subjects, and it is also given access to the Cultural Fund, the Sports Fund, the Youth Fund, etc. (van Genugten 1992a, 125).
43. *European Treaty Series*, No.147; PP RF, "O podpisanii Evropeiskoi konventsii o sovmestnom kinoproizvodstve", *SAPP RF*, 1994, No.5, item 377.
44. *European Treaty Series*, No.132.
45. *Supra*, No.99.
46. H.-F. Beseler, in *Intellectual Property Rights in the Framework of the Joint EU-US Action Plan. A Transatlantic Workshop*, 28-29 May 1996, Rome, 22.
47. Para. 7.3.1. *Green Paper on Copyright and the Challenge of Technology—Copyright Issues Requiring Immediate Action*, COM (88) 172 final.

multilateral context—problems with regard to individual countries or groups of countries needed to be tackled bilaterally. According to the Commission, these problems essentially related to three areas: (i) the absence of adequate substantive standards protecting intellectual property; (ii) the lack of effective enforcement where such standards were in place; (iii) and the application of national treatment to Community right holders. The countries of Central and Eastern Europe received no special attention.[48]

545. However, only two weeks later, on 22 June 1988, the EEC and the Council of Mutual Economic Assistance (CMEA, better known as Comecon) established official relations with one another. In a Joint Declaration,[49] the parties undertook to "develop cooperation in areas which fall within their respective spheres of competence and where there is a common interest" (point 2). Given that Comecon was not a supranational organization and the Central and Eastern European states which were members of Comecon always had retained their full competence with regard to copyright, this Declaration opened the door to the conclusion of bilateral agreements between the EEC and its members on the one side and individual Eastern Bloc countries on the other.

546. Franzone[50] gives three reasons to explain the inclusion of provisions on intellectual property, and in particular copyright law, in these bilateral agreements with the Central and Eastern European countries: (1) technology transfers to and direct investments in the countries of Central and Eastern Europe will only take place in an environment in which sufficient legal protection is given to the results of creative activity; (2) the most advanced economies increasingly specialize in services and products with a great added value, in which intellectual property is an important element. The reforms in the former Eastern Bloc have to enable these countries to take part in this evolution; (3) copyright and neighboring rights are, in the last analysis, intimately linked with freedom of speech and the free exchange of ideas, which are fundamental values in a pluralistic and democratic society. The increase of the protection for copyright and neighboring rights would, therefore, mean a consolidation of democracy.

The obligations which these bilateral agreements imposed on the Central and Eastern European states differ according to the moment at which they were signed, but, also, according to the place which this country was assigned in the future European Home. In our discussion, we will limit ourselves to the agreements with the USSR and the Russian Federation.

48. Elst 1996, 274.
49. "Joint Declaration on the establishment of official relations between the EEC and the Council for Mutual Economic Assistance", June 22, 1988, *OJ*, No.L 157/35 of June 24, 1988. See, also, de Smijter 19; Maresceau 4-5; Toledano Laredo 546.
50. Franzone 246.

547. On 26 February 1990, the Council of the European Communities confirmed the Agreement between the EEC and Euratom on the one hand, and the USSR on the other, on trade and commercial and economic cooperation.[51] In this Agreement, apart from the indemnity clause taken from article 30 (ex art.36) EC Treaty,[52] an article 19 was also included concerning intellectual property:

> Within the limits of their respective powers, the Contracting Parties undertake to:
> — ensure adequate protection and enforcement of industrial, commercial and intellectual property rights,
> — ensure that their international commitments in the field of industrial, commercial and intellectual property rights are honored,
> — encourage appropriate arrangements between undertakings and institutions within the Community and the USSR with a view to due protection of industrial and intellectual property rights."[53]

This provision is formulated very generally, and bears witness to the European two-track policy, which aims at the consolidation of the existing international obligations as a form of minimum protection on the one hand, and on top of that at the guarantee of an effective and sufficient protection and implementation of, among other things, copyright law.[54] This two-track policy, which was maintained towards all Central and Eastern European countries, would be further refined and made more concrete in later agreements.[55]

548. With regard to this article 19 of the Trade agreement with the USSR, Von Lewinski posited that the European Union here took into account the general political, social and economic situation of these countries after the fall of communism and their need to adapt their structures to the coming market economy.[56]

51. *OJ*, No.L 68/3, 15 March 1990. As early as March 1988 the USSR had made its view of the future relations with the EEC known to the European Commission. The Vice-President of the State Commission for economic external relations of the Council of Ministers of the USSR, Ivanov, proposed cooperation with the EEC in a large number of fields, including intellectual property (*Agence Europe*, 11 March 1988), but the EEC wanted no more than a trade agreement: Maresceau 9-10.

52. Art.16 (1) Agreement with the USSR:
> "This Agreement shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of [...] the protection of industrial, commercial and intellectual property [...] Such prohibitions and restrictions must not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between the Contracting Parties."

Remarkbale is the use of the expression "industrial, commercial *and intellectual* property", in which intellectual property appears to be used as a synonym for copyright and neighboring rights. In art.30 (ex art.36) EC Treaty copyright is subsumed by the Court of Justice in the term "industrial and commercial property" (Case 78/70, *Deutsche Gramophon Gesellschaft* v. *Metro*, 8 June 1971, *ECR*, 1971, 487 (implicitly para.11); Cases 55 and 57/80, *Musik-Vertrieb membran* v. *GEMA*, 20 January 1981, *ECR*, 1981, 147 (explicitly para.9); confirmed many times afterwards).

This seems to us to be a rationalization a *posteriori* rather than a reflection of the true motivations of the European Commission. The fact that the latter was so accommodating to the Central and Eastern European countries—as appears from the Follow-up of the Green Paper on copyright of 17 January 1991, in which the European Commission restated its belief in the importance of bilateral agreements[57] and, for the first time, stated expressly its willingness to conclude bilateral agreements with Central and Eastern European countries containing provisions relating to copyright[58]—has more to do with the fact that the intellectual, industrial, and commercial property laws fall to a great extent under the authority of the Member States. This greatly restricts the Commission's freedom of movement concerning the inclusion of more concrete clauses in the agreements with the Central and Eastern European states.[59] One has to remember that, at the moment of the issuance of the Follow-up, not a single European Directive had been approved in the area of copyright and neighboring rights.

549. Since then, however, the situation has changed radically, as the internal European harmonization of copyright legislation has started to yield concrete results. Within the European Union, the Commission's harmonization plans have (for now) led to seven Directives: the Council Directive of 14 May 1991

53. Incidentally, this general trade agreement was preceded by a specific agreement on the trade in textile products ("Agreement between the European Economic Community and the Union of Soviet Socialist Republics on trade in textile products", an agreement which would be provisionally applied by a Decree of the Council of 18 December 1989 by the EC, starting on 1 January 1990, on condition of mutual provisional adoption by the partner country in expectation of the definitive signing, *OJ*, No.L 397/1, 30 December 1989. Art.20 of this agreement ran: "As regards intellectual property, at the request of either Contracting Party, consultations shall be held [..] with a view to finding an equitable solution to problems relating to the protection of marks, designs or models of articles of apparel and textile products." (Compare *OJ*, No.L 123/1, 17 May 1994. See, also, PSMP RF, "O podpisanii Soglashenii o torgovle tekstil'nymi tovarami mezhdu Rossiiskoi Federatsiei i Evropeiskim ekonomicheskim soobshchestvom", 10 August 1993, *SAPP RF*, 1993, No.33, item 3121. On the background to this provision, see paras 7.4.4.-7.4.8. *Green Paper on Copyright and the Challenge of Technology—Copyright Issues Requiring Immediate Action*, COM (88) 172 final). The scope of such a provision is, as the Court of Justice confirmed, very limited (Consideration 67 of advisory opinion 1/94 of the Court of Justice of 15 November 1994, *CMLR*, 1995, 789-800 (with a general comment by J.H.J. Bourgeois, "The EC in the WTO and Advisory Opinion 1/94: an Echternach Procession", 763-787); *I.L.M.*, 1995, 689 (with an introductory article by R.M. Bierwagen)).
54. Govaere 1991, 63; von Lewinski 1994a, 430 and 1994b, 65-67.
55. Franzone 249.
56. Von Lewinski 1994a, 430.
57. Para. 7.8.2. Follow-up to the Green Paper, working program of the Commission in the field of copyright and neighboring rights, COM (90) 584 final.
58. Para. 7.6. Follow-up to the Green Paper.
59. Para.7.6.1. Follow-up to the Green Paper.

on the legal protection of computer programs,[60] the Council Directive of 19 November 1992 on rental rights and lending rights and on certain rights related to copyright in the field of intellectual property,[61] the Council Directive of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission,[62] the Council Directive of 29 October 1993 harmonizing the term of protection of copyright and certain related rights ("Term Directive"),[63] the Council Directive of 11 March 1996 on the legal protection of databases,[64] the Council Directive of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society, and the Council Directive of 27 September 2001.[65]

Moreover, the Commission has succeeded—despite an initial failure[66]—in obliging all Member States to join the Berne and Rome Conventions before 1 January 1995, by the backdoor of the European Economic Area Treaty.[67] In this way the Commission reached its aim after all, namely establishing the Conventions of Berne and Rome as a common basis of comprehensive minimum protection in all Member States and as the basis for further harmonization of the national laws.[68]

60. 91/250/EEC, *OJ*, No.L 122/42 of 17 May 1991.
61. 92/100/EEC, *OJ*, No.L 346/61 of 27 November 1992.
62. 93/83/EEC, *OJ*, No.L 248/15 of 6 October 1993.
63. 93/98/EEC, *OJ*, No.L 290/9 of 24 November 1993.
64. 96/9/EC, *OJ*, No.L 77/20 of 27 March 1996.
65. 2001/29/EC, *OJ*, No.L 167/10 of 22 June 2001; 2001/8/EC, *Oj*, No.L 272/32 of 13 October 2001.
66. Already in 1990 and in 1991, the Commission had presented to the Council a proposal for a decision to oblige the member states to join the Berne Convention (1971) and the Convention of Rome (1961) (COM (90) 582, *OJ*, No.C 24, 31 January 1991; COM (92) 10), but a number of Member States rejected this to prevent the EEC from extending its authority to such international agreements. The Council was only prepared to adopt a non-binding Resolution in which it noted that the Member States, insofar as they had not already done so, undertook to accede to the Paris Act of the Berne Convention and the Rome Convention by 1 January 1995 (Council Resolution of 14 May 1992 on increased protection for copyright and neighboring rights, *OJ*, No.C 138/1 of 28 May 1992).
67. Art.5 (1) Protocol 28 on intellectual property to the Agreement concerning the European Economic Area, signed between the European Communities, their member states and the Republic of Austria, the Republic of Finland, the Republic of Iceland, the Principality of Liechtenstein, the Kingdom of Norway, the Kingdom of Sweden and the Swiss Confederation, and approved by the Council and the Commission of the European Communities on 13 December 1993, *OJ*, No.L 1/1, 3 January 1994. Because of the ultimate non-entry of the Swiss Confederation to the Agreement concerning the European Economic Area this Agreement had to be altered: *OJ*, No.L 1/571, 3 January 1994. Austria, Finland and Sweden afterwards became full members of the European Union.
68. See, also, para. 1.11. Follow-up to the Green Paper.

550. All this has obviously strengthened the European Commission's position in its negotiations with the Central and Eastern European countries.[69] The European Union has become more demanding in its external, bilateral relations in the area of copyright with regard to the other treaty partner, the more so as it has more certainty about its internal authority in the matter.

551. On 24 June 1994, the European Communities and the Member States on the one hand and the Russian Federation on the other hand signed an Agreement on Partnership and Cooperation (hereinafter: "the Partnership Agreement" or "PA").[70] Even though it does not create a free trade area on a bilateral basis,[71] the PA *does* mean a considerable extension of the domains of organized cooperation. Economic cooperation on the basis of the market-economy principles has intensified. The Parties are (with some exceptions) to accord one another most-favored-nation treatment[72] and to accord imported products national treatment with regard to internal taxes or other internal

69. "[... E]n toute occurence l'adoption d'une directive donne compétence à la Commission pour agir au lieu et place des Etats membres, dans le secteur concerné, dans le cadre des relations internationales de la Communauté. L'adoption progressive des directives [...] permettra donc à la Commission d'agir au plan international, à la place des Etats membres, dans les matières qu'elles traitent."
(T. Desurmont, "Chronique de la Communauté européenne", *RIDA*, 1993, vol.155, 95.) On the congruence between internal and external powers of the European Communities, see for instance the so-called AETR-decision of the Court of Justice of 31 March 1971 in Case 22/70, *Commission* v. *Council*, *ECR*, 1971, 263. For a discussion of this issue, see R. Barents and L.J. Brinkhorst, *Grondlijnen van Europees Recht*, Alphen aan den Rijn, Tjeenk Willink, 1994, 390 ff.; P.J.M. Kapteyn and P. Verloren van Themaat, *Inleiding tot het recht van de Europese Gemeenschappen Na Maastricht*, Deventer, Kluwer, 1995, 757 ff.; G. Wils, *De bijdrage van het Hof van Justitie tot de ontwikkeling van een Europese markteconomie*, II, doctoral thesis, Leuven, 647 ff.

70. COM (94) 257 final. For the Russian text (lacking the Appendices): *Diplomaticheskii vestnik*, 1994, No.15-16, 29-59. For a thorough discussion of the PA, see J. Borko, *Russland und die Europäische Union: Perspektiven der Partnerschaft*, in *Berichte BoiS*, 1996, No.36; P.J.M. Kapteyn and P. Verloren van Themaat, *Inleiding tot het recht van de Europese Gemeenschappen Na Maastricht*, Deventer, Kluwer, 1995, 811-812; H. Timmermann, *Die Beziehungen EU—Russland: Voraussetzungen und Perspektiven von Partnerschaft und Kooperation*, in *Berichte BoiS*, 1994, No.60; H. Timmermann, *Russlands Aussenpolitik: Die europäische Dimension*, in *Berichte BoiS*, 1995, No.17, 14-17; H. Timmermann, *Partnerschaft mit Russland. Chancen und Probleme der EU-Anbindungsstrategie*, in *Berichte BoiS*, 1996, No.43; J.-Ch. van Eeckhaute, "De overeenkomst inzake partnerschap en samenwerking: een nieuw juridisch en politiek kader voor de betrekkingen tussen de European Union en Russia", *R.W.*, 1994-95, 1041-1052.

71. Art.3 PA states very prudently that in 1998 the European Union and Russia shall examine whether circumstances allow the beginning of negotiations on the establishment of a free trade area. See, also, Toledano Laredo 559.

72. Art.10 PA. This principle, derived from art.I para.1 GATT, means that each trade advantage granted to any third country shall be granted automatically and unconditionally also to the other Party.

charges of any kind, and to laws, regulations, and requirements affecting their internal sale, offer for sale, purchase, transportation, distribution, or use.[73] No quantitative restrictions are to be imposed on goods originating in Russia and imported into the Community, or *vice versa*;[74] the freedom of movement of capital between the EU and Russia is recognized in principle (although subject to some provisional restrictions);[75] etc. It is, moreover, completed by an institutionalized political dialogue[76] and other forms of cooperation (cultural, financial, and the prevention of illegal activities).[77]

552. With regard to intellectual property rights in general and to copyright in particular, article 54 PA and Annex 10 are of special importance with the PA.

Article 54 PA runs, under the title "Intellectual, Industrial and Commercial Property Protection (in Russian in full: *intellektual'naia sobstvennost'*)", as follows:

> (1) Pursuant to the provisions of this Article and Annex 10, the Parties confirm the importance they attach to ensuring adequate and effective protection and enforcement of intellectual, industrial and commercial property rights.
> (2) The Parties confirm the importance they attach to the obligations arising from the following multilateral conventions: [...]
> (3) The implementation of the provisions of this article and Annex 10 shall be regularly reviewed by the Parties in accordance with Article 90.[78] If problems in the area of intellectual, industrial and commercial property affecting trading conditions are to arise, urgent consultations shall be undertaken, at the request of either Party, with a view to reaching mutually satisfactory solutions.

Annex 10 provides:

> 1. Russia shall continue to improve the protection of intellectual, industrial and commercial property rights in order to provide, by the end of the fifth year after the coming into force of the Agreement, for a level of protection similar to that existing in the Community, including effective means of enforcing such rights.
> 2. By the end of the fifth year following the coming into force of the Agreement, Russia shall accede to the multilateral conventions on intellectual, industrial and commercial property rights to which Member States are parties or which are de facto applied by Member States, according to the relevant provisions contained in these conventions:
> — Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971);
> — International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (Rome, 1961);
> — [...]

73. Art.11 PA.
74. Art.15 PA.
75. Art.52 PA.
76. Arts.6-9, 90-97 and 101 PA.
77. Arts.56-89 PA.
78. According to art.90 PA, a Council of Cooperation is founded which has to monitor the execution of the agreement.

> 3. The Council of Cooperation may recommend that paragraph 2 of this Annex shall apply to other multilateral conventions.
> 4. From the coming into force of this Agreement Russia shall grant to Community companies and nationals, in respect of the recognition and protection of intellectual, industrial and commercial property, treatment no less favorable than that granted by it to any third country under bilateral agreements.
> 5. The provisions of paragraph 4 shall not apply to advantages granted by Russia to any third country on an effective reciprocal basis and to advantages granted by Russia to another country of the former USSR.

553. While article 54 PA gives the impression that the Treaty parties undertake equal obligations, which are, moreover, vaguely specified, Appendix 10 clarifies that in reality very concrete actions are expected of one Treaty party, the Russian Federation. Within five years after the coming into force of the PA, Russia has to join the Conventions of Berne and Rome (and the Council of Cooperation could add other agreements to this, such as TRIPS and the possible Protocol to the BC[79]) *and* it has to bring its copyright legal protection to a level which is similar to that of the European Union. It is clear that this latter provision only binds Russia and does not create any obligation for the European Union.[80] In any case, the legal level of copyright protection in the European Union refers to the four Directives which were approved at the moment of the signing of the PA by the EU,[81] but according to Franzone this also contains the "hard core" of provisions and principles which are applied by all Member States in their national legislation, such as the legal measures against infringements of intellectual property rights.[82] Another example would be the protection of moral rights, at least at the level provided for by the Berne Convention.

Russia only has to ensure a "similar" level of protection, which in any case leaves Russia a larger margin of appreciation than would have the term "identical".[83] As Russia is not a part of the common market, harmonization is not an aim in itself. What is important is that European legal right holders and copyright industries enjoy protection for their creations and investments in Russia at a level no lower than the one they enjoy in Europe. If Russian legislation at certain points would grant protection at a higher level than is usual in the European Union (*e.g.*, the term of protection for rehabilitated

79. Franzone 253. Note that the PA does not impose any obligation on Russia to accede to the Convention of Geneva.
80. On the comparable provisions in three interim agreements with Hungary, the Czech and Slovak Federative Republic and Bulgaria, see advisory opinion 1/94 of the Court of Justice of 15 November 1994 (*supra*, No.547, note 54 *in fine*): "a provision of this type is binding only on the third State which is a party to the treaty".
81. For a comparison of current Russian copyright legislation and the first four European Directives, see Elst 1996, 285-325.
82. Franzone 253.
83. Compare Franzone 254-255.

authors or performers), the PA should never be used as an argument against these rules of national legislation for harmonization's sake.

554. The harmonization of national copyright laws within the EU has, in the meantime, led to the approval of a three more Directives (on the legal protection of databases, on copyright in the information society, and on the resale right).[84] Russia cannot, on the basis of article 54 and Appendix 10 PA, be forced to adjust its national legislation in line with these instruments. Article 55 PA does, however, provide that Russia shall endeavor to ensure that its legislation shall be gradually compatible with that of the Community in a number of areas. However, intellectual property is not mentioned as an area in which the convergence of laws should take place, and this in contrast to what is, for instance, the case in the Partnership and Cooperation Agreement with the Ukraine.[85]

555. The PA is of a so-called "mixed nature". This means that it falls partly within the powers of the Community, partly within the powers of the Member States. As a consequence, the EC, all Member States and the Russian Federation had to ratify this agreement before it enters into force (1 December 1997). In the meantime, all provisions relating to commercial matters which do fall within the powers of the EC were collected in a so-called "interim-agreement", which could be implemented without the intervention of the national legislatures. The signing of this interim-agreement by the EC Council was postponed several times because of the bloodshed in Chechnya. It was, however, finally signed in Brussels on 17 July 1995[86] and entered into force on 1 February 1996.[87]

556. Article 18 Interim Agreement provides under the title "Intellectual, industrial and commercial property protection"[88] as follows:

> 1. Adequate and effective protection and enforcement of intellectual, industrial and commercial property rights shall be ensured pursuant to the provisions of this Article and of Annex IV.
>
> 2. If problems in the area of intellectual, industrial and commercial property affecting trading conditions were to occur, urgent consultations shall be undertaken, at the request of either Party, with a view to reaching mutually satisfactory solutions.

Article 24 (1) Interim Agreement adds to this:

84. *Supra*, No.549.
85. Art.43 (2) Partnership and Cooperation Aggreement between the European Communities and their Member States on the one hand, and the Ukraine on the other hand, signed on 14 June 1994 in Luxemburg: COM (94) 226 final.
86. *OJ*, No.L 247/1 of 13 October 1995. See also *Agence Europe*, 17-18 July 1995; M. Shchipanov, "Vse dal'she ot 'kholodnogo mira'", *Rossiiskaia gazeta*, 20 July 1995.
87. *OJ*, No.L 316/44 of 30 December 1995.
88. According to a Common Declaration of the European Communities and Russia conerning art.18, the expression "intellectual, industrial and commercial property" also refers to copyright (including on computer programs) and the neighboring rights: *OJ*, No.L 247/22 of 13 October 1995.

> Within the scope of this Agreement, each Party undertakes to ensure that natural and legal persons of the other Party have access free of discrimination in relation to its own nationals to the competent courts and administrative organs of the Parties to defend their individual rights and their property rights, including those concerning intellectual, industrial and commercial property.[89]

In Annex IV, Russia commits itself to continuing to improve the protection of intellectual, industrial, and commercial property rights in order to provide—by the end of the fifth year after the coming into force of the PA—a level of protection similar to that provided in the Community, including comparable means of enforcing such rights. According to a Declaration by Russia in relation to the above quoted article 18, the provisions of article 54 (2) PA, with the exception of the final indent (this provision is not relevant to copyright), and paragraphs 4 and 5 of Annex 10 of the PA shall be applied from the coming into force of the Interim Agreement.[90]

557. In comparison with the PA, the Treaty parties to the Interim agreement in essence only undertake the general duty to guarantee sufficient and effective protection and respect for intellectual, industrial, and commercial property rights. The commitment which Russia undertakes in Appendix IV Interim Agreement is merely a reference to the duty of the convergence of the copyright legislation with European Directives as it is included in the PA. Neither accession to the Berne Convention and the Convention of Rome, nor the duty of future adaptation of national legislation to new European Directives are mentioned in the Interim Agreement. The sole concrete concession of Russia and the European Communities with regard to copyright is the immediate application of the most-favored-nation clause on the acknowledgement and protection of, among other things, copyright, with the exception of those advantages granted by Russia to a third State on an effectively mutual basis, as well as the advantages which Russia grants to another country of the former USSR.[91]

558. Finally, we must also mention that the PA, as well as the interim Agreement,[92] includes a provision which reproduces almost word-for-word article 30 (ex art.36) EC Treaty.[93] This article, together with article 28 (ex art.30) EC Treaty, provides the basis for establishing the theory of exhaustion of the distribution right within the European Union, and since 1 January 1994

89. See, equally, art.98 (1) PA.
90. *OJ*, No.L 247/27 of 13 October 1995.
91. See, in this context, the Agreement of Moscow of 24 September 1993 on cooperation in the protection of copyright and neighboring rights: *infra*, No.821.
92. Art.12 Interim Agreement.
93. "The Agreement shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of [...] the protection of intellectual, industrial and commercial property [...] Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Parties."

even within the European Economic Area[94] (EEA).[95] The exhaustion rule, however, does not apply to treaties on free trade or association, even though they contain an identical provision,[96] nor, *a fortiori*, to agreements which create an even weaker legal link between the European Union and a third state, such as the Agreements on partnership and cooperation.[97] This means that a European legal right holder may successfully invoke his copyright to stop the importation of copies of his work that were marketed in Russia by or with permission of the legal right holder.[98]

§ 2. Russia–USA

559. The United States were from the start more direct in their approach to the Soviet Union concerning intellectual property. Copyright is, in the bilateral relationships between the US and Russia, considered in the light of the opening of new export markets for American industry[99] and as a condition measure for encouraging American investments in Russia.[100]

In the Trade Treaty, which was signed on 1 June 1990 by President Bush and President Gorbachev,[101] the US obtained a series of concessions from the USSR in exchange for granting the USSR the status of most-favored-nation, also in the area of intellectual property.[102]

560. In article VIII of the trade treaty, both parties not only guaranteed that their international commitments in the field of intellectual property rights (*e.g.*, in the UCC) would be honored. They both also undertook to guarantee

94. Art.2 (1) Protocol 28 with the Agreement on the EEA, *OJ*, No.L 1/3 of 3 January 1994. These were Austria, Finland, Sweden (which a year later became all three full members of the EEC), Norway, Iceland and Liechtenstein. After a negative referendum Swiss stood aloof. The Agreement on the European Economic Area (EEA) came into effect on 1 January 1994 (*OJ*, No.L 1/1 of 3 January 1994). For Liechtenstein the EEA Agreement only came into effect on 1 May 199 (*OJ*, No.L 86 of 20 April 1995).
95. For a recent overview, see M. Rottinger, "L'épuisement du droit d'auteur. Le droit d'auteur et les règles de la libre circulation des marchandizes", *RIDA*, 1993, vol.157, 50-127.
96. With reference to the association treaty with Portugal when this country was not yet a member of the European Union, see: Case 270/80, *Polydor Ltd. and RSO Records Inc.* v. *Harlequin Record Shops Ltd. and Simons Records Ltd.*, 9 February 1982, *ECR*, 1982, 329. See, *e.g.*, also D. Horovitz, "The Impending 'Second Generation' Agreements Between the European Community and Eastern Europe—Some Practical Considerations", *JWT*, 1991, No.5, 63-64.
97. Franzone 255; von Lewinski 1994b, 25.
98. Compare Govaere 1991, 72-74.
99. Von Lewinski 1994a, 431.
100. See, *e.g.*, the economic wing of the "Charter for Partnership and Friendship", signed on 17 June 1992 in Washington by President Bush and President El'tsin, which reads: "The Russian Federation assumes that it is absolutely necessary to create a favorable investment climate in Russia. For this purpose, in accordance with its constitutional procedures, it intends to improve its laws in the fields of taxation, property, contract law and those relating to intellectual property rights" (*I.L.M.*, 1992, 782-789).

an adequate and effective protection and enforcement of intellectual property rights, among other things by joining the Berne Convention (Paris, 1971),[103] to provide copyright protection for computer programs as literary works, and to provide protection for sound recordings first made by their respective nationals or companies or first published in their national territory[104] by guaranteeing to phonogram producers at least the rights of reproduction, public distribution, and importation—and notwithstanding the rights of an owner of a particular copy of a sound recording in such copy—the exclusive commercial rental and lending rights in such copy.[105]

561. The US's approach seems much more aggressive than that of the European Union. This is not only expressed in the imposition of measures to be interpreted very concretely, but, also, in the strict time scheme which was

101. Agreement on Trade Relations between the United States of America and the Union of Soviet Socialist Republics, 1 June 1990, *I.L.M.*, 1990, 946. On 9 December 1991, the Agreement was ratified by President Bush (*Eastern Europe Reporter*, 23 December 1991, 209). On the Soviet side, it could no longer be ratified by the Soviet Parliament. On 12 June 1992, however, it was ratified by the Russian Federation: PVS RF, "O ratifikatsii Soglasheniia o torgovykh otnosheniiakh mezhdu Soiuzom Sovetskikh Sotsialisticheskikh Respublik i Soedinennymi Shtatami Ameriki", 12 June 1992, *VSND i VS RF*, 1992, No. 27, item 1562. For the Russian text of the agreement, see: *BMD*, 1993, No. 1. For a discussion: V.I. Blinnikov, "Novyi shag mezhdunarodnogo sotrudnichestva v oblasti okhrany intellektual'noi sobstvennosti", *V.I.*, 1991, No. 7, 44-49; Vermeer 155-156. The US has signed comparable agreements with Armenia, Georgia, Kazakhstan, Kyrgysstan, Moldova, Ukraine and Belarus: Waters 955.
102. T.W. Hoya, "Soviet Foreign Trade Law as Seen From the United States", in *The Emancipation of Soviet Law*, F.J.M. Feldbrugge, (ed.), in *Law in Eastern Europe*, vol. 44, Dordrecht, Martinus Nijhoff Publishers, 1992, 167-169.
103. Art. VIII (3) also stipulates: "Upon the date when both Parties are members of the Berne Union, the protection of works in existence prior to that date shall be determined in accordance with art. 18 of the 1971 Paris Act of the Berne Convention." With this provision the American film industry in particular hoped to get protection in the USSR for older films ("Agreement Includes Provisions To Expand Market Access", *Congressional Quarterly*, 9 June 1990, 1823-1824). Whether or not this was successful, will appear later, *infra*, No. 628. Note that the pressure which the US put on the USSR/Russia to join BC, was only justified with economic arguments ("economies in transition to a market economy have to attract highly valuable technologies, and to do so must grant the highest possible protection"), whereas no mention was made of the moral rights of the author, see, *e.g.*, B. Swenson, "Intellectual Property Protection Through the Berne Convention: A Matter of Economic Survival for the Post-Soviet New Commonwealth of Independent States", *Denver Journal of International Law and Policy*, 1992, 95-102.
104. But with the clear intention of extending such protection to sound recordings originating in the other Party's territory.
105. In the *Side Letter* concerning intellectual property, which pursuant of art. VIII (4) Trade Treaty is an integral part of the agreement, more detailed provisions were made concerning the protection of computer programs and audio recordings. See, also, Schwartz 125 ff. and 157-159.

enjoined on the Soviet Union. Whereas the European Union left Russia a period of five years in which to meet obligations formulated in a general (but not necessarily vague) manner, the government of the USSR promised in a Side Letter that in 1991 it would submit legislative proposals to the Supreme Soviet for the fulfillment of the obligations under article VIII on intellectual property laws, and that it would take all possible measures to have this legislation approved in the course of 1991.[106] In formal terms, the USSR undertook this time schedule voluntarily, but bearing in mind the economic relationship between the Treaty parties it is clear that the US put the other party under strong economic pressure to move quickly to the execution of the Trade Treaty.

562. This approach was part of a general forward foreign trade policy, which was especially given shape in 1988 with the approval of the "Special 301 Provisions"[107] allowing the US to impose unilateral trade sanctions on countries where unfair and unjust trade practices—such as the massive violation of the copyrights of American legal right holders—take place.[108] In spite of the great problems of piracy in the USSR and Russia, this country could (for now, and probably for rather political reasons[109]) escape such American trade sanctions,[110]

106. In a comparable treaty of the US with Poland of 21 March 1990, Poland undertook to provide for the legal protection of computer programs as works of literature before 31 December 1991: Side Letter to "Treaty Between the United States of America and the Republic of Poland Concerning Business and Economic Relations", 21 March 1990, *I.L.M.*, 1990, 1209.
107. Sec.182 Trade Act 1974, as altered by section 1303 Trade Act 1988 (Omnibus Trade and Competitiveness Act 1988, PL 100-418, 23 August 1988) and secs.301 ff. Trade Act 1974 as altered by sec.1301 Trade Act 1988. The "United States Trade Representative (USTR)" monitors whether the US's trade partners comply with the trade treaties with the US. If this is not the case, the USTR puts the country in question on a "watch list". These countries are urged to take the necessary measures to comply with the trade treaty. If there is no suitable reaction, the country is put on the "priority watch list". If the state concerned still neglects to solve the trade problem, the President can impose unilateral trade sanctions on that country.
108. Von Lewinski 1994b, 45 ff.; Waters 956-960.
109. "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" (Boffey 93). See also "Chasing pirates in Russia", *Financial Times East European Business Law*, June 1996, 2.
110. According to the annual report for 1994 of the International Intellectual Property Alliance (IIPA) in which recommendations were formulated for the US Trade Representative, Russia belongs on the "Priority Watch List", *i.e.*, the one but highest category in the area of piracy ("Last year the Russian Federation was accountable for about $805 million, only slightly less than the figure for China. Although Russia has made several of the required legislative changes it still has not made the infringement of intellectual property rights a criminal offence. Efforts to enforce existing laws governing the protection of IP rights have been non-existent."), see "IIPA identifies forty two piracy culprits", *Copyright World*, March 1995, 13-16.

but as a big stick the threat of trade sanctions *can* obviously strongly influence Russia's internal process of legislation and enforcement policy with regard to copyright.

563. Indeed, once Russia had brought its legislation more or less into line with the requirements of the Trade Treaty with the US, the pressure from the US moved to the implementation of the new legislation. From the Joint Declaration on the principles and aims of the development of trade, economic, and investment cooperation between the Russian Federation and the US of 28 September 1994, it appeared that the US was particularly concerned with the protection in practice of computer programs, sound recordings, and books, *and* that the Americans still expected Russia's rapid accession to the Convention of Berne.[111]

§ 3. Other Bilateral Treaties

564. Next to the abovementioned agreements between the superpowers, we must finally draw attention to Russia's bilateral cultural treaties, which often also include a copyright clause. The contents often boil down to an encouragement for the authors' associations of the various countries to enter into closer cooperation, an exchange of information on each other's legislation, and possibly to a separate agreement which still has to be approved and which is to determine the modalities of the cooperation more precisely.[112]

565. Agreements on economic and industrial cooperation also often name copyright as a domain of cooperation, such as, for instance, in article 2 of the Agreement between the Governments of Russia and Spain on economic and

111. "Sovmestnoe zaiavlenie o printsipakh i tseliakh razvitiia torgovogo, ekonomicheskogo i investitsionnogo sotrudnichestva mezhdu Rossiiskoi Federatsiei i Soedinennymi Shtatami Ameriki", 28 September 1994, *Diplomaticheskii vestnik*, 1994, Nos.19-20, 17.

112. See, *inter alia*, art.XV "Soglashenie mezhdu Pravitel'stvom Rossiiskoi Federatsii i Pravitel'stvom Respubliki Indii o kul'turnom i nauchnm sotrudnichestve", *BMD*, 1993, No.5, 66 (India); art.7 "Soglashenie mezhdu Pravitel'stvom Rossiiskoi Federatsii i Pravitel'stvom Soedinennogo Korolevstva Velikobritanii i Severnoi Irlandii o sotrudnichestve v oblasti obrazovaniia, nauki i kul'tury", 15 February 1994, *Diplomaticheskii vestnik*, 1994, Nos.5-6, 21 (United Kingdom); art.9 "Soglashenie mezhdu Pravitel'stvom Rossiiskoi Federatsii i Pravitel'stvom Respubliki Moldova o kul'turnom i nauchnom sotrudnichestve", 17 August 1994, *Diplomaticheskii vestnik*, 1994, Nos.17-18, 27 (Moldova); art.17 "Soglashenie o sotrunichestve v oblasti kul'tury i obrazovaniia mezhdu Pravitel'stvom Rossiiskoi Federatsii i Pravitel'stvom Gosudarstva Izrail'", 25 April 1994, *Diplomaticheskii vestnik*, 1994, Nos.9-10, 25 (Israel); art.6 "Soglashenie mezhdu Rossiiskoi Federatsiei i Korolevstvom Ispaniia o sotrudnichestve v oblasti kul'tury i obrazovaniia", 11 April 1994, *Diplomaticheskii vestnik*, 1994, Nos.9-10, 13 (Spain); art.6 "Soglashenie mezhdu Pravitel'stvom Rossiiskoi Federatsii i Pravitel'stvom Laosskoi Narodno-Demokraticheskoi Respubliki o kul'turnom i nauchnom sotrudnichestve", 9 March 1994, *Diplomaticheskii vestnik*, 1994, Nos.7-8, 9 (Laos); art.8 "Soglashenie mezhdu Pravitel'stvom Rossiiskoi Federatsii i Pravitel'stvom Respubliki Armeniia o sotrudnichestve v oblasti kul'tury, nauki i obrazovaniia", 13 November 1995, *Diplomaticheskii vestnik*, 1995, No.12, 28 (Armenia).

industrial cooperation which mentions "consultations and cooperation concerning the protection of property rights, patents and copyrights in the framework of the legislation in force in both countries".[113] In the Agreement concluded between Russia and Poland on trade and economic cooperation, the Parties have undertaken to provide, and guarantee, protection for intellectual property rights, including measures concerning their provision and exercise, but only pursuant of the existing international agreements which already bind Russia and Poland, or on the basis of the principles of reciprocity and non-discrimination.[114]

566. None of these agreements create important obligations for the states involved. They only make clear that in Russia, too, the consciousness has grown that the international protection of copyrights is more than the mere approval of the Convention of Berne; it demands a concrete cooperation between the governments and the collecting societies of different countries. For Russia, this international cooperation at the level of the protection of copyright goes hand-in-hand with the promotion and distribution of Russian works abroad.[115] Copyright is in other words, at least to some extent, a part of cultural policy. Nevertheless, an economic motive can be discerned in this demand for the promotion of Russian works abroad: the fear of a trade deficit with regard to cultural goods. *Nihil novo sub sole*. Already in the czarist period,[116] but, also, afterwards in the Soviet period,[117] and now in the post communist period, Russia feared that joining an international system for the protection of copyright would turn out negatively for Russia, as Russia imports and 'consumes' far more works from the West than that it 'produces' works and exports them to the West.

567. A trade treaty, which is much more detailed with regard to intellectual property, is the Agreement on Trade and Economic Cooperation between the Swiss Confederation and the Russian Federation, negotiated during 1993

113. "Soglashenie mezhdu Pravitel'stvom Rossiiskoi Federatsii i Pravitel'stvom Ispanii ob ekonomicheskom i promyshlennom sotrudnichestve", 12 April 1994, *BMD*, 1994, No.10, 55.
114. Art.9 Dogovor mezhdu Rossiiskoi Federatsiei i Respublikoi Pol'sha o torgovle i ekonomicheskom sotrudnichestve", concluded in Warsaw on 25 August 1993 and ratified by the Federal Assemblee RF on 17 December 1994: *SZ RF*, 1994, No.34, item 3542. The text of the Agreement was published in *SZ RF*, 195, No.20, item 1767.
115. See, *e.g.*, art.6 of the cultural agreement Laos: "The parties to the agreement will contribute to the development of cooperation in the area of the protection of copyrights between the respective organizations of the two countries, as well as to the mutual introduction of the general public of RF and the People's Democratic Republic of Laos to the works of literature, science and art of Russian authors and authors from Laos" (*Diplomaticheskii vestnik*, 1994, Nos.7-8, 9).
116. *Supra*, No.96.
117. *Supra*, No.117.

and in force since 1 July 1995.[118] According to article 12 of this Agreement, the Contracting Parties shall provide and ensure adequate, effective, and non-discriminatory protection of intellectual property rights. They shall adopt and take adequate, effective, and non-discriminatory measures for the enforcement of such rights against infringement thereof, and in particular against counterfeiting and piracy.[119] They are to confirm compliance with the substantive provisions of the Berne and Rome Conventions and apply their best efforts to adhere to them (which is, in fact, only important for Russia in relation to the Rome Convention). The Contracting Parties mutually grant most-favored-nation treatment in the field of intellectual property and agree, upon request of either of them, to review the provisions on the protection of intellectual property rights with a view to further improving the level of protection and to avoid (or remedy) trade distortions caused by the current level of protection of intellectual property rights.

568. For the sake of completeness, we must also mention that the copyrights of foreign investors can, as a possible part of investments, fall under the protection of bilateral investment agreements[120] or can be exempted in bilateral tax treaties of double tax levy.[121]

118. Kindly communicated to the author by Ms. Bettina Waldmann, DG I/G. III of the European Commission.

119. See, also, art.5, Annex to the Agreement, on art.12 Protection of Intellectual Property:
"1. The Contracting Parties shall provide for enforcement provisions under their national laws that are adequate, effective and non-discriminatory so as to guarantee full protection of intellectual property rights against infringement. Such provisions shall include civil and, in certain fields, also criminal sanctions against infringements of any intellectual property right covered by this Agreement, and in particular injunctions, damages adequate to compensate for the injury suffered by the right holder, as well as provisional measures, including inaudita altera parte ones.
2. Enforcement shall be non-discriminatory, fair and equitable. They shall not be unnecessarily complicated and costly, or entail unreasonable time limits or unwarranted delays.
3. Final administrative decisions in the procedures referred to in the present Article shall be subject to review by a judicial or quasi-judicial authority."

120. See, *e.g.*, art.1 (1.2.4.) Agreement of 9 February 1989 between the Governments of the Kingdom of Belgium and the Grand Duchy of Luxemburg, and the Government of the Union of Socialist Soviet Republics concerning the mutual promotion and protection of investments, approved by the Law of 8 March 1991, *Belgisch Staatsblad*, 15 October 1991.

121. See, *e.g.*, art.10 Agreement of 17 December 1987 between the Government of the Kingdom of Belgium and the Government of the Union of the Socialist Soviet Republics to avoid the double taxation of income from property, approved by Law 17 October 1990, *Belgisch Staatsblad*, 23 March 1991.

Conclusion

569. It is clear that the earlier isolationist policy no longer serves the interests of Russia. This is why Russia urgently seeks to link into the "civilized", mainly European, copyright systems. However, it is mainly the western countries which are the demanding party in that area, now that they grant a higher level of copyright protection than does Russia. The West hence, in its treaty relationships with Russia, demands the improvement, among other things, of the copyright regime in Russia in exchange for broader access to the Western markets and the (limited) political integration of Russia in Europe.

570. The European Union and the US do, however, clearly have different priorities. The European Union's approach takes into account Russia's specific economic difficulties. Moreover, the element of 'integration' obviously figures much larger for the European Union than for the US. For the US, striving for an adequate protection of intellectual property in other states is seen entirely in the perspective of the creation of new export markets for American industry or of favorable conditions for American investment in Russia.

Such a unilateral and aggressive approach, in which the advantage of American industry is clearly the highest priority, provokes resistance from many Russian copyright specialists. If the pressure from the US has certainly added to the acceleration of the process of reform in Russia, it has not—as will become clear later—led to the Russian legislator's acceptance of the 'copyright'-concept, at least with regard to content. In its copyright legislation Russia has, in recent years, again sought convergence with the continental European schools of copyright.

Chapter II. The Chronology of the Transformation of Copyright

Introduction

571. As indicated above, from the late seventies onwards internal criticism of existing Soviet copyright increased.[1] The external pressure to begin reforms of copyright only came later, from the early nineties.[2] It is therefore remarkable that as early as 1986, *i.e.*, at the very beginning of Gorbachev's policy of *perestroika*, a "plan for the preparation of legislative acts of the USSR, decrees of the Government of the USSR and proposals concerning the perfection of legislation of the USSR for the years 1986–1990"[3] announced—under the heading "Legislation concerning the perfection of the economic mechanism and the administration of the economy"—a legislative act for the first half of 1990 comprising alterations and additions to the 1961 Fundamentals of Civil Law of the USSR and the Union Republics, the preparation of which was allocated, *inter alia*, to the authors' agency *VAAP*. This indicated that the provisions on copyright in the Fundamentals 1961 were to be amended.[4] The stimulus for the reforms must, therefore, be seen as an answer to internal dissatisfaction; foreign influence on the content of these reforms was only to be felt at a later stage.

572. In expectation of major reforms, the history of copyright was apparently "business as usual" in the late eighties and the beginning of the nineties, both internally and in external copyright relations. Primarily at the executive, but at one point also at the judicial and legislative levels, a number of alterations relating to copyright were introduced, some more important than others. We will first discuss this fragmentary 'minor *perestroika* of copyright' chronologically (Section 1). Then, we will sketch the various phases of the 'major *perestroika* of Soviet copyright', including a discussion of the contents of the first (subsequently repealed) copyright legislation of the post-Communist era, the Fundamentals of Civil Legislation of 31 May 1991 (Section 2).

1. *Supra*, Nos.141 ff.
2. *Supra*, Nos.530 ff.
3. Postanovlenie Prezidiuma Verkhovnogo Soveta SSSR i SM SSSR, "O plane podgotovki zakonodatel'nykh aktov SSSR, postanovlenii Pravitel'stva SSSR i predlozhenii po sovershenstvovaniiu zakonodatel'stva SSSR na 1986–1990 gody", 28 August 1986, *VVS SSSR*, 1986, No.47, item 964, *SP SSSR*, 1986, No.31, item 162, *Izvestiia*, 21 November 1986.
4. *Obzor pravovoi raboty sistemy VAAP za 1986 god*, M., VAAP, 1987, 1. In a comparable plan at the level of the RSFSR changes to the Civil Code were also announced, but *VAAP* was not mentioned among the organs which were to prepare the alterations: Postanovlenie Prezidiuma Verkhovnogo Soveta RSFSR i SM RSFSR, "O plane podgotovki zakonodatel'nykh aktov RSFSR, postanovlenii Pravitel'stva RSFSR i predlozhenii po sovershenstvovaniiu zakonodatel'stva RSFSR na 1987–1990 gody", 3 April 1987, *SP RSFSR*, 1987, No.5, item 40.

Section 1. The Minor **Perestroika** *of Soviet Copyright*

§ 1. Internal Changes to Soviet Copyright Law

1.1. Directives for the Courts

573. Internally, this period was initiated by the Supreme Court of the USSR's issuing of new guidelines for the courts concerning the application of the legislation in investigations of disputes resulting from copyright relations[5] and replacing earlier guidelines of 1967 (as amended in 1975). There was little innovation as to content.[6]

1.2. Alterations to the Civil Code RSFSR

574. In 1987 several articles of the Civil Code concerning copyright were amended,[7] but this was only the introduction of the changes to the Fundamentals 1961 brought in at Union level in 1981. For this very reason, these changes were discussed in the first Part.

1.3. New Rates for the Remuneration of Authors

575. Also in 1987, the Central Committee of the CPSU and the Council of Ministers issued a joint (and, thus, politically important) Decree in which the four cultural administrations, the Ministry of Justice, *VAAP*, and the creative unions were charged with the drafting of proposals for the perfecting of copyright, particularly with regard to the remuneration of authors for the publication and republication of works of literature, the public display of works, the use of published works on radio, television, in the theater, on records, and the translation of belles-lettres.[8] It is remarkable that rates were to be fixed for the use of published works on radio and television, as the then-current legislation allowed such use without the author's permission and without payment of a fee.[9] This was, apparently, the announcement of the intention to abolish this free use, as legal theorists had demanded.[10]

576. In implementing this joint Decree the rates for the remuneration of authors were—after preparatory work by, among others, a commission of the secretariat of the Writers Union—revised upwards, both at a federal level[11]

5. PPVS SSSR, "O primenenii sudami zakonodatel'stva pri rassmotrenii sporov, voznikaiushchikh iz avtorskikh pravootnoshenii", 18 April 1986, *BVS SSSR*, 1986, No.3, 19-25; English translation in Levitsky 1986, 384-392.
6. For a discussion, see Gavrilov 1987, 229-231; Levitsky 1986, 375-383.
7. UPVS RSFSR, "O vnesenii izmenenii i dopolnenii v Grazhdanskii kodeks RSFSR i nekotorye drugie zakonodatel'nye akty RSFSR", 24 February 1987, *VVS RSFSR*, 1987, No.9, item 250.
8. Postanovlenie TsK KPSS i SM SSSR "Ob uluchshenii uslovii deiatel'nosti tvorcheskikh soiuzov", 14 February 1987, *SP SSSR*, 1987, No.16, item 61.
9. *Infra*, No.1045.
10. *Infra*, No.1046.
11. PSM SSSR, No.825 "Ob uporiadochenii stavok avtorskogo voznagrazhdeniia za izdanie, publichnoe ispolnenie i inye vidy ispol'zovaniia proizvedenii literatury i iskusstva", 12 July 1988, unpublished, but cited in Levitsky 1990, 245.

and at the level of the 15 Union Republics.[12] In the RSFSR, the Council of Ministers on 19 December 1988 issued two Decrees. The first considerably increased the remuneration for public performance of a work,[13] while the second did the same with the remuneration for the publication of works of science, literature, and art[14] although these remunerations (minimum and maximum) were still expressed as fixed sums and were, thus, (first gradually, then rapidly) eroded by inflation.[15] These fixed sums were, furthermore, still linked to the size and print-run of a work but not to its retail price or sales.[16] The decreasing scale of remuneration for reprints, which existed until then,[17] was, however, replaced by a fixed percentage of 70% of the remuneration for the first issue irrespective of whether the reprint was a second, third, or fourth issue.

1.4. The Copyright Symbol and the Transfer of Rights Abroad

577. An Order of the State Committee for publishing, printing, and the book trade of the USSR (*Goskomizdat SSSR*) dated 3 July 1989, issued at the insistence of *VAAP* and the Writers' Union,[18] ordered all publishers to introduce on all their publications as of 1 August 1989 the copyright symbol followed by the name or pseudonym of the author, or the designation of the legal person who was legally considered to hold copyright on the publication.[19] This repealed an earlier Order of *Goskomizdat* USSR from 1973, which obliged the designation of the publishing enterprise to be put after the copyright symbol.[20]

12. For the text of all 15 Decrees on the remuneration of authors for the publication of works of science, literature and art, see A.V. Turkin (ed.), *Sbornik normativnykh aktov ob avtorskom voznagrazhdenii za izdanie proizvedenii nauki, literatury i iskusstva*, M., VAAP-Inform, 1991.
13. PSM RSFSR, "O stavkakh avtorskogo voznagrazhdeniia za publichnoe ispolnenie proizvedenii literatury i iskusstva", 19 December 1988, *SP RSFSR*, 1989, No.4, item 21. See, also, Gavrilov 1990b, 367-368; Levitsky 1990, 246-248.
14. PSM RSFSR, "O stavkakh avtorskogo voznagrazhdeniia za izdanie proizvedenii nauki, literatury i iskusstva", 19 December 1988, *SP RSFSR*, 1989, No.5, item 23.
15. Gavrilov 1990b, 365.
16. Gavrilov 1990b, 366. The Writers' Union had spoken out against such a change, because "the publication of a book is a slow and bureaucratic affair, there is no advertising, there are no sales statistics, etc., and the linking of remuneration to sales is therefore an uncertain thing, which furthermore means delay in paying the author, and works with small print runs are not necessarily less significant" (A. Andrianov, "Avtor: prava i bespravie", *Literaturnaia gazeta*, 24 February 1988). Early in 1990 the representatives of *VAAP*, nevertheless, asked that the remuneration of authors be linked to sales figures: see the interview with N. Chetverikov, Chairman of the board of *VAAP*: "Avtorskoe pravo: nasushchnye problemy", *Literaturnaia gazeta*, 31 January 1990.
17. *Infra*, No.464.
18. V. Gorlenko, "Tvorchestvo, pravo, kommertsiia ...", *Pravda*, 4 January 1990.
19. Prikaz Goskomizdata SSSR, "Ob utverzhdenii instruktsii o poriadke postavleniia znaka okhrany avtorskogo prava na proizvedeniiakh nauki, literatury i iskusstva, izdavaemykh v SSSR", 3 July 1989, *BNA SSSR*, 1990, No.5, 40. See, also, Gavrilov 1990b, 369.

578. This administrative decision appeared to have no consequences for copyright since, in the Soviet Union too, copyright originated entirely free of formalities. Its significance only became fully clear when, in execution of said Order, a new Order was issued by the State Committee for the press of the USSR (*Goskompechat' SSSR*—which had in the meantime replaced *Goskomizdat*), canceling the clause in model publication agreements in which the author transferred to the (Soviet) publisher all his rights for the use of his work abroad for the full duration of copyright.[21] In other words, the author in future retained all rights to exploit his work abroad. There could be no contractual deviation from this as no provision could be introduced into a publication agreement, which put the author at a disadvantage in comparison with the corresponding model contract.[22] The author could, thus, in future himself decide on the transfer of his rights to a foreign publisher although still only through the mediation of *VAAP*.[23]

1.5. The Fate of the Authors' Agency VAAP and Its Successors

579. Then the obligation to go through *VAAP* was itself threatened. We have already seen how Gorbachev gradually dismantled the state monopoly on foreign trade[24] and how the Decree of the Council of Ministers of the USSR of 2 December 1988[25] effectively abolished the state monopoly on the import and export of goods and services. With regard to the import and export of copyrights, this demonopolization—partly at *VAAP*'s own request[26]—was made concrete by a Decree of the Council of Ministers of 26 October 1990.[27] As of 1 January 1991, it was possible for authors to bypass *VAAP* when negotiating authors' contracts with foreign exploiters and to finalize contracts with foreign

20. Prikaz Goskomizdata SSSR, "Ob utverzhdenii Instruktsii o poriadke primeneniia znaka okhrany avtorskogo prava na proizvedeniia literatury, nauki i iskusstva", 28 March 1973, *BNA SSSR*, 1973, No.7.
21. Prikaz Goskompechat' SSSR, "O vnesenii izmenenii v tipovye izdatel'skie dogovory", 15 November 1989, *BNA SSSR*, 1990, No.5, 43. The alteration passed here concerns only the Model contract for the publication of a literary work, the Model contract for the publication of a work of visual art and the Model contract for the publication of a musical work. On this clause, see *infra*, No.1028.
22. Art.506 para.2 CC RSFSR.
23. Gavrilov 1990b, 369-370.
24. *Supra*, Nos.422 ff.
25. PSM SSSR, "O dal'neishem razvitii vneshneekonomicheskoi deiatel'nosti gosudarstvennykh, kooperativnykh i inykh obshchestvennykh predpriiatii, ob"edinenii i organizatsii", 2 December 1988, *SP SSSR*, 1989, No.2, item 7.
26. V. Gorlenko, "Tvorchestvo, pravo, kommertsiia ...", *Pravda*, 4 January 1990; "Avtorskoe pravo: nasushchnye problemy", *Literaturnaia gazeta*, 31 January 1990.
27. PSM SSSR, "O merakh po demonopolizatsii v oblasti eksporta i importa avtorskikh prav", 26 October 1990, *SP SSSR*, 1990, No.30, item 143. See, also, Elst 1993, 103; Prins 1991b, 244.

parties directly (or through the mediation of another organization). The same applied to the import of copyrights.[28]

580. The unpublished Decree of the Council of Ministers of the USSR of 16 August 1973 on *VAAP*[29] was altered by an equally unpublished appendix to the Decree of 26 October 1990, so that the censorship provision ("*VAAP* is responsible for the promotion of works by Soviet authors abroad and the use of foreign authors in the USSR taking account of the political, economic and cultural interests of the country") was rewritten in neutral terms. This was not directly related to the abolition of the state monopoly on foreign trade but, rather, to the abolition of censorship by the Law of 12 June 1990 on the press and the means of mass communication.

581. At the same time as *VAAP* was being de-monopolized and the de-ideologized its financial basis was also being depleted. Social pressure forced *VAAP* to relinquish its commission fees,[30] and the most successful authors now by-passed *VAAP* to make deals with foreign publishers, record companies, and suchlike directly. This was among the reasons for the transformation, in May 1991, of the social organization *VAAP* into a State Agency of the USSR for copyright and neighboring rights (*Gosudarstvennoe agentstvo SSSR po avtorskim i smezhnym pravam*, *GAASP* for short),[31] an organ of state, which—in addition to income from commissions—could count on subsidies from the state budget.

582. Yet it was clear that, alongside financial considerations, there were other reasons for the Soviet authorities to opt for the incorporation of the authors' agency into the apparatus of state. The preamble to the Decree of 14 May 1991 shows that the decision was taken

> in connection with the increasing role of copyright and neighboring rights in the creation of favorable conditions for creative activity and the extension of the country's cultural heritage, the USSR's greater participation in the international system for the protection of such rights, the growing influence of the level of protection of copyright and neighboring rights on the development of the USSR's international relations in the fields of science, culture, trade, and other spheres, and taking into account that these affairs gain a general significance for the state and cannot under current conditions be solved without suitable state aid.

28. The inconvertibility of the ruble did however remain a problem, since it made any financial transaction with a Western country that did not go through the official organs very difficult (Gavrilov 1991b, 341).
29. *Supra*, No.120.
30. As of 1 November 1990, *VAAP* had reduced its commissions from 25 to 15%, or from 15 to 10% (N. Chetverikov, "Komu VAAP sluzhit", *Pravda*, 5 March 1991).
31. PSM SSSR, "O Gosudarstvennom agentstve SSSR po avtorskim i smezhnym pravam", 14 May 1991, *SP SSSR*, 1991, No.11, item 53. See also Elst 1993, 103. Point 1 of this Decree declares that the term "neighboring rights" refers to the rights of performing artists, producers of sound recordings and broadcasters. The legislation then in force, however, did not recognize any neighboring rights!

This shows that the Soviet authorities had, by the early nineties, become aware that on the one hand the changed political and economic conditions[32] would give copyright an increasingly large role in creating favorable circumstances for cultural, creative activities, and, on the other hand that foreign powers were attaching growing importance to the maintenance of the level of copyright protection for the works of their nationals in the USSR.[33]

583. The transformation of *VAAP* into *GAASP* occurred at a moment when the Soviet Union was disintegrating at a rapid rate. Ten days before the foundation of the Commonwealth of Independent States, *GAASP* was transformed into the Interstate agency for copyright and neighboring rights (*Mezhgosudarstvennoe agentstvo po avtorskim i smezhnym pravam*), responsible for the coordinated policy of the sovereign states in the field of copyright and for the fulfillment of the USSR's international obligations in this field.[34] This Decree of the State Council of the USSR was not however implemented: the Soviet authors' agency—under whatever name—disappeared together with the USSR.[35]

584. Barely a month and a half later, on 15 January 1992, the Founding Meeting was held in Moscow to set up *VAAP*, the Pan-Russian (*vserossiiskoe*), and thus no longer Pan-Union (*vsesoiuznoe*), agency for copyright. The Statutes of the new, now Russian *VAAP*[36] show that *VAAP*—unlike *GAASP*—was founded as a social organization, which—and this unlike the former *VAAP*—would be a true organization of its members. This meant both collective members (creative unions and funds of the Russian Federation, and other social associations involved in defending the professional interests of authors) and individual members. The main activity of the new *VAAP* would be the realization and collective protection of copyrights in those spheres of exploitation in which the individual achievement of copyright is practically impossible or very difficult (public performance, mechanical recording, and reproduction, etc.).[37]

32. At the time that *GAASP* was founded, the party monopoly and much of the party's influence on social affairs had been lost, the censorship had been abolished, the property of the citizen, even in the means of production, had been recognized and the political choice for the development of a market economy had already been made.
33. At that moment, the USSR had undertaken both with regard to the European Communities and the USA to guarantee an effective and sufficient level of copyright protection: *supra*, Nos.547 and 560.
34. Postanovlenie Gosudarstvennogo Soveta SSSR, "O Mezhgosudarstvennom agentstve po avtorskim i smezhnym pravam", 27 November 1991, *VVS SSSR*, 1991, No.50, item 1425.
35. Elst 1993, 103.
36. "Ustav Vserossiiskogo Agentstva po avtorskim pravam (VAAP)", unpublished. See also "VAAP na smenu VAAPu", *Kul'tura*, 18 January 1992.
37. In contrast to *GAASP*, the new *VAAP* did not set itself the task of administering neighboring rights.

585. The new *VAAP* was, however, not to have a long life. In order to achieve their objectives, the founders of the new *VAAP* asked for, and obtained, the transfer of the infrastructure and the assets of the late *GAASP*, granted by a Decree of the Presidium of the Supreme Soviet of the Russian Federation of 3 February 1992.[38] This was the signal for a political struggle between the Russian parliament and the Russian President for control of the legacy of *GAASP*.[39] Three weeks later President El'tsin issued an *Ukaz* founding the Russian agency for intellectual property of the President of the Russian Federation (*Rossiiskoe agentstvo intellektual'noi sobstvennosti pri Prezidente Rossiiskoi Federatsii*, *RAIS* for short) on the basis of the abolished State agency of the USSR (*GAASP*).[40] All enterprises, organizations, institutions, buildings, financial assets, and other property on the territory of the RF, or beyond the borders of the CIS, which had been under the administration of *GAASP* on 1 January 1992, were transferred to *RAIS*.

586. The struggle was settled in the President's favor on 28 April 1992 by the Constitutional Court. The Presidium of the Supreme Soviet's Decree of 3 February 1992 was nullified, among other reasons because the Presidium had gone beyond its constitutional authority by involving itself in questions of the founding, reorganization, or liquidation of social associations or of the determining of their functions, rights, and obligations. The finding also referred to the infringement of the division of competence between the executive and legislative powers.[41]

587. *RAIS*, therefore, emerged as the winner.[42] The Statutes of *RAIS* were ratified by a Presidential Order of 15 July 1992.[43] From these, it appeared that *RAIS* was to have a double function.[44]

On the one hand, it was a state body, competent to outline the state's policy in the field of copyright and neighboring rights.[45] In this capacity *RAIS* was,

38. Postanovlenie Prezidiuma Verkhovnogo Soveta RF "O Vserossiiskom agentstve po avtorskim pravam", 3 February 1992, *VSND i VS RF*, 1992, No.7, item 328.

39. Elst 1993, 103. As political background to this struggle, it is sufficient to refer to articles in the press stating that the parliamentary chairman Khasbulatov hoped to do a friendly favor for his literary agent and the director of the old *VAAP*, N. Chetverikov, by having him appointed head of the new *VAAP*. Chetverikov was a *KGB* lieutenant-general, and was appointed head of the old *VAAP* after being declared *persona non grata* in France. He was a symbol for the intertwining of copyright functions with those of organs of censorship and foreign espionage which was so typical of the old *VAAP*. See Iu. Pospelova and M. Sokolov, "Khasbulatov s"ezdil v Pizu i poplatilsia", *Kommersant"*, May 1992; Iu. Kostylev, "VAAP-GAASP-RAIS: staraia struktura—novoe soderzhanie", *Knizhnoe delo*, 1992, No.2, 20.

40. Ukaz Prezidenta RF, "O Rossiiskom agentstve intellektual'noi sobstvennosti pri Prezidente Rossiiskoi Federatsii (RAIS)", 24 February 1992, *VSND i VS RF*, 1992, No.10, item 497. The name "Russian agency for intellectual property attached to the President of the RF" was later shortened to "Russian agency for intellectual property": Point 3 Ukaz Prezidenta RF "O strukture tsentral'nykh organov federal'noi ispolnitel'noi vlasti", 30 September 1992, *VSND i VS RF*, 1992, No.41, item 2279.

among other things, charged with submitting concrete proposals to the President with regard to the improvement of the legislation in this field, coordinating the activities of the central organs of the executive power and cooperating with the committees in affairs which fall within its competence, monitoring compliance with the legislation concerning copyright and neighboring rights, representing Russia at the drafting and concluding of international agreements in this field (*e.g.*, in the Intergovernmental Committee of the Universal Copyright Convention), and issuing binding instructions and clarifications for both the state administrations and the users of works and objects of neighboring rights in order to ensure the uniform application of copyright legislation throughout Russian territory.

On the other hand, *RAIS* fulfilled the functions usually exercised by collecting societies: the collection, distribution, and payment of authors' remunerations for the public performance of works, the publication of works on phonograms and other sorts of mechanical and magnetic recording and the use of works of applied decorative art in industry, the strengthening of individual advice to Russian and foreign right holders and users, the conclusion of mutual agreements with comparable foreign authors' associations, etc.

Finally, we must indicate *RAIS*'s responsibility to cooperate in the forming of companies for the administration of copyright and neighboring rights

41. PKS RF—Rossii "Po delu o proverke konstitutsionnosti postanovleniia Prezidiuma Verkhovnogo Soveta RSFSR ot 3 fevralia 1992 goda No.2275—and "O Vserossiiskom agentstve po avtorskim pravam", 28 April 1992, *VSND i VS RF*, 1992, No.21, item 1141, in English translation in *SD*, 1994, No.3, 48-53.

    Five days before this judgment, the Presidium of the Supreme Soviet had itself already withdrawn the disputed Decree (Postanovlenie Prezidiuma Verkhovnogo Soveta RF, "O priznanii utrativshim silu Postanovleniia Prezidiuma Verkhovnogo Soveta RF 'O Vserossiiskom agentstve po avtorskim pravam' ", 23 April 1992, *VSND i VS RF*, 1992, No.18, item 1022). A later request to have exactly the same Decree declared unconstitutional, was declared inadmissible due to the sentence already given on 28 April 1992: PKS RF, 19 March 1993, *VSND i VS RF*, 1993, No.15, item 536; English translation in *SD*, 1994, No.4, 75-83, esp. 80-81.

42. See, *e.g.*, S. Taranov, "RAIS ne khochet stat'VAAPom", *Izvestiia*, 22 July 1992; Iu. Kostylev, "VAAP—GAASP—RAIS: staraia struktura—novoe soderzhanie", *Knizhnoe delo*, 1992, No.2, 19-21; "VAAP, GAASP, RAIS...chto dal'she?", *Izvestiia*, 10 September 1992.

43. Rasporiazhenie Prezidenta RF, "Voprosy Rossiiskogo agentstva intellektual'noi sobstvennosti pri Prezidenta Rossiiskoi Federatsii", 15 July 1992, *VSND i VS RF*, 1992, No.29, item 1768, *Rossiiskie Vesti*, July 1992, No.37. See also J.N.H., "Russian Federation's Decree on Intellectual Property Agency", *PS SEEL*, October 1992, 13 and 17.

44. Elst 1993, 103. See, also, Iu. Rakhaeva, "Novaia metla ... akkuratno pribiraet", *Moskovskii Komsomolets*, 2 April 1992.

45. See, also, Point 1 para.2 Ukaz Prezidenta RF "O Rossiiskom agentstve intellektual'noi sobstvennosti pri Prezidente Rossiiskoi Federatsii (RAIS)", 24 February 1992, *VSND i VS RF*, 1992, No.10, item 497. The reference to neighboring rights is remarkable, since the copyright legislation then in force did not yet recognize such rights.

on a collective basis, as well as organizations (agencies) for the cession and obtaining of copyrights on an individual basis. It was apparently intended that *RAIS* would gradually relinquish its functions as an authors' agency to private organizations in order to dedicate itself to its primary charge as an organ of state, possibly with the addition of an umbrella function as a regulator of the newly founded private agencies similar to the German Patent Office.[46] As we will see, *RAIS* was itself not long-lived.[47]

1.6. Media Legislation

588. The first changes to the copyright legislation in a formal sense are to be found in the USSR Law on the press and other news media of 12 June 1990,[48] with a special measure concerning the publication of readers' letters,[49] which affirmed existing professional practice with regard to shortening and editing,[50] and a measure on the signing of articles by journalists.[51]

589. On Russian territory the NML USSR was replaced after a year and a half by the News Media Law of the R.F.[52] Besides another measure concerning readers' letters[53] and journalists signing by name,[54] the NML R.F obliges editor

46. Elst 1994, 152; Gavrilov 1992, 900; Iu. Kostylev, "VAAP—GAASP—RAIS: staraia struktura—novoe soderzhanie", *Knizhnoe delo*, 1992, No.2, 19.
47. *Infra*, No.627.
48. Zakon SSSR, "O pechati i drugikh sredstvakh massovoi informatsii", 12 June 1990, *VSND i VS SSSR*, 1990, No.26, item 492.
49. Art.25 para.3 NML USSR provided that: "When being published readers' letters may be shortened and edited, without, however, twisting their meaning."
50. E.P. Gavrilov, "Neuerungen im Medien- und Urheberrecht der UdSSR", *Medien und Recht*, 1991, 8-9. Art.25 para.1 NML USSR also confirmed the principle that the use of works of journalism, literature, art and science by the news media is allowed if copyright is respected.
51. Art.30 NML USSR gave as the rights of a journalist, *inter alia*, "6. to refuse to compose a document contrary to his convictions under his own name; 7. to have his signature removed from a document, if he is of the opinion that the content has been twisted in the course of the editorial process; 8. to reserve to himself the keeping of the secret of authorship". See, also, Gavrilov 1990b, 373-374.
52. Zakon R.F, "O sredstvakh massovoi informatsii", 27 December 1991, *VSND i VS RF*, 1992, No.7, item 300.
53. By virtue of art.42 para.2 NML, R.F readers' letters may be used in the reports and documents of that medium, if the meaning of the letter is not twisted and the provisions of the Media Law are not infringed. See, also, Gavrilov/Elst 284.
54. The right of a journalist to choose to disseminate a report or document compiled by him under his own name, or anonymously or by way of a pseudonym, is guaranteed in its entirety in art.47 para.1 point 12 NML R.F. Point 11 furthermore gives the journalist the choice, if—in his opinion—the content of a report or document compiled by him is twisted in the course of the editorial process, either to have his name removed from the document, or to enforce his rights as author to the full to prohibit the use of the report or document outright or to come to an agreement on the conditions and nature of its use.

and journalist to "respect the rights on works used by the medium, including copyright, publishers' rights and other intellectual property rights". Furthermore, "the author or another rightholder can personally negotiate special provisos to the conditions and manner of the use of the work granted to the editorial board".[55] If editorial board, publisher, or distributor of a news medium infringes the property on non-property rights of an author, a judge can order the dissemination of the print run of the infringing issue or the infringing broadcast to be stopped.[56] Finally, the NML RF provides that the dissemination of the production of a news medium is only possible with the permission of the editor-in-chief,[57] which raises questions about the entitlement to copyright in a newspaper as a whole (or in a television broadcast).[58]

1.7. The Legislation on Education

590. The Law of 10 July 1992 on education[59] introduced a special regulation concerning "property rights" on products of intellectual, creative labor resulting from the activity of an educational institution. We will return to this Law.[60]

§ 2. The USSR's External Relations concerning Copyright

591. In 1986, the USSR concluded a Treaty with Sweden on the mutual protection of copyrights,[61] *i.e.*, the second such treaty with a Western country (after the 1981 Treaty with Austria). The most important aim of the treaty was the extension of the protection of the UCC (1952) to works (including photographic works) created by natural persons[62] with a permanent residence abode in the USSR or Sweden and created or published before 27 May 1973

55. Arts.42 para.1 and 47 para.1 point 5 NML RF. It is not clear what the NML RF means by the term "publisher's rights" (*izdatel'skie prava*), also used in art.22 para.3 NML RF, a term which was and is in itself unknown in the Russian copyright legislation. It is possible that it refers to the original copyright, recognized at the time of the ratification of the NML RF, of organizations which publish magazines or periodicals independently or through a publisher (art.485 para.1 CC RSFSR), but in this case one could only speak of publisher's rights (which were then called copyright by a legal fiction), if the initiative for these publications came from the publishing enterprise itself.
56. Art.25 para.5 NML RF. Dissemination refers only to the sale of copies or the broadcasting of a program, not to its rental (art.2 NML RF).
57. Art.26 NML RF.
58. Comp. arts.485 and 486 para.4 CC RSFSR.
59. Zakon RF, "Ob obrazovanii", 10 July 1992, *VSND i VS RF*, 1992, No.30, item 1797.
60. *Infra*, No.671.
61. "Soglashenie mezhdu Pravitel'stvom Soiuza Sovetskikh Sotsialisticheskikh Respublik i Pravitel'stvom Korolevstva Shvetsii o vzaimnoi okhrane avtorskikh prav", 15 April 1986, *SP SSSR*, II, 1986, No.15, item 41; Sveriges överenskommelser med främmande makter, 1986, No.9; *DA*, December 1986, Lois et traités, SE-SU, Traités Bilatéraux—Texte 02, 1. For a discussion, see Gavrilov 1987, 228-229.
62. The original copyright of legal persons (as it existed in the USSR) was kept out of the area of application of the bilateral Treaty.

(the date that the UCC came into force for the USSR), insofar as the period of protection had not expired.[63] Furthermore, it was made explicit that the protection, granted by the UCC and by this bilateral agreement, also extends to the moral rights of the authors and other right holders.

592. On 19 April 1989, an Agreement was concluded between the USSR and Madagascar concerning the mutual protection of copyrights, which is particularly remarkable as being the first Agreement with a country, which was not a member of the UCC.[64] The text of the Agreement was, however, never published.

593. On 28 September 1989, a Protocol to the existing USSR-Austria Agreement on the mutual protection of copyrights was signed.[65] In the original Agreement, the UCC was declared to apply between both parties to works, which had been created but not yet published on 27 May 1973 (the date on which the UCC came into force in the USSR). The Protocol extended this retroactivity to works, which had already been published before said date, and this in almost identical phrasing to the Agreement with Sweden.[66]

594. The bilateral agreement concerning the mutual recognition of copyrights between the GDR and the USSR was rescinded by the USSR,[67] after the reunification of the two Germanys had led to confusion as to its continuation.[68]

595. With regard to multilateral treaties, the first that can be mentioned is the USSR's 1988 accession to the Brussels Convention on the dissemination of program-carrying signals transmitted by satellite.[69]

596. More important, however, is the fact that in 1989 the USSR's Deputy Minister for Foreign Affairs, V.F. Petrovskii, announced that the USSR was

63. Gavrilov 1987, 228-229; Ph. Möhring, E. Schulze., E. Ulmer, K. Zweigert, (ed.), *Quellen des Urheberrechts*, III, Alfred Metzner Verlag, Frankfurt am Main, Schweden /I, 5.
64. Gavrilov 1990b, 365. Silonov (49) dates the agreement as of 19 April 1988.
65. The Protocol was ratified by the USSR on 2 July 1991 (PVS SSSR, "O ratifikatsii Protokola k Soglasheniiu mezhdu Soiuzom Sovetskikh Sotsialisticheskikh Respublik i Avstriiskoi Respublikoi o vzaimnoi okhrane avtorskikh prav ot 16 dekabria 1981 goda", *VSND i VS SSSR*, 1991, No.28, item 812), and the procedure of ratification was also completed in Austria (R. Dittrich, "Die Weiterentwicklung des österreichischen Urheberrechtes", *Grur Int.*, 1991, 779-780).
66. For a discussion of this Protocol, see R. Dittrich, "Zur Revision des bilateralen Urheberrechtsabkommens mit der UdSSR", *Rundfunkrecht*, 1990, Nos.1/2, 1-3.
67. PSM SSSR, "O voprosakh, sviazannykh s deistviem nekotorykh soglashenii mezhdu SSSR i GDR", 2 June 1991, *SP SSSR*, 1991, No.15, item 66. Gavrilov 1991b, 342 had asked for this cancellation.
68. S. Haupt, "Die völkerrechtlichen Verträge der DDR auf dem Gebiet des Urheberrechts im Blickwinkel der politischen Veränderungen in Europa", *ZUM*, 1992, 286-291.
69. UPVS SSSR, "O prisoedinenii Soiuza Sovetskikh Sotsialisticheskikh Respublik k Konventsii o rasprostranenii nesushchikh programmy signalov, peredavaemykh cherez sputniki", 12 August 1988, *VVS SSSR*, No.34, item 550.

carrying out the preparatory work necessary to facilitate speedy accession of the USSR to the Berne Convention.[70] For the first time, there was an announcement at this level[71] of what had appeared impossible in Russia for over 100 years. In April 1989, the moment of the speech, the USSR was under no international obligation to subscribe to the Berne Convention. Internally, in the press and the legal theory, the possibility of acceding to the BC was barely voiced.

Just as with the USSR's accession to the UCC, political motives relating to foreign policy seem to have played an important role. The place of the announcement also points in that direction: an information forum in London, organized by the CSCE, precisely the organization which had done so much in the preceding decade for the thaw between East and West. At a moment that the USSR was beginning to score points for human rights, such an announcement to the CSCE was a well-chosen political move. It demonstrated the USSR's willingness to co-operate with the West, even in the fields of media and culture, and emphasized the USSR's determination to break out of its isolation.[72]

597. At first, though, it looked as though the Soviet authorities had misjudged the significance of the Berne Convention. After all, the first normative text to refer to the Berne Convention was an order by President Gorbachev on the drafting of urgent measures for the protection of social morals![73] Later, in the definition of the "creative worker" in the Fundamentals on culture of 1992,[74] there was an explicit reference to the persons considered "to be such" by the UCC, the Berne Convention and the Convention of Rome, at a moment that Russia had only joined the UCC. This was the first reference to the Berne Convention at a legislative level. In the press, repeated pleas for accession to the Berne Convention appeared,[75] and legal theory also began—albeit only on a very limited basis—to study the benefits and disadvantages of accession.

Thus, Gavrilov summarized the internal discussion by listing—as the benefits of accession—the strengthening of international contacts and mutual trust which would supposedly lead to a greater "consumption" of Soviet works

70. "Evrope—glasnost' i ravnuiu otkrytost'", *Pravda*, 20 April 1989.
71. In 1988, a representative of *VAAP* at a Conference organized by the *Confédération Internationale des sociétés d'Auteurs et Compositeurs* (CISAC) had already typified the plans for the reform of Soviet copyright legislation as an attempt to bring the level of the protection of copyright up to that provided for by the two conventions (UCC and BC) in their respective versions of 1971: Levitsky 1990, 243.
72. Prins 1991b, 244.
73. Rasporiazhenie Prezidenta SSSR, "O razrabotke neotlozhnykh mer po okhrane obshchestvennoi nravstvennosti", 5 December 1990, *VSND i VS SSSR*, 1990, No.50, item 1092.
74. Art.3 Zakon RF, "Osnovy zakonodatel'stva Rossiiskoi Federatsii o kul'ture", 9 October 1992, *VSND i VS RF*, 1992, No.46, item 2615, Rossiiskaia Gazeta, 17 November 1992.
75. V. Gorlenko, "Tvorchestvo, pravo, kommertsiia ...", *Pravda*, 4 January 1990; "Avtorskoe pravo: nasushchnye problemy", *Literaturnaia gazeta*, 31 January 1990.

abroad, the increase in copyright protection for Soviet works in the USSR (although Gavrilov admits that this objective could also be met without accession to the BC), and the protection of Soviet works in those countries which were not a party to the UCC, but were to the BC. As disadvantages, he mentions the high financial burden, both of paying the annual contributions to the Union of Berne and of paying additional remunerations to both domestic and foreign authors resulting from the increase of the level of protection,[76] as well as the "purely technical problems" relating to obtaining the permission of authors, collecting and paying the remunerations, and regulating the new methods of exploitation, such as radio and television broadcasting of works.[77] As the USSR, and later the RF, desired first to adapt their legislation to the BC before signing the Treaty, Russia effectively acceded to the BC only six years after Soviet authorities had first announced their resolve.[78]

Section 2. The Major **Perestroika** *of Soviet Copyright*

§ 1. The Fundamentals 1991

1.1. Creation and Coming into Effect

598. As we wrote in the introduction to this Chapter, as early as 1986 the idea arose of amending the 1961 Fundamentals of Civil Law, including the sections on copyright, by 1990. On the basis of a joint decree of the Central Committee of the CPSU and the Council of Ministers of 14 February 1987,[79] a working party was formed with representatives of the four cultural administrations (the Ministry of Culture, *Goskino*, *Gosteleradio*, and *Goskomizdat*), the Ministry of Justice, the State committee for labor (*Goskomtrud*), *VAAP*, and the creative unions, with the brief of formulating proposals for the improvement of the legislation on copyright.[80] By mid-1990, the working party had drafted a proposal to amend Section IV of the Fundamentals 1961 and to introduce a Section IV A on neighboring rights, 32 articles in total. This proposal was never published.[81]

76. The negative consequences of accession to the BC for the USSR's balance of foreign trade is also emphasized by: P. Nikulin, in "Intellektual'naia sobstvennost': vzgliad iz zavtra", *Sots. Zak.*, 1990, No.5, 14; P. Nikulin, "Ne terpit otlagatel'stva", *Khoziaistvo i Pravo*, 1990, No.9, 112.
77. Gavrilov 1990b, 364-365.
78. *Infra*, No.628.
79. Postanovlenie TsK KPSS i SM SSSR, "Ob uluchshenii uslovii deiatel'nosti tvorcheskikh soiuzov", 14 February 1987, *SP SSSR*, 1987, No.16, item 61.
80. An interview with an administrative secretary of the Writers' Union, A. Salynskii, showed that the aim of the working party was accession to the 1971 Paris versions of both the UCC and the BC. Particular attention was given to broadcasting rights, copyright on audiovisual works, the rental of films and the rights to video recordings (A. Andrianov, "Avtor: prava i bespravie", *Literaturnaia gazeta*, 24 February 1988).
81. See, also, Gavrilov 1991b, 342-343.

As the economic reforms increasingly pointed towards the development of a market economy, one began to realize that it was crucial to replace the Fundamentals 1961 and the fifteen Codes of Civil Law. A draft of Fundamentals of Civil Legislation was prepared by the USSR Supreme Soviet's Committee for legislation and was published.[82] In this draft, just as in the Fundamentals 1961, there was a Section IV, which under the heading "Copyright" now regulated not only copyright but, also, neighboring rights.[83] The limited extent of Section IV of the draft Fundamentals (eight articles) is enough to show that the Committee for legislation had not adopted the proposal of the *ad hoc* working party, and with regard to content too there were few traces of this proposal to be found in the draft.

When in May 1991 the Supreme Soviet discussed the draft Fundamentals of Civil Legislation, it transpired that only the part on copyright gave rise to serious debate; some of the articles were even presented to the deputies in optional variants.[84] Ultimately the new Fundamentals of Civil Legislation of the USSR and the Republics (hereinafter: Fundamentals 1991) were passed on 31 May 1991.[85] Section IV retained the structure, which it already had in the draft, but was extended with two articles regulating neighboring rights *ratione loci* and the sanctions for the infringement of copyright and neighboring rights. Furthermore, corrections and additions, some quite important, were made.

599. The disintegration of the USSR, though, prevented the Fundamentals 1991 from coming into force on the date provided, 1 January 1992.[86] The old Russian legislation, thus, continued to apply.[87]

82. "Proekt. Osnovy grazhdanskogo zakonodatel'stva", *Izvestiia*, 19 January 1991. This at least partially implemented the executive decree accompanying the USSR Law on property which had given the Council of Ministers of the USSR the task of submitting a draft bill in the course of 1990 that would regulate relations arising from the creation and use of works of science, literature and art, and other objects of intellectual property: Postanovlenie, "O vvedenii v deistvie Zakona SSSR 'O sobstvennosti'", 6 March 1990, *VSND i VS SSSR*, 1990, No.11, item 165. See also Gavrilov 1990a, 69.
83. For a discussion of this part of the draft, see Gavrilov 1991b, 343; Prins 1991b, 245-246.
84. *Survey of World Broadcasting*, Part 1 USSR, 29 May 1991, SU/1084 C1/2.
85. "Osnovy grazhdanskogo zakonodatel'stva Soiuza SSR i Respublik", 31 May 1991, *VSND i VS SSSR*, 1991, No. 26, item 733, *Izvestiia*, 25 June 1991.
86. *Supra*, No.397. See, also, Elst 1993, 95; Gavrilov 1992, 894; Sergeev 15-16.
87. This also applied to the 1986 Guidelines of the dissolved USSR Supreme Court with regard to the settlement of copyright disputes (*supra*, No.573): PPVS RF, No.8 "O primenenii sudami Rossiiskoi Federatsii postanovlenii Plenuma Verkhovnogo Suda Soiuza SSR", 22 April 1992, *BVS RF*, 1992, No.7, 11-12. See also the unofficial list of still applicable Directives of the Supreme Court USSR and RF: A.Ia. Kachanov, "Perechen' deistvuiushchikh postanovlenii Plenumov Verkhovnykh Sudov SSSR i Rossiiskoi Federatsii, obzorov sudebnoi praktiki (po sostoianiiu na 22 dekabria 1992 g.)", *Sov. Iust.*, 1993, No.14, 30-31; No.15, 28-31; No.16, 27-31; No.17, 27-31, esp. No.15, 30. Also Naumov 13-14.

600. In order to prevent so much legislative work on the part of the USSR parliament from going to waste, and because of the urgent necessity of creating a legal framework for the introduction of a market economy, the Supreme Soviet of the Russian Federation on 14 July 1992 passed a Decree "On the regulation of civil-law relations in the period of the implementation of economic reforms",[88] by which the Fundamentals of Civil Legislation of 31 May 1991 came into force in the territory of the Russian Federation from 3 August 1992 onwards.[89] Because the original executive decree for the Fundamentals, dated 31 May 1991, itself did not come into force, its transitional provisions concerning copyright—namely that there be no retroactive protection for works first identified as objects of copyright in the Fundamentals 1991 and published before 1 January 1992,[90] and the immediate application of the extended term of protection on terms still running[91]—were lost. The Decree of 14 July 1992 itself contained no transitional provisions.

The Fundamentals 1991 only came into effect conditionally,[92] namely "insofar as not contrary to the Constitution and the legislative acts adopted by the RF after 12 June 1990", the day of the Russian declaration of sovereignty.[93] Conversely, the CC RSFSR was only partially taken out of effect,[94]

88. PVS RF, "O regulirovanie grazhdanskikh pravootnoshenii v period provedeniia ekonomicheskoi reformy", *VSND i VS RF*, 1992, No.30, item 1800, *Rossiiskaia gazeta*, 24 July 1992.
89. On the date of coming into force, see Point 1 PVS RF, "O nekotorykh voprosakh primeneniia zakonodatel'stva Soiuza SSR na territorii Rossiiskoi Federatsii", 3 March 1993, *VSND i VS RF*, 1993, No.11, item 393, *Rossiiskaia gazeta*, 25 March 1993; Point 1 PPVS RF, No.17 "O nekotorykh voprosakh primeneniia Osnov grazhdanskogo zakonodatel'stva Soiuza SSR i respublik na territorii Rossiiskoi Federatsii", 22 December 1992, *BVS RF*, 1993, No.2, 7, *Zakonnost'*, 1993, No.3, 56; Point 1 Postanovlenie PVAS RF, No.23 "O nekotorykh voprosakh primeneniia arbitrazhnymi sudami Osnov grazhdanskogo zakonodatel'stva Soiuza SSR i respublik na territorii Rossiiskoi Federatsii", 22 December 1992, *Khoziaistvo i Pravo*, 1993, No.3, 82. See also Elst 1993, 95.
90. Point 11 PVS SSSR, "O vvedenii v deistvie Osnov grazhdanskogo zakonodatel'stva Soiuza SSR i Respublik", *VSND i VS SSSR*, 1991, No.26, item 734. This measure in the first instance affected computer programs which were published before 1 January 1992: see the commentary of S. Khokhlov on the provisions of the executive decree of 31 May 1991 in *Khoziaistvo i Pravo*, 1991, No.9, 15; Prins 1991c, 388.
91. Point 12 PVS SSSR, "O vvedenii v deistvie Osnov grazhdanskogo zakonodatel'stva Soiuza SSR i Respublik", *VSND i VS SSSR*, 1991, No.26, item 734.
92. Point 1 PVS RF, "O regulirovanie grazhdanskikh pravootnoshenii v period provedeniia ekonomicheskoi reformy", *VSND i VS RF*, 1992, No.30, item 1800, *Rossiiskaia gazeta*, 24 July 1992. This means *e.g.*, that the copyright provisions of NML RF have priority over the copyright provisions of the Fundamentals 1991: Gavrilov/Elst 284.
93. *Supra*, No.397.
94. Point 2 PVS RF, "O regulirovanie grazhdanskikh pravootnoshenii v period provedeniia ekonomicheskoi reformy", *VSND i VS RF*, 1992, No.30, item 1800, *Rossiiskaia gazeta*, 24 July 1992.

namely insofar, as it was contrary to the provisions of the Fundamentals 1991. This measure resulted in a very confusing hierarchy of norms in the field of civil law.[95]

The coming into force of the Fundamentals 1991 in Russia was not only conditional, it was also temporary, namely "until such time as a new Code of Civil Law of the Russian Federation be adopted".[96] Section IV Fundamentals 1991, which dealt with copyright, was to remain in force for one year to the day: from 3 August 1992 to 3 August 1993, the date on which—as we will see[97]—an entirely new copyright law came into force.

601. The importance of the Fundamentals 1991 for the development of copyright is put into perspective by the compactness of its measures concerning copyright (ten articles, of which seven concerned copyright in the strict sense, two regulated neighboring rights, and one provided for sanctions for infringement of copyright and neighboring rights).

Nevertheless, the Fundamentals 1991 have a key position in the history of civil law in Russia. The document, both in Russia[98] and in the West,[99] was considered a leap towards modernity and the market economy. The Fundamentals 1991 were the bridge between the old and the new social models, symbolized by their acceptance during the Soviet period and coming into force in independent Russia. This was also true of the provisions concerning copyright. In many ways, the Fundamentals 1991 meant a break with the socialist character of Soviet copyright.

1.2. Discussion

602. Insofar as the legislative division of competence regarding copyright within the federal Soviet Union was concerned, the Fundamentals 1991 evidenced a clear tendency towards centralization and homogenization, for example because a number of subsidiary problems formerly regulated by the Civil Codes were now solved in the federal Fundamentals 1991 itself,[100] and because the making explicit of a number of principles in the Fundamentals 1991 (*e.g.*, protection without formalities,[101] only natural persons being authors[102]) prevented the

95. *Supra*, No.397. See also with regard to the confusion concerning the applicable copyright: Elst 1993, 97; Gavrilov 1992, 895 ("ein mosaikartiges Regelungsbild").
96. Point 1 PVS RF, "O regulirovanie grazhdanskikh pravootnoshenii v period provedeniia ekonomicheskoi reformy", *VSND i VS RF*, 1992, No.30, item 1800, *Rossiiskaia gazeta*, 24 July 1992.
97. *Infra*, Nos.620-621.
98. "Ein qualitativ einwandsfreies, modernes und gut ausgearbeitetes Gesetzgebungsdokument": Alekseev 20.
99. "The New Fundamentals was a remarkable feat. In 170 concise sections, it stated modern, sensible and market-oriented rules that reincarnate all classic concepts and institutions of civil law in their contemporary exposition" (V.P., "Russian Federation Reaches Back to 1991 USSR Fundamentals of Civil Law", *PS SEEL*, 1992, No.5, 5).

Republics from taking contrary measures. Due to the disintegration of the USSR, this division of competence in practice never functioned. Nonetheless, it is worth mentioning as this centralizing tendency shows that the Soviet legislator—in drawing up the Fundamentals 1991—clearly took account of the legal theorists' demand that the fragmentation of copyright law be countered.[103] Furthermore, this tendency would continue in federal Russia, and ultimately lead to the granting of exclusive legislative competence with regard to copyright to the Federation.[104]

603. With regard to the definition of what constitutes a "work", the following innovations were noteworthy: (a) the mention of computer programs as a separate category (thus not as a literary work),[105] and of databases as an example of collective work, in the non-exhaustive listing of objects of copyright;[106] (b) the abolition of the formalities for the protection of photographs;[107] (c) the abolition of the requirement that performance guidelines be fixed in writing (or in some other way) for works of choreography and pantomime;[108] and (d) the scrapping of the category "works, expressed with the aid of mechanical or other technical recording", which meant that the earlier theoretical protection of phonograms as an author's works was deleted.[109] Works of folklore, official documents, and symbols were excluded from copyright protection.[110]

604. The original copyright holder, as indicated in the Fundamentals 1991, was without exception the citizen[111] by whose creative labor that work had

100. This is true, *e.g.*, of the definition of the term 'publication' for internal use (art.134 (1) para.2 Fundamentals 1991. Comp. art.476 CC RSFSR) and the reference to the definition in international treaties for external use (art.136 para.4 Fundamentals 1991. Comp. art.478 para.2 CC RSFSR), the listing of the objects of copyright (art.134 (2) Fundamentals 1991. Comp. art.475 para.2 CC RSFSR) and of those objects which are excluded from copyright protection (art.134 (5) Fundamentals 1991. Comp. art.487 para.1 CC RSFSR), the provision of the mutual obligations of author and user organization when concluding an author's contract (art.139 Fundamentals 1991. Comp. art.503 ff. CC RSFSR).
101. Art.134 (3) Fundamentals 1991.
102. Art.135 (1) Fundamentals 1991.
103. *Supra*, No.142.
104. Art.71 (o) Const.1993 (art.71 (n) in the Latin alphabet).
105. For instance, see also Grishaev 1991, 59; I.A. Zenin, "O kontseptsii prava intellektual'noi sobstvennosti v SSSR", in Gal'perin 1992, 54.
106. Art.134 (2) Fundamentals 1991.
107. Art.134 (3) Fundamentals 1991 for the first time made explicit that for the originating, the exercising and the protection of copyright no registration or the fulfilling of any formality is required.
108. Grishaev 1991, 22-23.
109. Phonograms are protected by a neighboring right, *infra*, No.614.
110. Art.134 (5) Fundamentals 1991.
111. The use of the term 'citizen' can be considered unfortunate, since the works of those who are not subjects of the USSR (RF) could also enjoy protection through (first) publication in the USSR (RF) or by virtue of international treaties (art.136 Fundamentals 1991).

been created.[112] This means that original copyright which—under the earlier Soviet legislation—had been vested in organizations publishing scientific collections, encyclopedic dictionaries, magazines, and other periodicals, the film studios and the broadcasters on the works they produced, was rescinded. The last category was remembered with neighboring rights,[113] while the first two categories obtained a derived right to use the work in its entirety.

605. Film producers were given only a derivative right for the use of cinema, television, and video films, a right, which was initially vested in the not further defined "authors" of these audiovisual works. These last transferred the right to use the work to the producer within the contractually provided limits.[114] The authors of works (whether pre-existing or created in the course of the production of the film) used in a film, each retained copyright on their work, transferred the right to use it in the film to the producer, and were free to use the work independently of the film as a whole.[115] The phrase "the transfer to the film producer of the right to use the work in the film" looks as though it has to be interpreted as a *cessio legis*, *i.e.*, without the possibility of agreement to the contrary. The authors of a film and the authors of works used in a film, retained their right to remuneration, since only the right to use was transferred by agreement or by the *cessio legis*, and the right to remuneration was non-transferable.[116]

606. With regard to a work "brought about in the course of fulfilling one's duties", *i.e.*, an "employee-made work" (*sluzhebnoe proizvedenie*), the Fundamentals 1991 also maintained the principle that the author is the natural person by whose creative activity the work was created.[117] To the employer's advantage there was, however[118] a *cessio legis* of the right to use the employee-created work, at least in a manner 'conditioned' by the purpose of the duties and within the limits proceeding from the duties, and for a period of no more than three years from the moment that the work was delivered.[119] For the exploitation of an employee-created work by the employer within said limits and duration, the author only had the right to remuneration "in the cases and according to the

112. Art.135 (1) Fundamentals 1991. See also Grishaev 1991, 16.
113. *Infra*, No.615.
114. Art.135 (5) para.1 Fundamentals 1991.
115. Art.135 (5) para.2 Fundamentals 1991.
116. *Infra*, No.608.
117. Art.140 para.1 Fundamentals 1991.
118. Art.483 para.1 CC RSFSR did limit the regulation of employee-created works to works, which were created within a scientific or other organization.
119. Art.140 para.3 Fundamentals 1991. Because the law also provides the possibility of agreeing a transfer of rights for a shorter period, the employer could also agree to reduce this term to nil, so that this would not in fact be a *cessio legis*, but a rebuttable presumption of the transfer of rights. Comp. Gavrilov 1992, 898 who writes that the parties can reach replacement agreements.

amounts to be determined legislatively".[120] The short period of applicability of the Fundamentals 1991 explains why such special legislation was never adopted.[121]

607. With regard to the description of the rights of the author, the extent of systematization and modernization is noticeable. Article 135 (2) para.1 Fundamentals 1991 granted the author an exclusive[122] right to his work. This sole, exclusive right was a bundle of powers: the right of authorship (for the first time explicitly mentioned in the legislation), the right to name, the right to the integrity of the work, the right to publication of the work,[123] the right to use the work, and the right to remuneration for permission to use and use of the work. The right to use the work was itself made up of various, non-exhaustively[124] listed subsidiary powers. The most important innovations were the recognition of a broadcasting right (including satellite and cable transmission), of a general right to revision or adaptation, of a right of the architect or designer to the realization of an architectural or design project, and of the exclusive character of a right to public performance and the recording right. The distribution right was also reserved, which in theory at least implied the recognition of an exclusive lending and rental right.[125]

608. One of the greatest merits of the Fundamentals 1991 was the restoration of the exclusivity of copyright by the abolition of all involuntary licenses.[126]

120. Art.140 para.2 Fundamentals 1991.
121. Nevertheless, Gavrilov 1992 (898) thought that the measure in art.140 Fundamentals 1991 "den Erfordernissen einer vernünftigen Abwägung der Interessen sowohl des Urhebers wie des Arbeitergebers nicht genügend Rechnung [scheint] zu tragen. Die Rechte des Urhebers scheinen nämlich sehr weit und die Rechte des Arbeitgebers sehr eng gefasst".
122. The recognition of the "exclusive" character of copyrights only slipped into the Fundamentals 1991 at the last moment. In art.124 Draft of Fundamentals of Civil Legislation, composed by the Supreme Soviet's Committee for legislation ("Proekt. Osnovy grazhdanskogo zakonodatel'stva", *Izvestiia*, 19 January 1991), the term 'exclusive' did not occur.
123. "A work is considered to be published, if with the author's permission it is published, publicly performed, publicly displayed, broadcast on radio or television, built or in any other way made accessible to an undetermined group of persons" (art.134 (1) para.2 Fundamentals 1991). This definition differs in three points from the earlier definition in art.476 para.1 CC RSFSR: in future the permission of the author is required for there to be any question of publication (Gavrilov 1984a, 146-147 and Serebrovskii (120) had already accepted this under the old Soviet legislation), the erection of a building is now explicitly mentioned as a form of publication (see already I.A. Gringol'ts, in Fleishits/Ioffe 705), and the residual category is no longer given as "in any other way communicated to", but rather as "in any other way made accessible to an undetermined group of persons" (in this sense see the suggestion of Dozortsev 1980, 125).
124. Gavrilov 1992, 897.
125. In any case, the jurisprudence could deduce the existence of an exclusive lending and rental right from the non-exhaustive character of the listed subsidiary powers of the right to use the work.
126. See arts.489 para.2 and 495 CC RSFSR.

The exercise of the exclusive rights was linked to the non-transferable[127] right to remuneration, the extent of which was to be agreed in an author's contract, taking into account the minimum levels to be fixed by the Government for the various methods of exploitation.[128] There was no longer any mention of legal upper limits to remuneration, so that it can be assumed that with the coming into force of the Fundamentals 1991 the existing rates were retained, but without the maximums. For the first time, there was also express provision for the possibility of linking the author's remuneration to the economic success of the exploitation of the work.[129]

609. The Fundamentals 1991 restored contractual freedom and the autonomy of the will of contracting parties with regard to the determination of the nature of the work to be created, the term in which the work had to be submitted, the imposition of a duty of exploitation, and the author's fee.[130] The strong impact of administrative law on the law of contract was, thus, destroyed. The model authors' contracts lost their relative force of law by the coming into operation of the Fundamentals 1991.[131]

The Fundamentals 1991 no longer distinguished between two types of contract,[132] and spoke only of "the author's contract", by virtue of which the author was obliged to create a work in accordance with the agreement and subsequently transmit the work commissioned, or transfer the already existing work for use, while the user was obliged to (begin to) use the work in the manner, to the extent, and within the period determined in the contract, as well as the obligation to pay a contractually fixed fee to the author.[133] The Fundamentals 1991 provided that the legislator would impose a time limit to the contractually allowed use of the work and to the applicability of the author's contract itself,[134] but the legislator's social sensitivity in the Fundamentals 1991 did not go beyond good intentions.

610. The exceptions to the economic rights of the author were drastically cut back. Not only were the ten existing free uses[135] reduced to seven,[136] they were also all formulated more restrictively and furthermore made subsidiary to the general condition that they in no way hinder the normal exploitation of the

127. Art.135 (2) para.2 and (6) para.2 Fundamentals 1991 provide only for the transferability of the right to use the work.
128. Art.139 (1) para.4 Fundamentals 1991.
129. Art.139 (1) para.4 *in fine* Fundamentals 1991. In the Draft of the Committee for legislation this provision did not occur.
130. Art.139 (1) para.2 Fundamentals 1991.
131. Gavrilov 1993b, 12.
132. Art.503 para.2 CC RSFSR.
133. Art.139 (1) para.2 Fundamentals 1991.
134. Art.139 (1) para.3 Fundamentals 1991.
135. Arts.492, 493 and 515 CC RSFSR.
136. Furthermore, the possibility of expropriation of separate rights of use in a work (art.501 CC RSFSR) no longer appeared in the Fundamentals 1991.

work or infringe the legitimate interests of the author.[137] The most important free uses remaining concerned: (1) the right to quote and make press reviews;[138] (2) reproduction on radio, television (but no longer in the cinema[139]), and in newspapers of publicly delivered speeches and reports, as well as of articles on current economic, political, social, and religious questions from newspapers and magazines (but, thus, no longer from any published work of literature, science, or art in the original version or in translation[140]), unless—and this too was new—the author of the work specifically forbad this;[141] (3) the reproduction of published literary and artistic works in overviews of current affairs in the cinema, on radio, and television to an extent relative to the informative purpose;[142] (4) the reprographic reproduction in separate copies (a requirement previously lacking[143]) of published works for purposes of research, study, or education without making a profit; and (5) the free use of other people's published works for the satisfaction of personal needs.[144] The absence of a right of remuneration for the authors in these last two cases can, however, be seen as a definite shortcoming.

611. Another important improvement to Soviet copyright, which the Fundamentals 1991 brought about was the extension of the period of protection from 25 to 50 years *p.m.a.* as of 1 January of the year following the year of death.[145] In the case of co-authorship, this term was no longer calculated for each author separately[146] but from the death of the longest living co-author.[147] New too were the rules concerning the period of protection for anonymous, pseudonymous, and posthumously published works. For these works, the term was reckoned from 1 January following the year of publication[148] unless—in the case of pseudonymous and anonymous works—the identity of the author

137. Art.138 (2) preamble and (3) *in fine* Fundamentals 1991.
138. In comparison with the regulation of art.492 point 2 CC RSFSR, quotation in publications for political education has gone, but the quotation of press articles in press overviews is new. It was probably introduced under the influence of art.10 (1) BC.
139. Comp. art.492 point 4 CC RSFSR.
140. Comp. art.492 point 4 and 5 CC RSFSR.
141. Comp. art.10bis (1) BC. For a comparison with the old regulation, see Gavrilov/Elst 283.
142. Art.492 point 6 CC RSFSR only allowed the reproduction (excepting the making of a copy by mechanical contact) of works of visual art which were situated in freely accessible places (except exhibitions and museums), but with the limitation of place (cinema, radio, television), context (overview of current events), purpose (provision of information) and proportionality (extent of the reproduction must be in proportion to the purpose of information).
143. Comp. art.492 point 7 CC RSFSR.
144. Art.138 (3) Fundamentals 1991. Comp. art.493 CC RSFSR.
145. Art.137 (1) para.1 Fundamentals 1991.
146. Art.497 para.2 CC RSFSR.
147. Art.137 (1) para.2 Fundamentals 1991.
148. Art.137 (1) para.3 and (2) Fundamentals 1991.

was revealed, in which case the usual method of calculation was applied.[149] The Fundamentals 1991 failed to clarify whether:

(1) the revelation of the identity of the author had to take place within the period of 50 years after publication, or could also take place later (but in any case before the expiry of the normal period of protection), resulting in a reinstitution of rights; and
(2) the special method of calculation also applied in the case of posthumous publication more than 50 years after the author's death.

The Fundamentals 1991 for the first time explicitly confirmed the view of the legal theorists that the rights of authorship, name, and the integrity of the work are not limited in time.[150]

612. The Fundamentals were finally also innovatory in that they acknowledged, for the first time in the history of Russian copyright, a category of exclusive rights for (natural or legal) persons who are not themselves authors but whose achievements—at the level of disseminating an author's works—legitimize such acknowledgement.[151] These "neighboring rights" (*smezhnye prava*) were granted to performing artists, persons that bring about sound recordings, persons that bring about video recordings (videograms), and the broadcasting enterprises.

613. Performing artists (including stage directors and orchestral conductors) were granted two non-property rights: the right to name, and the right to protection of the performance from distortion.[152] This latter right seemed to have a more limited application than the author's right to the integrity of his work. After all, the performing artist enjoyed protection only from distortions of his performance, not from other changes. The property rights granted to performing artists were the fixation right, the right to live broadcasting and the broadcasting of a fixation of the performance, the right to any other use (*e.g.*, the reproduction right in the fixation of a performance), and the right to remuneration.[153]

The term of protection was fixed at 50 years from the first performance.[154] The right of the performing artist to be named in reproductions of the performance was protected in perpetuity.[155] In contrast to the author's right of integrity, the right to protection of the performance from distortion was not perpetual but apparently coincided with the general period of protection.

149. Art.137 (1) para.3 Fundamentals 1991.
150. Art.137 (3) Fundamentals 1991.
151. A.N. Turlin, "Mezhdunarodno-pravovaia okhrana smezhnykh prav", *Zhurnal mezhdunarodnogo chastnogo prava*, 1993, No.1, 28.
152. Art.141 (1) Fundamentals 1991.
153. Art.141 (1) Fundamentals 1991.

614. The two following categories of holders of neighboring rights concerned those who brought about sound and video recordings respectively.[156] It would appear that this description was intended to cover the natural persons by whose actions a performance was first fixed on phonogram or videogram with the permission of the performing artists (and the author), in other words the sound and/or video-engineer,[157] thus not the producer of phonograms or videograms. Furthermore no special set of legal regulations was provided in relation to the rights to such achievements when employee-created. Where formerly, at least in theory, the sound engineer could hold rights to phonograms as an author, under the Fundamentals 1991 he acquired a set of neighboring rights.[158]

The said persons enjoyed the right to use such a fixation, the reproduction right in its broad sense,[159] the importation right (although without explicit recognition, or exclusion, of the right to forbid parallel imports[160]), and the right to commercial rental of the copies of a phonogram or videogram.[161] These rights applied for 50 years after the first publication (*publikatsiia*[162]) of the phonogram or videogram.

154. Art.141 (5) para.1 Fundamentals 1991. This provision is furthermore very confusingly composed, because it regulates the transfer by inheritance of the rights of both performing artists and of those who bring about sound and visual recordings. Only by reading this provision together with art.141 (1) which regulates the rights of performing artists, and with art.141 (2) which regulates the rights of those who bring about sound and visual recordings, does the precise meaning of art.141 (5) Fundamentals 1991 become entirely clear.
155. Art.141 (5) para.2 Fundamentals 1991.
156. Art.141 (2) Fundamentals 1991.
157. This appears on the one hand from the use of the verb 'to bring about' or 'create' (*sozdat'*) which can only be used for physical persons, and on the other from the reference to the heirs of this person in art.141 (5) Fundamentals 1991. See Elst 1993, 101. Gavrilov 1992, 898 is of the opinion, although without providing argumentation, that both natural and legal persons could be meant.
158. Elst 1993, 101.
159. The same wide meaning has to be given to the right of reproduction as in the provisions on copyright. This means that not only the multiplication of the phonograms and videograms, but, also, public performance or broadcasting on radio or television, whether or not by cable or satellite, is subject to the permission of the maker of the recordings. This person, in other words, also has the right to the secondary use of the phonograms and videograms (*e.g.*, the right to the broadcasting of phonograms which were disseminated for commercial purposes).
160. Nothing in the Fundamentals 1991 indicates the existence of the national or international exhaustion of the distribution right.
161. Art.141 (2) para.2 Fundamentals 1991. It is the only right in the category of neighboring rights which is qualified as "exclusive". It appertains only to the maker of the phonograms and videograms, not (explicitly) to the author or the performing artist whose work or performance was recorded on the phonogram or videogram. A right to the non-commercial lending of phonograms and videograms is not (explicitly) recognized.

615. The broadcasting organizations, which under the old Soviet legislation enjoyed original copyright in their broadcasts,[163] enjoyed the four minimum rights which are obligatory under article 13 RC:[164] the right to allow other broadcasters to rebroadcast (*retransliatsiia*); the right to fix the broadcasts; to reproduce the broadcasts;[165] and the right to allow the public reproduction of television broadcasts in locations accessible to an undetermined group of persons for payment. These rights were protected for 50 years from the first broadcast.[166]

616. On the whole the recognition of neighboring rights in the Soviet legislation was an important step forwards in the development of Soviet law, both at a theoretical and a practical level.[167] A clear distinction was made between the performances, phonograms, videograms and broadcasts to which a neighboring right (and not a copyright) was held, and contrarily the copyright-protected works which were performed, recorded on phonogram or videogram, or contained in radio and television broadcasts. It is also good that the Soviet legislator went beyond the RC in granting moral rights to the performing artist, in the length of the period of protection and in recognizing a fourth category of holders of neighboring rights (the makers of videograms).

Nevertheless the measures were too rudimentary to estimate the exact applicability of the rights granted.[168] With regard to the exceptions to neighboring rights reference was made to future legislation.[169] Furthermore the lack of systematization and the unusual terminology indicated a not entirely successful legal reception.

617. However summary the measures of the Fundamentals 1991 concerning copyright may have been, it made the breach with the past at the level of material rights no less spectacular. The extension of the period of protection, the recognition of only natural persons as original authors, the extension of the exclusive rights of the author, the abolition of all compulsory licenses and

162. This terminology was entirely new in legal Russian, since for "publication" the terms *vypusk v svet* or *opublikovanie* are usual (see, *e.g.*, art.134 (1) para.2 Fundamentals 1991). It is not clear whether a difference in meaning was to be deduced from this.
163. Art.486 para.4 CC RSFSR. See also Savel'eva 1993b, 33-34.
164. Art.141 (3) Fundamentals 1991.
165. Art.13 (c) RC does limit this reproduction right to fixations of their broadcasts made without the permission of the broadcasting enterprises, or fixations of their broadcasts made for purposes which by virtue of art.15 RC allow a limitation to the neighboring rights (*e.g.*, private use, education or scientific research), if the reproduction is made for other purposes than these. In the Fundamentals 1991 the right of reproduction is recognized in an absolute fashion. See, however, No.1136.
166. Art.141 (5) para.1 Fundamentals 1991.
167. Thus, a tardy response came to the demand voiced—admittedly not unanimously—in the legal theory since the fifties that performing artists be granted neighboring rights: *supra*, No.151.
168. Kostiuk 115; Sergeev 263.
169. Art.141 (6) Fundamentals 1991.

the stricter formulation of the free uses, which were reduced in number, the reduction of administrative influence on the law of authors' contracts, the taking into account of modern technologies, the systematization of the author's rights and the recognition of four categories of neighboring rights were all signs of the Soviet legislator's will to seek congruence with the level of protection enforced in the West. Copyright was adapted to a market economy, without losing sight of copyright's social function.

That some of these innovations were brought about under foreign pressure—and probably overhasty—did contribute to a number of the provisions of Section IV Fundamentals 1991 lacking maturity. The number of obscurities, misconceptions and contradictions in the articles on neighboring rights in particular lead one to suspect that the Soviet legislator's consciousness of the problems was not great in this area. In any case the brief nature of the provisions of Section IV Fundamentals 1991 left many questions unanswered. This was an ill which only a fully fledged Copyright Law could cure.

§ 2. The Computer Law (1992) and the Copyright Law (1993)

618. On 23 September 1992—together with a whole series of other laws concerning intellectual property[170]—a Law on the legal protection of computer programs and databases was approved.[171] The rapid creation of this Law can largely be explained by the preparatory work which the EEC (!) carried out. Many of the provisions of the Russian Law recapitulate the provisions of Directive 91/250/EEC of 14 May 1991 concerning the legal protection of computer programs.[172] As this Law could hardly be described as relevant to the cultural sector, it will further largely be left out of account.[173]

619. In the meantime from 1991 work was begun on the drafting of a general Russian copyright law, independent of the Civil Code. A committee of experts, appointed by the Commission of the Council of Nationalities for the cultural and natural heritage of the peoples of the RSFSR,[174] composed a

170. Patentnyi Zakon RF, 23 September 1992, *VSND i VS RF*, 1992, No.42, item 2319 (Patent Law), English translation in Elst/Malfliet 219-246; Zakon RF, "O tovarnykh znakakh, znakakh obsluzhivaniia i naimenovaniiakh mest proiskhozhdeniia tovarov", 23 September 1992, *VSND i VS RF*, 1992, No.42, item 2322 (Law on trademarks, service marks and appellations of origin), English translation in Elst/Malfliet 329-353; Zakon RF, "O pravovoi okhrane topologii integral'nykh mikroskhem", 23 September 1992, *VSND i VS RF*, 1992, No.42, item 2328 (Law for the legal protection of topologies of integrated microcircuits); English translation in Elst/Malfliet 319-327.

171. Zakon RF, "O pravovoi okhrane programm dlia elektronnykh vychislitel'nykh mashin i baz dannykh", 23 September 1992, *VSND i VS RF*, 1992, No.42, item 2325, English translation in Elst/Malfliet 305-318.

172. *OJ*, L 122/42 of 17 May 1991. See also Yakovlev (294).

173. For a thorough discussion, see Prins 1994b; Yakovlev.

174. The members of this group of experts were M.N. Kuznetsov (Chairman), E.P. Gavrilov, Z.A. Poliakova, V.I. Zhukov *et al.*

draft Bill of the RSFSR on copyright,[175] while *VAAP*'s legal service also developed its own draft Bill of the RSFSR on copyright and neighboring rights.[176] The very names of the drafts show that the second, in contrast to the first, also provided measures for neighboring rights. From the two drafts two proposals were distilled which the Presidium of the Supreme Soviet of Russia sent to the relevant committees for discussion: a proposal "on copyright in the Russian Federation", based on the first draft, and a proposal "on the protection of the rights of performing artists, producers of phonograms, organizations which disseminate broadcasts and organizations which disseminate cable transmissions", based on the provisions on neighboring rights in the *VAAP* draft.[177] The two proposals were not, however, tailored to one another and could thus not really form the basis of new discussions. Independently two different proposals for copyright laws were drafted, one by a second panel of experts appointed by the Committee for science and education of the Supreme Soviet RF,[178] the other by the authors' agency *RAIS*, but both remained unpublished.

Comments on these drafts were requested from WIPO, foreign governments and foreign copyright specialists, and ultimately—after heavy discussions among the members of the various committees of experts[179]—a working group late in 1992 synthesized the different drafts into a single bill.[180] This final, joint bill was investigated by the Presidium of the Supreme Soviet on 15 December 1992 and sent to the relevant parliamentary committees.[181] On 27 January 1993 the bill on copyright and neighboring rights virtually unanimously[182] passed its first reading.[183] Then over a hundred proposed amendments were submitted, 22 of which were taken into consideration. A number of these were adopted. On

175. "Proekt. Zakon RSFSR ob avtorskom prave", *Knizhnoe obozrenie*, 3 April 1992. See also V. Gubarev, "Copyright: return to the fold of civilization?", *Moscow News*, 1992, No.23, 15.
176. "Proekt. Zakon RSFSR ob avtorskom prave i smezhnykh pravakh", unpublished.
177. Postanovlenie Prezidiuma Verkhovnogo Soveta RF, "O proektakh zakonov Rossiiskoi Federatsii 'Ob avtorskom prave v Rossiiskoi Federatsii' i 'Ob okhrane prav ispolnitelei, proizvoditelei fonogramm, organizatsii efirnogo veshchaniia i organizatsii, rasprostraniaiushchikh peredachi po provodam' (zakon 'O smezhnykh pravakh v Rossiiskoi Federatsii')", 30 March 1992, *VSND i VS RF*, 1992, No.19, item 1039. See, also, Gavrilov 1992, 902.
178. This group of experts consisted of, among others, I.V. Savel'eva (Chairman), S.I. Rozina, B.V. Kokin, and R.M. Gorelik.
179. Savel'eva 1993a, 800 and 1993b, 29.
180. "Zakon Rossiiskoi Federatsii ob avtorskom prave i smezhnykh pravakh. Proekt podgotovlen rabochei gruppoi", unpublished. This document also contains a short 'Memo of Clarification' (*poiasnitel'naia zapiska*).
181. Postanovlenie Prezidiuma Verkhovnogo Soveta RF, "O proekte zakona Rossiiskoi Federatsii 'Ob avtorskom prave i smezhnykh pravakh'", 15 December 1992, *VSND i VS RF*, 1992, No.52, item 3065.
182. In the Soviet of the Republics, there was one abstention: Savel'eva 1993a, 800.

29 April 1993 a joint session of the two chambers of the Supreme Soviet passed the bill at its second reading, which would normally have been its last.[184]

The President, however, refused to sign the bill, giving two official reasons. The *first* was related to the division of powers between Federation and Republics as then fixed in the constitutional.[185] The Supreme Soviet reacted to this constitutional problem formalistically, on the one hand by sending the text as approved at its second reading to the legislative organs of the Republics, without receiving any reaction, and on the other by referring to article 2 of this text which already provided that the copyright legislation also comprise "the legislative acts adopted by the Republics of the Russian Federation on the basis of this Law", so that this federal Law nevertheless had the character (albeit not in name) of a Fundamental law.

The *second* reason for the veto was the President's requirement that a number of alterations be made to the contents or form of the text, in seven places.[186] The Supreme Soviet adopted all the President's suggestions.

According to Newcity[187] there was, however, a *third*, unofficial reason for the President's veto. The continued existence of the authors' agency *RAIS* would be threatened, if the Law, and in particular the section concerning the collecting agencies, were approved, and *RAIS* would therefore have asked

183. Postanovlenie Soveta Respubliki Verkhovnogo Soveta RF, "O proekte zakona Rossiiskoi Federatsii 'Ob avtorskom prave i smezhnykh pravakh'", 27 January 1993, *VSND i VS RF*, 1993, No.6 item 203. See also B.A. McDonald, "Russia. Copyright bill gets through the first round", *Copyright World*, March 1993, 11-12; S. Viktorov, "Big Brother No Longer Holds Exclusive Copyright", *Commersant*, 2 February 1993. The text approved at the first reading was published in *Nauka i bizness* (appendix to *Delovoi mir*), 5 February 1993.

184. Savel'eva 1993a, 800. The text of the act as passed at the second reading, was published in *Kommersant"*, 3-9 May 193, 25-28. According to Gavrilov however an error crept into this publication, namely art.13 which regulates copyright on audiovisual works was published in its original and not its amended version (private communication). For an initial commentary, see N. Khoroshavnia, "Zashchita avtorskikh prav: svoeiu sobstvennoi rukoi", *Kommersant"*, 3-9 May 1993, 29.

185. Gavrilov 1995a, 686. Art.81[1] para.1 (i) Const.1978, inserted on 21 April 1992 (Zakon RF, "Ob izmeneniiakh i dopolneniiakh Konstitutsii (Osnovnogo Zakona) Rossiiskoi Sovetskoi Federativnoi Sotsialisticheskoi Respubliki", *VSND i VS RF*, 1992, No.20, item 1084), provided that the regulation of intellectual property rights be a joint power of the Federation and the 20 member republics. The Russian Federation could issue Fundamentals in this sphere, which then had to be worked out in more detail either by the 20 Republics (S.A. Chernysheva, in Sukhanov 1993, 319; Prins 1994a, 24) or by the federal parliament itself for that part of the territory of the Federation not covered by any Republic (art.72 para.1 (o) Const.1978, as amended on 21 April 1992). Furthermore the drafts of Fundamentals had to be sent to the Republics for comments, before final approval could be given by the federal parliament (art.81[1] para.3 Const.1978, as amended on 21 April 1992). According to art.38 Fundamentals on culture the protection of copyright is a joint power not only of the Federation and the Republics, but, also, of all other entities which make up the Federation.

the President not to ratify the bill. If this is indeed so, this intervention—as Newcity admits[188]—was in any case unsuccessful: the provisions concerned remained unchanged.

620. On 9 July 1993, the amended text was passed by the Supreme Soviet[189] and signed by the President (hereafter: CL 1993).[190] The first official publication of this Law took place on 3 August 1993, and by virtue of the accompanying executive decree this at once became the date on which the Law came into effect.[191]

621. At the same time Section IV Fundamentals 1991, which had been in force for exactly one year, was rescinded.[192] The fate of those articles of the CC RSFSR, which had stayed in force after the coming into effect of the Fundamentals 1991,[193] was not explicitly determined. One can, however, deduce from the executive order accompanying the Copyright Law that these provisions would only continue to apply insofar as they were not contrary to the new Law.[194] The extent to which the copyright provisions in the NML RF[195] continue to apply as *lex specialis* is unclear. This unclearness originally

186. Thus the titles of art.18 and art.26 were altered, a separate measure was introduced concerning the calculation of the duration of protection for authors or performing artists who had been victims of Stalin's repression or who had taken part in the Second World War (arts.27 (5) and 43 (5)), and in art.15 (2) the right of withdrawal was declared inapplicable to works created under a contract of employment. The measure concerning employee-created works was also declared applicable to audiovisual works. Finally, art.50 (3), which gave the police wide powers to investigate the dwellings of suspected copyright pirates without a warrant from a judge, was cancelled. This provision was condemned by the President as contrary to human rights. See Newcity 1993a, 339.
187. Newcity 1993a, 339 and 1993b, 1-2.
188. Newcity 1993a, 339-340 and 1993b, 2.
189. PVS RF, "O povtornom rassmotrenii Zakona Rossiiskoi Federatsii 'Ob avtorskom prave i smezhnykh pravakh'", 9 July 1993, *VSND i VS RF*, 1993, No.32, item 1244.
190. Zakon RF, "Ob avtorskom prave i smezhnykh pravakh", 9 July 1993, *VSND i VS RF*, 1993, No.32, item 1242, *Rossiiskaia gazeta*, 3 August 1993. For a Dutch translation [??], see Appendix III.
191. Point 1 PVS RF, "O poriadke vvedeniia v deistvie Zakona RF 'Ob avtorskom prave i smezhnykh pravakh'", 9 July 1993, *VSND i VS RF*, 1993, No.32, item 1243, *Rossiiskaia gazeta*, 3 August 1993.
192. Point 10 PVS RF "O poriadke vvedeniia v deistvie Zakona RF 'Ob avtorskom prave i smezhnykh pravakh'"", 9 July 1993, *VSND i VS RF,* 1993, No.32, item 1243, *Rossiiskaia gazeta*, 3 August 1993.
193. *Supra*, No.397.
194. Point 6 PVS RF, "O poriadke vvedeniia v deistvie Zakona RF 'Ob avtorskom prave i smezhnykh pravakh'", 9 July 1993, *VSND i VS RF*, 1993, No.32, item 1243, *Rossiiskaia gazeta*, 3 August 1993. It was presumably on the basis of this that art.514 CC RSFSR, which regulates the rights of the portrayed, continued to apply even after the coming into effect of the CL 1993. According to Gavrilov 1995a (687) and Hüper (162), the copyright provisions of Section IV CC RSFSR have effectively gone out of force.
195. *Supra*, No.589.

also affected the Law on Education,[196] but after a set of amendments on 13 January 1996 the Law was officially published in an entirely new version,[197] so that there can no longer be any doubt about the validity of the provisions now included in article 39 (7) concerning the rights to products of intellectual activity in educational institutions. The Law of 23 September 1992 on the legal protection of computer programs and databases also continues to apply, since article 2 CL 1993 explicitly refers to this Law as part of Russia's copyright legislation.[198]

622. By virtue of article 2 CL 1993, "the legislative acts of the Republics within the Russian Federation adopted on the basis of this Law" are also part of the copyright legislation. This provision was a direct consequence of the then existing division of powers with regard to copyright, but has in the mean time become meaningless. After all, the Constitution 1993 provides that the legal regulation of intellectual property is among the (exclusive) powers of the Russian Federation,[199] and thus no longer among the joint powers of Federation and Republics.[200]

623. On 19 July 1995, the Copyright Law was amended in its provisions describing liability and measures of protection in the case of infringements of copyright and neighboring rights, and a number of relevant alterations were carried through in the Criminal Procedure Code of RSFSR and the Code of Administrative Infringements RSFSR.[201]

624. Finally, in 2001 two proposals for amending the 1993 Copyright Law were filed with the State *Duma*, the first one by the people's deputy V.Ia. Komissarov, the other one by a number of deputies under the guidance of former Soviet Minister of Culture, N.N. Gubenko.[202]

§ 3. Specific Legislation and Executive Decrees

625. Various recent laws refer in general terms to the copyright legislation: the Law on social associations,[203] on advertising,[204] and on geodesy and cartography.[205] Others contain themselves very specific provisions on copyright,

196. *Supra*, No.590.
197. Federal'nyi Zakon R.F. "O vnesenii izmenenii i dopolnenii v Zakon Rossiiskoi Federatsii 'Ob obrazovanii'", 13 January 1996, *Rossiiskaia gazeta*, 23 January 1996. For a discussion of the contents, see *infra*, No.671.
198. Prins 1994b, 174; Savel'eva 1993b, 29;
199. Art.71 (o) Const.1993. See also Gavrilov 1995a, 686.
200. Dozortsev 1994, 44; Polenina 35.
201. Federal'nyi Zakon R.F. "O vnesenii izmenenii i dopolnenii v Ugolovno-protsessual'nyi kodeks RSFSR, Kodeks RSFSR ob administrativnykh pravonarusheniiakh i Zakon Rossiiskoi Federatsii 'Ob avtorskom prave i smezhnykh pravakh'", 19 July 1995, *SZ RF*, 1995, No.30, item 2866.
202. Both are available at <www.copyrighter.ru> (19 February 2003).

such as the Law on the compulsory deposit of documents,[206] and the Law on architectural activity.[207] Criminal liability for infringement of copyright or neighboring rights was defined differently in the new Criminal Code which was signed by President El'tsin on 13 June 1996 and came into effect on 1 January 1997.[208]

626. A draft Law on recognizing the Russian Federation the owner of the economic rights in audiovisual works, filed with the State *Duma* on 26 February 1999, aimed at the renationalization of Soviet films created before the entry into force of the CL 1993. It failed to be adopted in its first reading.[209]

627. At the level of executive Decrees and Presidential Edicts, the following initiatives were adopted:

— A Decree containing minimum rates for the remuneration of authors for a number of methods of exploitation.[210]
— A Decree on recommended remuneration for performing artists for a number of methods of exploitation of performances.[211]
— Various Governmental decrees providing the possibility of canceling the license of certain exploiters of cultural goods as a sanction for repeated infringements of copyright and neighboring rights.[212]
— A Presidential Edict disbanded *RAIS*. The private Russian Authors' Association *RAO* (*Rossiiskoe avtorskoe obshchestvo*) became its lawful successor.[213]

203. Art.21 para.5 and art.24 Federal'nyi Zakon RF, "Ob obshchestvennykh ob"edineniiakh", 19 May 1995, *SZ RF*, 1995, No.21, item 1930, *Rossiiskaia gazeta*, 25 May 1995 (flags, emblems, logos and other symbols chosen by a social association may not infringe copyright).
204. Art.4 Federal'nyi Zakon RF, "O reklame", 18 July 1995, *SZ RF*, 1995, No.30, item 2864, *Rossiiskaia gazeta*, 25 July 1995 (copyright in advertising).
205. Art.10 Federal'nyi Zakon RF, "O geodezii i kartografii", 26 December 1995, *Rossiiskaia gazeta*, 13 January 1996 (copyright in maps).
206. Art.20 Federal'nyi Zakon RF, "Ob obiazatel'nom ekzempliare dokumentov", 29 December 1994, *SZ RF*, 1995, No.1, item 1, *Rossiiskaia gazeta*, 17 January 1995 (the copying of legally deposited printed works).
207. Arts.16-19 Federal'nyi Zakon RF, "Ob arkhitekturnoi deiatel'nosti v Rossiiskoi Federatsii", 17 November 1995, *SZ RF*, 1995, No.47, item 4473, *Rossiiskaia gazeta*, 29 November 1995 (copyright in works of architecture).
208. Ugolovnyi kodeks Rossiiskoi Federatsii, *Rossiiskaia gazeta*, 18, 19, 20 and 25 June 1996.
209. T. Semashko, "Supermarket pod vyveskoi 'Mosfil'm'", *Rossiiskaia gazeta*, 17 November 1999.
210. PP RF, "O minimal'nykh stavkakh avtorskogo voznagrazhdeniia za nekotorye vidy ispol'zovaniia proizvedenii literatury i iskusstva", 21 March 1994, *SAPP RF*, 1994, No.13, item 994.
211. PP RF "O stavkakh voznagrazhdeniia ispolniteliam za nekotorye vidy ispol'zovaniia ispolneniia (postanovki)", 17 May 1996, *Rossiiskaia gazeta*, 30 July 1996.

— The Government established an "Interdepartmental commission for the guaranteeing and protection of objects of intellectual property" with the purpose of co-coordinating the struggle against all forms of piracy.[214]
— Administrative power for conducting the state policy in the field of intellectual property protection was granted first to the Ministry of Justice,[215] then, at least partly, to *Rospatent*[216] which in an unexpected next move was abolished and all its powers transferred again to the Ministry of Justice by Presidential Edict No.651 of 25 May 1999,[217] to be finally reinstated by Presidential Edict of 29 February 2000.[218] *Rospatent* gained competence in all fields of intellectual property, including copyright and neighboring rights.

212. PSM RSFSR, "O regulirovanii izdatel'skoi deiatel'nosti v RSFSR", 17 April 1991, in *Pechat' i drugie sredstva massovoi informatsii. Sbornik normativnykh i spravochnykh materialov*, I, M., 1991, 15-21, amended by PSMP RF, 8 June 1993, *SAPP RF*, 1993, No.24, item 2240, *Zakon*, 1994, No.6, 19-21 (point 14 "Vremennoe Polozhenie ob izdatel'skoi deiatel'nosti v RSFSR"); PP RF "O regulirovanii poligraficheskoi deiatel'nosti v Rossiiskoi Federatsii", 22 September 1993, *SAPP RF*, 1993, No.40, item 3754, *Zakon*, 1994, No.6, 22 (point 10 "Polozhenie o poriadke otkrytiia poligraficheskikh predpriiatii"); PP RF "Ob utverzhdenii Polozheniia o litsenzirovanii deiatel'nosti, sviazannoi s publichnym pokazom kino- i videofil'mov", 19 September 1995, *SZ RF*, 1995, No.39, item 3776, *Rossiiskaia gazeta*, 7 October 1995; PP RF, 7 December 1994, *SZ RF*, 1994, No.34, item 3604 (point 17 Polozhenie o litsenzirovanii televizionnogo veshchaniia i radioveshchaniia v Rossiiskoi Federatsii).
213. Point 1-3 Ukaz Prezidenta RF, "O gosudarstvennoi politike v oblasti okhrany avtorskogo prava i smezhnykh prav", 7 October 1993, *SAPP RF*, 1993, No.41, item 3920, *Rossiiskaia gazeta*, 14 October 1993.
214. PP RF, "O sozdanii Mezhvedomstvennoi komissii po voprosam obespecheniia okhrany ob"ektov intellektual'noi sobstvennosti", 7 March 1995, *SZ RF*, 1995, No.11, item 992, *Rossiiskaia gazeta*, 22 March 1995; PP RF "O Mezhvedomstvennoi komissii po voprosam obespecheniia okhrany ob"ektov intellektual'noi sobstvennosti", 9 September 1995, *SZ RF*, 1995, No.38, item 3689, *Rossiiskaia gazeta*, 27 September 1995.
215. Presidential Edict, No.642 "On measures for development of the judicial organs of the Russian Federation", quoted by S.I. Rozina, "The rebirth of copyright in Central and Eastern Europe", in C. Keane (ed.), *Legislation for the book world* , Council of Europe Publishing, 1997, 97. See also Ukaz Prezidenta RF, "Voprosy Ministerstva iustitsii Rossiiskoi Federatsii", 2 August 1999, *Rossiiskaia gazeta*, 5 August 1999 (approving the Statutes of the Ministry of Justice).
216. PP RF, No.413 "O sovershenstvovanii deiatel'nosti federal'nykh organov ispolnitel'noi vlasti v oblasti avtorskogo prava i smezhnykh prav", 12 April 1999, *SZ RF*, 1999, No.16, item 2004, *Rossiiskaia gazeta*, 21 April 1999. The RF Ministry of Justice, however, continues to prepare legislative proposals in the field of copyright, to uphold contacts with social organizations in this field, and takes part in international cooperation: see para.6, 48) of the Statutes of the Ministry of Justice, *ibid*.
217. *SZ RF*, 1999, No.22, item 2727.
218. See *Grur Int*., 2000, 825.

— A Presidential Edict contains the first elements of a regulation for a remuneration right for home copying of audiovisual works and sound recordings.[219]

§ 4. The Accession to International Copyright Conventions

628. In the international field Russia finally took the decision to join the Convention of Berne, the Convention of Geneva and the Act of Paris of the Universal copyright convention.[220] On 25 June 1993 Russia also, within the framework of the CIS, signed a bilateral agreement with the Republic of Armenia on the mutual protection of copyrights,[221] and on 24 September 1993 a multilateral Agreement with the other CIS-Members on co-operation in the protection of copyright and neighboring rights.[222] Furthermore, on 25 April 1996, a catch-all agreement for the mutual protection of intellectual property rights was made with the People's Republic of China.[223]

§ 5. The New Civil Code and Copyright

629. We have already indicated that the Fundamentals 1991 came into effect in 1992 "in expectation of the ratification of a new Civil Code". On 30 November 1994 Book I of a new Civil Code (hereinafter: CC RF) was signed by President El'tsin,[224] with 1 January 1995 as date of coming into effect of the greater part.[225] It contains no material rules concerning copyright, but does

219. Ukaz Prezidenta RF, "O merakh po realizatsii prav avtorov proizvedenii, ispolnitelei i proizvoditelei fonogramm na voznagrazhdenie za vosproizvedenie v lichnykh tseliakh audiovizual'nogo proizvedeniia ili zvukozapisi proizvedeniia", 6 December 1998.

220. Point 4 Ukaz Prezidenta RF, "O gosudarstvennoi politike v oblasti okhrany avtorskogo prava i smezhnykh prav", 7 October 1993, *SAPP RF*, 1993, No.41, item 3920, *Rossiiskaia gazeta*, 14 October 1993; Rasporiazhenie Prezidenta RF, "Voprosy prisoedineniia Rossiiskoi Federatsii k riadu mezhdunarodnykh konventsii v oblasti okhrany avtorskikh prav", 25 March 1994, *SAPP RF*, 1994, No.13, item 1020; point 1 PP RF, "O prisoedinenii Rossiiskoi Federatsii k Bernskoi konventsii ob okhrane literaturnykh i khudozhestvennykh proizvedenii v redaktsii 1971 goda, Vsemirnoi konventsii ob avtorskom prave v redaktsii 1971 goda i dopolnitel'nym Protokolam 1 i 2, Konventsii 1971 ob okhrane interesov proizvoditelei fonogramm ot nezakonnogo vosproizvodstva ikh fonogramm", 3 November 1994, *Rossiiskaia gazeta*, 30 November 1994. See also *Industrial Property and Copyright*, 1995, 43.

221. "Soglashenie mezhdu Pravitel'stvom Rossiiskoi Federatsii i Pravitel'stvom Respubliki Armeniia o vzaimnoi okhrane avtorskikh prav", 25 June 1993, *BMD*, 1994, No.5, 46-47. For a discussion, see Gavrilov 1994b, 394.

222. "Soglashenie o sotrudnichestve v oblasti okhrany avtorskogo prava i smezhnykh prav", 24 September 1993, in Dozortsev 1994, 318-320.

223. "Soglashenie mezhdu Pravitel'stvom Rossiiskoi Federatsii i Pravitel'stvom Kitaiskoi Narodnoi Respubliki v oblasti okhrany prav intellektual'noi sobstvennosti", *Problemy intellektual'noi sobstvennosti*, 1996, No.10, 46.

224. "Grazhdanskii Kodeks Rossiiskoi Federatsii. Chast' pervaia", 30 November 1994, *SZ RF*, 1994, No.32, item 3301, *Rossiiskaia gazeta*, 8 December 1994.

225. Federal'nyi zakon RF, "O vvedenii v deistvie chasti pervoi Grazhdanskogo Kodeksa Rossiiskoi Federatsii", 30 November 1994, *Rossiiskaia gazeta*, 8 December 1994.

determine the place of copyright within the Russian legal system and the legal nature of copyright. It confirms that copyright is part of civil law;[226] that civil rights can arise as a result of the creation of works of science, literature and art, discoveries and other results of intellectual activity;[227] that holding copyrights and rights to other legally protected results of intellectual activity is part of the legal competence of the citizens;[228] that the results of intellectual activity, including the exclusive rights to them (intellectual property) are objects of civil rights;[229] and that the rights to the results of an intellectual activity are exclusive rights, and the use of them thus only allowable with the permission of the right holder.[230]

630. On 26 January 1996 Book II of the CC RF was also signed by President El'tsin.[231] It came into effect on 1 March 1996,[232] and deals with the law of contractual obligations. With regard to copyright we here find only the rule that if a public procurement has as its object the creation of a work of science, literature or art, the person decreeing the public procurement gains the privilege of agreeing a contract with the author of the winning work for the use of the work in return for suitable remuneration, unless the conditions of the procurement provide otherwise.[233]

631. Book III of the CC RF was planned to contain three sections: on the law of inheritance, on international private law, and on intellectual property. The idea of including a special chapter on intellectual property into the Civil Code[234] is precisely the cause for continuously postponing the adoption of Book III. This idea should be situated against the background of the (fairly recent) Soviet tradition of regulating copyright law in the Civil Code. It is, however, difficult to ignore that the continuation of this tradition has become very difficult since in 1992-1993 a number of separate encompassing legislative Acts on intellectual property rights have been enacted (Copyright Law, Computer Programs Law, Patent Law, Trademark Law, Law on selection achievements).

632. A number of (unpublished) drafts for such chapter on IP rights were worked out by, or under the guidance of, Professor V. A. Dozortsev. The latest

226. Art.2 (1) CC RF.
227. Art.8 para.2 CC RF.
228. Art.18 CC RF.
229. Art.128 CC RF.
230. Art.138 CC RF.
231. "Grazhdanskii kodeks Rossiiskoi Federatsii. Chast' vtoraia", *Rossiiskaia gazeta*, 6, 7, 8 and 10 February 1996.
232. Point 1 Federal'nyi Zakon RF, "O vvedenii v deistvie chasti vtoroi grazhdanskogo kodeksa Rossiiskoi Federatsii", 26 January 1996, *Rossiiskaia gazeta*, 6 February 1996.
233. Art.1060 CC RF.
234. For a critical comment on an unpublished draft of the intellectual property provisions in the third part of the CC RF, see E. Gavrilov, "Avtorskoe pravo i drugie iskliuchitel'nye prava v proekte tret'ei chasti GK", *Ross. Iust.*, 1997, No.4, 45-46.

to our disposal dates from 6 January 1999.[235] Within Section V of the proposed Civil Code (Exclusive rights/intellectual property) the draft consists of the following chapters: Chapter 61 (General Provisions), 62 (Copyright), 63 (Neighboring rights), 64 (patent law, including industrial design and utility models), 65 (know-how), 66 (selection achievements, *i.e.*, breeder's rights), and 67 (means for individualizing a legal persons, goods, works and services, *i.e.*, a company name, service and trade marks, appellations of origin). It is important to see that the drafters have gone beyond a mere coordination operation (as was carried out in France), and have tried to formulate general principles that are applicable to all exclusive rights, an operation which is unique in the world history of copyright.[236] Moreover they seem to have been motivated by the desire to strike a balance between stability and flexibility in the intellectual property legislation. Stability would be guaranteed be including basic, general principles on copyright (and the other intellectual property rights) in the Civil Code, whereas specific legislation would contain detailed rules in each of the fields of intellectual property.

It is, however, uncertain whether the latter aim may be reached, as from a formal point of view the Civil Code is a federal law, as are the Copyright Law and the Computer Programs Law. There is thus no hierarchy between these norms, and, even in the case when no explicit amendments are made to the Civil Code, the application of a *lex posterior* or *lex specialis* may undermine its "stability" in an indirect way. Moreover, if Russia is to follow its own traditions in legislative techniques, then it may be feared that the adoption of Book III of the Civil Code will be accompanied by a decree stating that "all legislative acts that contradict the new law (*in casu* the CC) shall no longer be in force", without indicating in detail which articles of which laws have become obsolete. This would entail an enormous risk of divergent interpretations on what the state of the actual law is.

633. This being said, there is no doubt that, from a psychological point of view, legislators everywhere are hesitant when it comes to amending a Civil Code, as it is considered to be a basic law, a kind of "constitution" regulating civil relationships between private persons. If therefore any provisions on copyright law are to be included in the Civil Code, these should be only really basic principles (*e.g.*, "the author is the physical person who creates the work").

This is unfortunately not the case with the draft under discussion. It contains, *e.g.*, detailed rules on copyright protection on interviews or on drafts of official documents. The division of "normative labor" between the CC and

235. Published in *Trudy po intellektual'noi sobstvennosti*, I, *Problemy intellektual'noi sobstvennosti v grazhdanskom kodekse Rossii*, M., 1999, 62-114.

236. A. Dietz, "Mesto zakona ob intellektual'noi sobstvennosti (v chastnosti, zakona ob avtorskom prave) v pravovoi sisteme (Pochemu on iavliaetsia ne prosto razdelom Grazhdanskogo kodeksa)", *Iuridicheskii konsul'tant*, 1997, Nos.5-6, 29-38.

the CL also lacks coherence: what is the use of granting rights to authors and beneficiaries of neighboring rights in the CC, and leaving it up to the Copyright Law to define the limits or restrictions to these rights ? And then there is the question of definitions. The terms used in the draft are generally not defined, whereas article 4 CL contains a whole list of definitions. Are these definitions applicable to the terms used in the CC?[237]

634. These formal questions set aside, one must concede that the proposed Chapters 62 and 63 on copyright and neighboring rights contain some major improvements in comparison with the existing copyright legislation: the prolongation of the term of protection of copyright to 70 years *p.m.a.*; the possibility of computing the 50-year protection term for performing artists from the moment of fixation or broadcasting; the protection of first fixations of the film as a category of neighboring rights; the author's integrity right is again defined in the wordings of the 1964 CC RSFSR; the recognition of a distribution (including importation) and rental right for performing artists; a clearer distinction is made between an assignment agreement and a licensing agreement (in fact already in Chapter 61 containing general principles), and between contracts concluded by the author, and contracts concluded by another legal rightholder; the application of certain protective measures in the field of contract law for performing artists; collecting societies are only to operate on the basis of a governmental license.[238]

635. Other provisions are less clear or even contradictory compared to the general provisions of Chapter 61, or are apparently or possibly in contradiction with the existing rules contained in the CL. What is, *e.g.*, the fate of the special rules for rehabilitated authors or war veterans, and for posthumously published works as provided by the existing Copyright Law? And what has happened to the right of access or the *droit de suite*? And is the rebuttable presumption of transfer of the exploitation rights to the employer for employee created works really restricted in scope by the aim of the task given by the employer and the limits which flow from this aim, even though such "*Zweckübertragungslehre*" was ignored by the legislator in 1993?

636. In general one cannot avoid the impression that the drafters of the said Chapters not just intended to coordinate and clarify the main principles of intellectual property, but, also, went beyond their self-imposed task by trying to amend some of the rules that are now provided by the existing Copyright Law of 1993. Many of these amendments would indeed improve the existing

237. For example: in art.1134 (2) of the draft CC the author is granted a right to the reproduction (*vozproizvedenie*) and a *separate* right to the recording/fixation (*zapis'*) of his work, whereas according to art.4 CL the recording/fixation is considered to be a form of reproduction.

238. Still, it is rather curious that the introduction of such *administrative* aspect of copyright is regulated in a *Civil* Code.

level of protection significantly, but these improvements are obscured by many unclear, confusing or contradictory provisions. One fails to understand why these amendments could not be made to the Copyright Law itself.

637.In order to counter the draft for a Section V in Book III of the Civil Code discussed in the previous numbers, the civil law department of the Law Faculty at the State University of St. Petersburg made up an alternative draft under the guidance of Professor A.P. Sergeev.[239] It is much shorter (16 articles instead of 129 in Dozortsev's draft), due to the fact that it contains just a single chapter with general provisions.

All specific rules for the different intellectual property rights are to be contained—as is already the situation at this moment—in specific legislative acts. Most articles refer to rules to be adopted in "federal laws", and therefore lack real content. Some provisions, however, do contain regulations which unfortunately do not always coincide with, nor improve the existing provisions of the Copyright Law. For instance, it is said that foreign citizens and legal persons, and persons without citizenship, acquire the right of intellectual property on "objects protected from the moment of their creation", if they are created in the territory of the Russian Federation or protected by virtue of international agreements to which the Russian Federation has acceded. In the Copyright Law not the place of creation, but the place of publication or of location in an objective, though unpublished form is the only relevant criterion. Other regulations which are self-executing are the provisions on contract law and on the ownership in subject matter of intellectual property rights made for hire.

638.As a result of this doctrinal dispute, Book III of the Civil Code was adopted on 26 November 2001, with sections on inheritance law and conflict of laws, but without a section on intellectual property rights.[240]

239. Published in *Trudy po intellektual'noi sobstvennosti*, I, *Problemy intellektual'noi sobstvennosti v grazhdanskom kodekse Rossii*, M., 1999, 115-123.

240. Grazhdanskii kodeks, Chast' tret'ia, 26 November 2001, *Rossiiskaia gazeta*, 28 November 2001.

TITLE II
THE RUSSIAN COPYRIGHT LAW OF 9 JULY 1993

Introduction

639. The new Law of the RF on copyright and neighboring rights of 9 July 1993 (hereinafter: CL or the Copyright Law)[1] came into force on 3 August 1993.[2] Alongside it, and from our perspective less interesting, the Law of 23 September 1992 on the legal protection of computer programs and databases (hereinafter: Computer Law)[3] remains in force.

640. There is an unpublished Explanatory note, which was submitted to the Supreme Soviet together with the draft legislation at the end of 1992.[4] This short four-page note gives no explanation of particular provisions in the proposed legislation, but places the bill (which ultimately became the law without many changes) in the context of the Russian Federation's international commitments concerning human rights, and of the current economic processes in Russia and the development of Russia's international trade relations.

Insofar as the economic reforms are concerned, it is pointed out that freedom of enterprise unavoidably leads to an increasing role for contractual relations, an alteration in the fixing of the level and method of payment of the author's fee, a different legal regulation of the use of the work of author-employees, etc. Furthermore, the level of protection of works of science, literature, and art is directly linked to the development of the Russian industry in question (the film industry, the publishing industry, the computer industry etc.). From the perspective of external economic policy this note points out that the western countries link economic aid and investments to the solution of the problem of the adequate protection of copyright and the presence of reliable legal means in the fight against piracy. Explicit reference was made to the Trade Treaty with the US.[5]

The bill would, according to the Memorandum of Clarification, not only bring the level of protection of Russian copyright to that of the three great Conventions (Berne, Rome, and Geneva), but often go even further, taking

1. Zakon RF, "Ob avtorskom prave i smezhnykh pravakh", 9 July 1993, *VSND i VS RF*, 1993, No.32, item 1242, *Rossiiskaia gazeta*, 3 August 1993.
2. Point 1 PVS RF, "O poriadke vvedeniia v deistvie Zakona RF 'Ob avtorskom prave i smezhnykh pravakh'", 9 July 1993, *VSND i VS RF*, 1993, No.32, item 1243, *Rossiiskaia gazeta*, 3 August 1993.
3. Zakon RF, "O pravovoi okhrane programm dlia elektronnykh vychislitel'nykh mashin i baz dannykh", 23 September 1992, *VSND i VS RF*, 1992, No.42, item 2325, English translation in Elst/Malfliet 305-318.
4. "Poiasnitel'naia zapiska k proektu Zakona Rossiiskoi Federatsii ob avtorskom prave i smezhnykh pravakh", unpublished.
5. *Supra*, Nos.599 ff.

into account the current trends towards perfecting the legal regulation of the field of intellectual property at an international level.

The Memorandum finally summed up the most important innovations in the proposed legislation. It mentions, *inter alia*, broadening the extent of copyright and the removal of unjust and undemocratic limitations upon the exercise of copyright; a detailed regulation of neighboring rights; the adaptation of the legislation to new technologies; a significant extension of the freedom of contract of the participants in copyright relations; the collective administration of authors' rights by collecting societies; and the renewal of the inventory of legal remedies.

641. The Copyright Law is divided into five sections: I. General provisions; II. Copyright; III. Neighboring rights; IV. Collective administration of property rights; V. The protection of copyright and neighboring rights. In total, it comprises fifty articles.

In our technical discussion of the Copyright Law in this Title, we will as far as possible follow the usual divisions of a textbook: classic copyright (Chapter I), contractual rights (Chapter II), neighboring rights (Chapter III), collecting societies (Chapter IV), the protection of foreign works and objects of neighboring rights (Chapter V), sanctions (Chapter VI), transitional law (Chapter VII), and a general conclusion (Chapter VIII).

Chapter I. Classic Copyright

Introduction

642. Objectively, classic copyright in the narrow sense concerns itself with the questions of what is the object of protection, who is the beneficiary of this protection, what is the extent of the protection (rights granted), its duration, and what legal means are available to the beneficiary of the rights to enforce the protection of his work. Two specific parts of this, to wit the means of legal protection, and the protection of foreign works in Russia, will be set aside for later separate treatment in Chapters V and VI respectively, since both these sub-areas are relevant to both copyright and neighboring rights.

Section 1. Protected Subject Matter

§ 1. General Description

643. Article 6 (1) CL 1993 provides that "Copyright shall extend to works of science, literature, and art that are the result of creative activity, regardless of the destination and value of the work, as well as of the method of its expression." Article 6 (2) adds to this a non-exhaustive[6] list of the objective forms in which a work must exist in order to enjoy copyright protection (written, oral, in the form of sound or video recording, images, volume-spatial, and others).

6. Savel'eva 1993a, 802.

644. The criteria of protection have remained the same. The works concerned must be works of science, literature, and art[7] which are (1) *the result of creative activity*[8] and (2) *exist in some objective form*.[9] Neither the value (artistic, historical, or scientific correctness or the moral content[10]) nor the purpose (whether or not utilitarian) are relevant from a copyright perspective. In the Computer Law, a rebuttable presumption of creativity is instituted, which naturally entails an important lightening of the burden of proof in disputes concerning infringements of copyright on computer programs and databases.[11]

645. The requirement of existence in an objective form cannot be equated with a fixation requirement since the "oral form" is one of the objective forms explicitly mentioned.[12] Furthermore, the objective form of a work is no longer required to be such that it allows reproduction.[13] Finally, article 6 (1) CL 1993 provides that copyright is applicable regardless of the method of a work's expression.[14] This, again, confirms that the *form* of expression has no significance as long as there is an externalization of the work subject to sensory perception, however ephemeral.

The purpose of the imposition of an objective form, as a protection requirement, is the exclusion of mere ideas from the copyright law's area of

7. This definition is, according to Russian legal theory, not in itself a criterion of protection: Sergeev 53-54.
8. Compare art.134 (1) para.1 Fundamentals 1991, and even as early as art.96 para.2 Fundamentals 1961 and art.475 para.2 CC RSFSR.
9. Compare art.134 (1) para.1 second sentence Fundamentals 1991; art.96 para.2 Fundamentals 1961 and art.475 para.2 CC RSFSR. See also Wandtke 568 ("Das Schöpferische und die Formgebung sind die entscheidende Zuordnungsgrössen, um das Arbeitsergebnis als Werk zu qualifizieren. Die rechtliche Konstruktion unterscheidet sich überhaupt nicht von den kontinentaleuropäischen Regelungen").
10. In the words of Gavrilov 1993a, X: "Naturally there is no sense in using an artistically weak or scientifically doubtful work, and *a fortiori* an anti-artistic or antiscientific work, but this does not at all mean that such a work does not enjoy protection under the law of copyright." See also Sergeev 43-44.
11. Art.3 (2) Computer Law.
12. Art.6 (2) CL 1993 gives as examples of the "oral form" in which a work can be cast: public delivery and public performance of a work. We may think of an unprepared speech or a jazz improvisation. Let us further note that the protection of pantomimic and choreographic no longer requires the existence of written directions: see art.134 (2) Fundamentals 1991 and art.7 (1) CL 1993. See also Dietz 1997, 15-16 (who expresses some serious critics on the use of the terms "objective form"); Sergeev 84.
13. Compare art.134 (1) para.1 Fundamentals 1991; art.96 para.2 Fundamentals 1961 and art.475 para.2 CC RSFSR.
14. Art.96 para.1 Fundamentals 1961 and art.475 para.1 CC RSFSR on the one hand, and on the other art.134 (1) Fundamentals 1991, provided that copyright protection applied irrespective of the *method of reproduction*. The removal of this provision does not, however, entail any real change.

application.[15] Only ideas which have been given an original form are protected by copyright.[16]

646.Both works which are disclosed and works which have not (yet) been disclosed (but that exist in some objective form), are protected by copyright.[17]

647.Copyright applies to the *corpus mysticum*, not the *corpus mechanicum*, the material object in which the work is brought to expression.[18] Transfer of the right of ownership of this last, thus, does not automatically entail transfer of the author's rights, a rule also confirmed in CL 1993, although with the exception of the cases provided by article 17 of this Law (*i.e.*, the article regulating the resale right and the right of access to a work).[19] If this is a reference only to the fact that the transfer of ownership of the material object of a work of visual art entails the transfer to the new owner of certain rights previously vested in the author, such as the right to display the work in public exhibitions, or to disseminate the (material) object more widely,[20] this exception is understandable. If, however, what is meant is that the right of access and the *droit de suite* pass to the new owner at the transfer of the property rights in the material object, the exception is incomprehensible since the nature of these two rights entail that they continue to be vested in the author, and even then only gain their full significance, when the right of ownership of the *corpus mechanicum* is no longer vested in the author and is even repeatedly transferred to different owners.[21]

15. See, also, art.6 (4) CL 1993, which states explicitly: "Copyright shall not apply to ideas, methods, processes, systems, manners, concepts, principles, discoveries or facts."The exclusion of discoveries from copyright is remarkable—not so much in itself, but because of the almost simultaneous disappearance from the Russian legal system of the protection system for discoveries typical of Soviet law. Under Soviet law the "author" of a discovery had the right to have the authorship of the discovery, and its priority, recognized in a diploma. Upon submission of this diploma the discoverer had the right to a remuneration, and could further count on all sorts of material advantages (art.517 CC RSFSR; Polozhenie "Ob otkrytiiakh, izobreteniiakh i ratsionalizatorskikh predlozheniiakh", 21 October 1973, *SP SSSR*, 1973, No.19, item 109).There was however no exclusive right to the discovery. Neither the last patent law of the USSR (Zakon SSSR, "Ob izobreteniiakh v SSSR", *VVS SSSR*, 1991, No.25, item 703), nor the current patent law of the RF (Patentnyi Zakon RF, 23 September 1992, *VSND i VS RF*, 1992, No.42, item 2319) contained any reference to the protection of discoveries.
16. Grishaev 1994, 92 writes: "In this way copyright protects the work as an entirety of form and content, and does not protect its contents separately." And Gavrilov 1993a, X: "Copyright protects elements of the content of the work only in the form in which they are expressed in the work, and not independently."
17. Art.6 (2) CL 1993. On the meaning of the term "disclosure", *infra* No.694.
18. Art.6 (5) para.1 CL 1993. See also Grishaev 1994, 92.
19. Art.6 (5) para.2 CL 1993.
20. Sergeev 38.
21. Elst 1994, 138.

§ 2. Examples of Subject Matter

648. Article 7 (1) CL 1993 contains a non-exhaustive[22] list of possible subject matters of copyright. This list largely corresponds to the one included in article 2 (1) BC, as well as to the one in article 134 (2) Fundamentals 1991. We will here limit ourselves to indicating a few noteworthy points.

649. Computer programs were listed in the Fundamentals 1991 as a separate category of works;[23] in article 7 (1) CL 1993 computer programs[24] are given as an example of literary works.[25]

650. Among works of visual art, mention of graphic stories, and comics stands out. Design also comes in this category so that double protection, under the copyright law and as an industrial model under the patent law, is granted.[26] Besides works of architecture (which refers to architectural plans as well as to actual buildings[27]), works of town-planning and of garden and park art (landscape gardening) are also mentioned.

651. A part of a work (*e.g.*, the title of a work[28]), which satisfies the requirements for copyright protection and can be used independently, is itself a subject matter of copyright.[29]

22. Alferov 36; Dietz 1997, 14; Savel'eva 1993b, 31; Sergeev 55. Thus, *e.g.*, interviews are not listed but are considered protected by copyright (E. Gavrilov, "Avtorskie prava na interv'iu", *Zakonodatel'stvo i praktika sredstv massovoi informatsii*, July-August, 1999).
23. Art. 134 (2) Fundamentals 1991. This measure was contrary to the Trade Treaty with the United States of America, *supra*, No. 560.
24. A computer program is defined by art. 4 CL as "an objective form of expression of a set of data and commands intended to operate computers and other computer devices in order to bring about a certain result, including preparatory materials obtained in the process of the elaboration of the computer program, and the audiovisual images hereby generated". See, also, art. 1 (1) Computer Law. For the different kinds of computer programs protected, see, also, art. 7 (2) CL 1993 and art. 3 (3) Computer Law.
25. See, also, art. 2 (2) Computer Law. Savel'eva 1993a, 802. This is in agreement with art. 10 (1) TRIPS and art. 1 (1) Council Directive 91/250/EEC of 14 may 1991 on the Legal Protection of Computer Programs, *OJ*, No. L 122 of 17 May 1991. In the legal theory, however, even after the ratification of the Computer Law and the Copyright Law 1993, the copyright mechanism (as well as the patent) was considered unsuitable for the protection of computer programs, and arguments in favor of a *sui generis* solution were presented: Dozortsev 1994, 50-52.
26. Patentnyi Zakon RF, 23 September 1992, *VSND i VS RF*, 1992, No. 42, item 2319, *Rossiiskaia gazeta*, 14 October 1992. See, also, Elst 1994, 133; E.P. Gavrilov, "The Legal Protection of Industrial Designs", in Elst/Malfliet 94-96; Sergeev 78.
27. Sergeev 82; L.P. Timofeenko, *Avtorskie prava arkhitektorov*, Kiev, 1999, 1-4. Documentation worked out on the basis of architectural drawings is also considered protected as a work of architecture: art. 16 (2) Federal'nyi Zakon RF, "Ob arkhitekturnoi deiatel'nosti v Rossiiskoi Federatsii", 17 November 1995, *SZ RF*, 1995, No. 47, item 4473, *Rossiiskaia gazeta*, 29 November 1995; point 9 of the informational letter No. 47 of the Presidium of the RF Supreme Arbitration Court of 28 September 1999 ("Obzor praktiki rassmotreniia sporov, sviazannykh s primeneniem zakona Rossiiskoi Federatsii 'Ob avtorskom prave i smezhnykh pravakh'"), see <www.rao.ru/law/lawarbitrage.htm>.

652. Derivative and composite works are also expressly subject to copyright protection, and this is irrespective of whether or not the works on which they are based or which they contain are protected by copyright.[30] Listed examples of derivative works (*proizvodnye proizvedeniia*) are translations, transformations, annotations, abstracts, summaries, reviews, dramatizations,[31] arrangements, and other adaptations of works of science, literature, and art. This relates to adaptations of one or more pre-existing works in which the creative activity of the adaptor lies in the adaptation itself. In collections, on the other hand, the originality lies in the selection and arrangement of pre-existing documents and works, without these being adapted.[32] Encyclopedias, anthologies, and databases[33] are given as examples of collections (*sborniki*),[34] which is itself an example of the broader category of composite works (*sostavnye proizvedeniia*). This category also includes newspapers, magazines, and other periodical publications, or series of scientific works.[35]

653. With regard to collections, one should pay attention to the change in the criterion for eligibility for copyright protection. In Soviet copyright law, the collection had to be the result of an independent arrangement (*obrabotka*) or systematization (*sistematizatsiia*) of the material, whether protected by the copyright law or not.[36] By virtue of article 135 (4) Fundamentals 1991, a collection was protected by copyright if it was the result of creative labor "in the selection *and* arrangement of the material",[37] a phrasing which the Computer

28. Makagonova 54-56; Sergeev 47. Protection of the title of the work is also apparent from the provision concerning the personal rights of the author in art.15 (1) CL 1993 ("the right to protection of the work, *including its title*"). "Encyclopedia for children" as title for a series of books was not considered to be sufficiently original to be protected by copyright: point 2 of the informational letter No.47 of the Presidium of the RF Supreme Arbitration Court of 28 September 1999 ("Obzor praktiki rassmotreniia sporov, sviazannykh s primeneniem zakona Rossiiskoi Federatsii 'Ob avtorskom prave i smezhnykh pravakh'"), see <www.rao.ru/law/lawarbitrage.htm>.
29. Art.6 (3) CL 1993.
30. Art.7 (3) CL 1993.
31. The director of a show is, nevertheless, regarded as a performing artist, and not as the author of the show: art.1 and 36 (1) CL 1993. See, also, Dietz 1997, 17; Wandtke 568. In an unpublished decision of 8 October 1996 the Naro-Fominskii town court of the Moscow region considered the audio-dramatization of a fairy-tale to be subject matter of copyright, and the maker thereof to hold author's rights.
32. Savel'eva 1993a, 802.
33. According to the definitions in art.4 CL 1993 and art.1 Computer Law, databases are to be understood solely as electronic databases. This does not exclude "paper" databases considered as collective works from copyright protection, but it certainly makes the specific measures of the Computer Law inapplicable.
34. See, also, art.2 (2) Computer Law.
35. Sergeev 86.
36. Art.487 CC RSFSR.
37. See, also, S.A. Chernysheva, in Sukhanov 1993, I, 324.

Law adopted with regard to databases.[38] In the Copyright Law 1993, however, the alternative was again used in connection with collections (*sborniki*) and other composite works (*sostavnye proizvedeniia*): copyright arises from the compiler's creative labor in the choice *or* arrangement of the material.[39]

The choice between the cumulative and the alternative variants is not without practical significance. A dictionary, for instance, can fairly easily meet the criterion of selection, but can hardly meet the requirement of an original arrangement since it is inherent to a dictionary that the words are ordered alphabetically. A cumulative application of both criteria (selection and arrangement) would threaten a whole range of collections with exclusion from copyright protection.

The definition of the protection criterion for collections is clearly inspired by article 2 (5) BC, which in its French version has "le choix *ou* la disposition des matières", while the English text has "the selection *and* arrangement of their contents", respectively alternative and cumulative. The Russian version of the BC published by WIPO[40] has "podbor *i* raspolozhenie", selection *and* arrangement as cumulative conditions, and it is this provision which was initially adopted in the Fundamentals 1991. In the Copyright Law 1993 the Russian legislator then followed the French version of the BC, in our view correctly as article 37 (1) (c) BC provides that in cases of disagreement about the interpretation of the different texts, the French text is to be taken as the standard.[41]

654. Since the passing of the CL of 9 July 1993, possible subject matter of copyright protection has also been named in other laws, for instance advertisements[42]—insofar as they cannot already be considered to belong to the categories of literary works, works of visual art, or photography—and topographical, geodesic, space, and other maps.[43]

§ 3. Exclusions from Copyright

655. A number of works are excluded from copyright protection by the law in order to allow their unhindered wide dissemination, with no private claims. In the first place, these are official documents (laws, court judgments, other texts of a legislative, administrative, or judicial nature), as well as their official

38. Art.3 (4) Computer Law.
39. Art.11 (1) para.1 CL 1993.
40. *Bernskaia konventsiia ob okhrane literaturnykh i khudozhestvennykh proizvedenii. Parizhskii akt ot 24 iiulia 1971 goda, izmenennyi 2 oktiabria 1979 goda*, WIPO, Geneva, 1990.
41. The alternative, non-cumulative application of the conditions of selection and arrangement also appears in art.3 (1) Directive 96/9/EC (11 March 1996) concerning the legal protection of databases, *OJ*, L 77/20, 27 March 1996.
42. Art.4 Federal'nyi Zakon RF, "O reklame", 18 July 1995, *SZ RF*, 1995, No.30, item 2864, *Rossiiskaia gazeta*, 25 July 1995. See also M.N. Maleina, "Pravovye aspekty politicheskoi reklamy", *GiP*, 1994, No.11, 154.
43. Art.10 Federal'nyi Zakon RF, "O geodezii i kartografii", 26 December 1995, *Rossiiskaia gazeta*, 13 January 1996. See also explicitly art.7 (1) CL 1993.

translations, and state symbols and signs[44] (flags, coats of arms, medals, monetary symbols and other state symbols and signs).[45] [46] Works of folk art are also expressly excluded from copyright protection.[47]

656. Finally, informational communications (reports) on events and facts have been declared free of copyright,[48] which is explained in the legal theory by the fact that such communications leave no room for the expression of the individuality of the author.[49] When a report on some event is accompanied by commentary, judgments, predictions, analytical considerations, or other interpretative phrases, the usual regulation of copyright again applies.[50] The Supreme

44. Art.134 (5) Fundamentals 1991 mentioned as an additional condition that these official symbols had to be confirmed by state and social organizations before being excluded from copyright protection. Art.8 CL 1993 only mentions state symbols; apparently the symbols used by social organizations are no longer excluded from copyright protection (Savel'eva 1993a, 802). At the moment the social organizations have themselves registered and "use symbols protected by the legislation of the RF on the protection of intellectual property or authors' rights", they have to provide the registering bodies with documents demonstrating their rights of use (art.21 para.5 Federal'nyi Zakon, "Ob obshchestvennykh ob"edineniiakh", 19 May 1995, *SZ RF*, 1995, No.21, item 1930, *Rossiiskaia gazeta*, 25 May 1995). According to art.24 of the same law, the symbols of social organizations may not infringe the intellectual property rights of citizens.
45. Art.8 CL 1993. See also Gavrilov 1996, (46-47)—who points out that symbols and signs of organs of local self-government (cf. Ukaz Prezidenta RF, "Polozhenie o gosudarstvennom Geral'dicheskom registre Rossiiskoi Federatsii", 21 March 1996, *SZ RF*, 1996, No.13, item 1307) are also not protected by copyright—and Makagonova 52-54.
46. After all, this exclusion of symbols of state from copyright does not mean they are completely without rights. Their reproduction is free, but their unmonitored destruction or mutilation is not allowed, given the legislation on the conservation of monuments. Thus a Decree of the Supreme Soviet of the Russian Federation of 12 June 1992 "On representations of the symbols of state of the former USSR" (PVS RF, "Ob izobrazheniiakh gosudarstvennykh simvolov byvshego SSSR", 12 June 1992, *VSND i VS RF*, 1992, No.26, item 1450) provides that the representations of the symbols of state of the former USSR (shield and flag) may only be replaced if they are situated in such places on the buildings, constructions and other objects transferred to the Russian Federation as are intended for the representations of the symbols of state of the Russian Federation. And the Decree even excludes the replacement of these symbols of the USSR in cases in which the representations of the symbols of the former USSR are art objects or a composite part of historic and cultural memorials, or their replacement is not possible without damaging the value of the buildings, constructions and other objects.
47. Art.8 CL 1993. See also Sergeev 51.
48. Art.8 CL 1993. Compare art.2 (8) BC.
49. Sergeev 51. On the designation of the name of the press agency which disseminates such communications, see art.23 para.3 NMA RF.
50. Makagonova 58-59; Sergeev 52. See also the Recommendation of the Judicial Chamber for Informational Disputes (*supra*, No.327) "On the judicial nature of the materials of the press agency ITAR—TASS" of 14 October 1994 (Rekomendatsiia Sudebnoi palaty po informatsionnym sporam pri Prezidente RF "O pravovoi prirode materialov ITAR—TASS"), *Rossiiskaia gazeta*, 22 October 1994. A word-for-word repetition of such reports is permitted with obligatory indication of name, unless specifically forbidden by the author (art.19 (3) CL 1993).

Arbitration Court decided that broadcasting schedules are to be considered as such informational reports on events and facts, and consequently not protected by copyright.[51]

Section 2. The Author

§ 1. The Principle of Authorship

657. The CL 1993 follows the line which in principle—although with exceptions—was followed in the Soviet legislation, and in the Fundamentals 1991 was even affirmed without exceptions: only the natural person,[52] through whose creative labor a work is created, can be the original holder of copyright.[53] [54] In other words, no original copyright is vested in legal persons.

658. For the first time the CL 1993 provides a presumption of authorship.[55] The person who is indicated on the original or on a copy of the work as its author is, in the absence of proof of the contrary, deemed to be its author.[56] This rule puts the person mentioned on the work in a comfortable position in any action against counterfeiters.[57] If a work is published anonymously or under a pseudonym, the publisher[58] whose name or designation is indicated

51. Decision No.6961/97 of 24 March 1998, *Vestnik VAS RF*, 1998, No.6, 76-78, and decision No.3900/98 of 24 November 1998, *Vestnik VAS RF*, 1999, No.2, 76-78. See, also, point 1 of the informational letter No.47 of the Presidium of the RF Supreme Arbitration Court of 28 September 1999 ("Obzor praktiki rassmotreniia sporov, sviazannykh s primeneniem zakona Rossiiskoi Federatsii 'Ob avtorskom prave i smezhnykh pravakh'"), see <www.rao.ru/law/lawarbitrage.htm>. For a critical comment, see E. Gavrilov, "Pravovaia okhrana programm teleperedach", *Zakonodatel'stvo i Praktika sredstv massovoi informatsii*, April 1999.
52. Art.135 (1) Fundamentals 1991 still mentioned the "citizen" as the initial rightholder, but mistakenly, given that under art.136 para.1 Fundamentals 1991, but now also by virtue of art.5 (1) CL 1993, a work which is first published on Russian territory is directly protected by Russian copyright legislation without regard to the author's citizenship.
53. Art.4 CL 1993. See also Sergeev 101. It is irrelevant whether the creative activity of the author is his profession or a hobby: professional and amateur creative workers are treated equally in the field of copyright and neighboring rights (art.10 para.3 Fundamentals on culture).
54. With relation to architectural drawings this principle is explicitly reiterated—albeit using the term "the citizen", and not "the person"—by art.16 (3) para.1 Federal'nyi Zakon RF, "Ob arkhitekturnoi deiatel'nosti v Rossiiskoi Federatsii", 17 November 1995, *SZ RF*, 1995, No.47, item 4473, *Rossiiskaia gazeta*, 29 November 1995.
55. Savel'eva 1993a, 803.
56. Art.9 (2) CL 1993.
57. Compare art.15 (1) BC.
58. The term "publisher" (*izdatel'*), used here in imitation of the Russian translation of the BC disseminated by WIPO (published in, *inter alia*, Dozortsev 1994, 262-289), may in this context not be understood too narrowly as the person who publishes printed matter, now that there is mention of "the publication (*opublikovanie*) of works", *i.e.*, the release into circulation of copies of a work with the consent of the author, in quantities sufficient to satisfy reasonable needs of the public, with regard to the nature of the work (art.4 CL 1993; compare art.3 (3) BC).

on the work is, in the absence of proof of the contrary and until the author reveals his identity and claim authorship,[59] deemed to be the author's legal representative.[60] In this capacity, he is entitled to protect the author's rights (in relation to third parties) and to ensure their exercise.[61]

659.Copyright in a work created by the joint creative labor of two or more persons belongs to the co-authors jointly, regardless of whether the work is one of divisible or indivisible co-authorship.[62] In the first case, namely if the separate parts of the work can be used independently, each of the authors is entitled to use the part of the work that he created at his own discretion unless provided otherwise in an agreement between all the authors.[63]

Copyright on the work as a whole is exercised jointly.[64] The coauthors can determine their mutual relationships by agreement.[65] But even if they do not, they are not—and this is new—bound together hand and foot for the joint exploitation of an indivisible work in its entirety (and where the separate exploitation of the various parts is by definition impossible). For, in such a case, none of the co-authors has the right to prohibit the use of the work without sufficient grounds.[66] In this way, the blocking of exploitation due to the unreasonable unwillingness or indifference of one of the co-authors is made impossible.

There is, however, some lack of clarity about whether one coauthor can institute legal proceedings, in his own name and without the intervention of the others, for breach of the joint copyright and for damages for his part in it.

660.The CL 1993 finally provides for the usual regulation concerning derivative works, *i.e.*, the authors enjoy copyright on their translation, revision, arrangement, etc., on the condition that the rights of the author of the original work are respected,[67] and cannot prevent other persons from making their own translations or adaptations of the same works.[68]

59. If the pseudonym used leaves no doubt as to the author's identity, the publisher can never represent the author on the basis of this rule.
60. Art.182 (1) CC RF; Gavrilov 1996, 54.
61. Art.9 (3) CL 1993. Compare art.15 (3) BC.
62. The fact of co-authorship is not judged on the basis of the working procedure but on the basis of the final result, *i.e.*, the authors' work: Gavrilov 1996, 55.
63. Art.10 (1) CL 1993.
64. Art.10 (2) para.1 CL 1993.
65. Art.10 (2) para.2 CL 1993.
66. Art.10 (2) para.3 CL 1993. See, also, Savel'eva 1993a, 803. It is ultimately the courts which have to assess the justice of the grounds of refusal. The user organization which published a Dutch-Russian dictionary, and obtained the authorization of the majority of the coauthors for a second edition, cannot use art.10 (2) CL 1993 as a reason to ignore the lack of authorization of the other coauthors (People's Court, Moscow, 7 December 1994, cited Gavrilov 1995a, 689).
67. Art.12 (1) CL 1993.
68. Art.12 (2) CL 1993.

§ 2. Employees

661. The principle that the original copyright is vested in the natural person by whose creative labor the work is brought about, remains unchallenged in relation to works created "in the course of performance of official duties or of an employer's official task".[69] "Official duties" probably refers to the description of the employee's duties as given in the contract of employment, while an official task would be a specific task which an employer entrusted to someone in his employ.

662. The term "employer" is defined as the person with whom the author stays in a labor relationship (*trudovye otnosheniia*), so that the situation of contracting for works (*podriad*) is not covered.[70] It is unclear whether works created by civil servants fall under the specific rules for employee-created works.

663. Clearly, the legislator was thinking only of the employer who is a legal person, as it is said that the employer can affix his "designation" (*naimenovanie*), rather than his "name" (*imia*) at every use of the employee-made work,[71] while the producers of audiovisual works, who according to their legal definition can be natural persons or legal entities,[72] can affix either name or designation.[73] The use of a "designation", and in particular of a "company designation (brand name)" (*firmennoe naimenovanie*), is reserved to legal persons.[74]

664. Not all works created by an employee during working hours come under the exceptional regulations for "employee-created works". Usually, an employee-created work is the result of a specific or general task entrusted to the author in or in accordance with his employment contract. Thus works which are created "beyond the line of duty", even if during working hours and with company materials, are not employee-created works.[75] Put differently, works created during working hours, but with no recognizable link to the duties provided for in the employee's employment contract, nor to a specific task given by the employer, cannot be seen as employee-created works and thus fall under common copyright law.[76] The content of the employer's task must be the creation of the work.[77]

665. Employee-created works are subject to a rebuttable presumption of the transfer to the employer of the exclusive rights to use the employee-created

69. Art.14 (1) CL 1993.
70. Art.14 (2) para.1 CL 1993. See also Gavrilov 1993b, 12; Korchagin *et al.* 179.
71. Art.14 (3) CL 1993.
72. Art.4 CL 1993 (definition of "producer of audiovisual works").
73. Art.13 (2) para.2 CL 1993.
74. On a legal entity's right to a business name, see art.54 CC RF.
75. Gavrilov 1993b, 12.
76. Sergeev 200-201.
77. If a work by a member of the editorial staff of a newspaper or magazine, a film studio or a broadcasting enterprise is not immediately related to his duties as an employee, it is not an employee-created work (Sergeev 92-93).

work.[78] An agreement between the employer and the author is to determine the amount of the author's remuneration for each kind of use of the employee-created work and the method of its payment.[79]

666.In comparison to the regulation in the Fundamentals 1991 concerning employee-created works,[80] the presumption of transfer of rights has become rebuttable, but the transfer of rights is in itself no longer tied to a specific purpose and limited in duration. Unless otherwise agreed, the transfer of exploitation rights to the employer is unlimited,[81] of course with respect for the employee's moral rights, which remain with the author-employee.[82] The employer, furthermore, has no obligation to exploit the work.[83]

667.Under the Fundamentals 1991, author-employees were only given a right to remuneration "in the cases determined by the legislation".[84] The CL 1993 is clearer in the sense that the amount and method of payment of the remuneration for "each kind of use" must be determined in a contract between

78. Art.14 (2) para.1 CL 1993. The right to remuneration for the home copying of sound recordings and audiovisual works (art.26 CL 1993) is not an exclusive right, and thus does not come under the transfer. The author-employee also retains his *droit de suite* (Gavrilov 1996, 74, No.8).
79. Art.14 (2) para.2 CL 1993. See also Wandtke 569.
80. *Supra*, No.606.
81. Gavrilov 1993b, 13; Sergeev 95. Prins 1994a, 27 incorrectly assumes that the rights to employee-created works only pass to the employer for a period of 3 years, after which they automatically return to the author. The dropping of the "*Zweckübertragungstheorie*" and of the limitation in time are undoubtedly related to the cancellation in art.12 Computer Law of both these author-friendly limitations upon the transfer of rights to the employer for computer programs and databases. In all proposals for a new Copyright law which were drafted before the passing of the Computer Law (*supra*, No.619), both mechanisms of protection, as described in art.140 Fundamentals 1991, were retained. When the final draft of the Copyright Law was submitted to the Supreme Soviet at the end of 1992, *i.e.*, a couple of months after the Computer Law was passed, both protection mechanisms had also disappeared from the general Copyright Law. This is a classic example of how the introduction of new technologies into the field of application of copyright can have a direct (and negative) impact on copyright in general. Is it then not ironic that precisely in a commentary on the copyright protection for computer programs and databases Otniukova deplores that the transfer of rights to the employer was not tied to a maximum term (G. Otniukova, "Avtorskie prava na programmy dlia EVM i bazy dannykh", *Zakon*, 1994, No.1, 54)?
82. Dietz 1997, 21; Korchagin *et al.* 179. Explicitly, with regard to works of architecture: art.19 (1) Federal'nyi Zakon RF "Ob arkhitekturnoi deiatel'nosti v Rossiiskoi Federatsii", 17 November 1995, *SZ RF*, 1995, No.47, item 4473, *Rossiiskaia gazeta*, 29 November 1995. Nonetheless see Gavrilov 1995c, 22-23: "[...] l'auteur ne conserve que les droits personnels non patrimoniaux, mais non dans leur intégralité: il faut considérer que le droit de publication de l'oeuvre (c'est-à-dire le droit de décider si une oeuvre peut être livrée au public) revient à l'employeur".
83. Pozhitkov 61. This was no less the case under the Fundamentals 1991.
84. *Supra*, No.606.

employer and author.[85] The employer can, in other words, no longer "buy out" the author-employee for a single fixed sum. As in this matter contractual freedom is accepted as a principle, it is entirely legal to contractually agree on a remuneration of a negligibly small amount for each kind of use.[86]

668. However, the Copyright Law provides the possibility for the Government fixing (indexing) minimum rates for the remuneration of authors.[87] The only Government Decree which has yet fixed minimum fees for authors,[88] shows that this regulation is also applicable to the relationships between employee-author and employer with regard to the use of employee-created works.[89]

669. The regulation of employee-created works does not apply to employee-created encyclopedias, encyclopedic dictionaries, periodical or serial collections of scientific works, newspapers, journals, and other periodical publications.[90] By contrast, it *does* apply to audiovisual works created in employment.[91,92]

670. According to the Computer Law, pretty much the same rules as in the general Copyright Law apply to computer programs and databases created in the line of official duties or as a task entrusted by an employer.[93]

85. Art.14 (2) para.2 CL 1993. See also Savel'eva 1993a, 804. Gavrilov 1993b, 12 writes that by virtue of the law the right to use an employee-created work passes to the employer automatically and without any additional remuneration. Sergeev 172 criticizes this view, in our opinion rightly. The right of use does, unless agreed to the contrary, pass to the employer, but for every sort of use he has to pay an additional remuneration.
86. Prins 1994a, 27.
87. Art.31 (3) para.2 CL 1993.
88. PP RF "O minimal'nykh stavkakh avtorskogo voznagrazhdeniia za nekotorye vidy ispol'zovaniia proizvedenii literatury i iskusstva", 21 March 1994, *SAPP RF*, 1994, No.13, item 994.
89. See Point 3 of Section II of Appendix 3 to the Government decree of 21 March 1994 (*ibid.*): "The author who in the course of fulfilling his official duties as an employee creates a model of a work of visual art for industrial reproduction or multiplication is to be paid an author's remuneration for the reproduction or multiplication of such a work according to the standards provided in this Decree, unless otherwise agreed in the contract between author and employer." Gavrilov 1995a, 691 note 28, is of the opinion, in our view mistakenly, that this provision states that the author of such a model only has a right to remuneration if there was no contractual agreement to the contrary with the employer. He sees this provision as in conflict with the provisions of the CL 1993, and thus null. In our view the possibility of agreement to the contrary refers solely to the amount of the author's remuneration, and in particular to the possibility of agreeing a higher remuneration, and not to the right of remuneration itself.
90. Art.14 (4) CL 1993.
91. *Contra*: Pozhitkov 61.
92. This is remarkable as in art.14 (4) of the bill of law as submitted to the Supreme Soviet and approved at a second reading, audiovisual works, just like the works mentioned in the previous paragraph, were explicitly excluded from the area of application of the regulation concerning employee-created works ("Zakon ob avtorskom prave", *Kommersant"*, 3-9 May 1993, 25). The presidential veto (*supra*, No.619), however, disposed otherwise.
93. Arts.8 and 12 Computer Law. See, also, *e.g.*, Newcity 1993a, 363.

671. Finally, we must indicate a provision of the Russian Law on education of 10 July 1992,[94] which in article 39 (7) provides that the "right of ownership" to the products of intellectual and creative labor which are the result of the activity of an educational institution, belong to that institution. This apparently, contrary to the principles of the Copyright Law 1993, makes the educational institution the initial copyright holder in *e.g.*, textbooks composed by teacher-employees. This is not exactly motivating for such teachers, and this at a time that there is a great shortage of suitable textbooks.

§ 3. Audiovisual Works

672. Audiovisual works are the purest example of works created by co-authorship,[95] but because of the high production costs of a film, the multiplicity of authors, and the interests of the film producers, most countries provide a separate regulation for determining the original and derivative title to audiovisual works. The importance attached to the regulation of audiovisual works is demonstrated by the intense lobbying of American interest groups in particular,[96] as well as by the fact that this regulation was one of the few substantially changed during the parliamentary debates.

673. Any work has to be considered an audiovisual work if it consists of a fixed series of interrelated images (whether or not accompanied by sound) intended for visual and (if accompanied by sound) aural perception by means of appropriate technical devices. This includes cinematographic works and all works expressed in the media analogous to cinematography (television and video films, slide films and slide series, or similar works), regardless of the manner of their first or subsequent recording.[97]

This definition is broad in two ways. *Firstly*, there is no requirement that the series of images *move*, so that a slideshow in which the series of slides has such a degree of internal consistency that it makes a single work (*e.g.*, a fully automatic slideshow with overlapping images), would presumably have to be considered an audiovisual work.[98] *Furthermore*, the recording technique is irrelevant so that besides works recorded on celluloid, films recorded on *e.g.*, video tape can be considered audiovisual works. Some form of recording is, however, required. A *live* television broadcast, which is not recorded, thus, falls outside the definition of an audiovisual work.

94. Zakon RF, "Ob obrazovanii", 10 July 1992, *VSND i VS RF*, 1992, No.30, item 1797, amended 13 January 1996 and published in its entirety in the new version in *Rossiiskaia gazeta*, 23 January 1996. For a discussion of the original version of this law, see J. De Groof, (ed.), *Comments on the Law on Education of the Russian Federation*, Leuven, Acco, 1993, 223.
95. See, *e.g.*, Gavrilov 1996, 68, No.9; Sergeev 73.
96. See, *e.g.*, Fleishman 189-238.
97. Art.4 CL 1993.
98. After all, cinematographic works are no more than a series of fixed images which only move thanks to an optical illusion.

674. The regulation of the title to audiovisual works in the new Copyright Law works from the principle already mentioned, that only natural persons can be the initial author of an audiovisual work,[99] but departs from this rule by not having authorship determined case by case by the judges, but by exhaustively indicating the categories of persons who count as the authors of the audiovisual work, to wit the director, the scriptwriter, and the author of any musical work (with or without text) specially composed for the audiovisual work in question.[100] After this last individual, in brackets, come the words "the composer" so that one can assume that a songwriter/librettist is not an author of the audiovisual work. There is an unrebuttable presumption that director, scriptwriter, and composer brought about the audiovisual work by their creative labor.

675. Other natural persons by whose creative labor an audiovisual work is brought into existence are not considered authors of the work in question.

The authors of the component works of an audiovisual work created in the process of its production, such as the camera director, the set designer,[101] etc. are not authors of the work as a whole, but do enjoy copyright in their own work.[102] Copyright in these separate works remains vested in them so that they can exploit them separately, independently of the audiovisual work.

The authors of pre-existing works also retain copyright in their work but are not considered authors of the audiovisual work in which their work is used. The typical example is the author of a novel on which the script is based.[103] In other words, a cinema version is only possible with the permission of the author of the novel, and in the same way a pre-existing musical work cannot be used in the audiovisual work without the permission of the composer and any songwriter.

676. In the draft copyright law as submitted to the Supreme Soviet, there was a provision that the exclusive rights to use an audiovisual work were vested in its producer, with no provision for any possible contractual deviation. This *cessio legis* affected all the exploitation rights.

In the final version of the CL 1993, the *cessio legis* has become a rebuttable presumption of transfer, and the rights which are the object of this transfer are exhaustively listed.[104] At the signing of an audiovisual production contract there is, in other words, a rebuttable presumption that the director, the scriptwriter,

99. Art.4 (definition of "author") CL 1993.
100. Art.13 (1) CL 1993.
101. In art.13 (1) of the original draft of the Copyright Law that was submitted to the Supreme Soviet at the end of 1992, the set builder was still designated an author of the audiovisual work.
102. Art.13 (4) CL 1993.
103. Art.13 (4) CL 1993.
104. Art.13 (2) para.1 CL 1993.

and the composer of music specially created for the audiovisual work transfer certain rights to the producer of the audiovisual work.[105]

677. The producer (*izgotovitel'*) of an audiovisual work is defined by the Copyright Law as the natural or legal person that has taken the initiative and the responsibility for the production (*izgotovlenie*) of such a work.[106] In the absence of proof to the contrary, it is presumed that the producer is the natural or legal person whose name or designation is indicated on the work in the usual way,[107] an element of the law of evidence intended to simplify a producer's action for breach of copyright.

678. Not all rights are presumed to pass to the producer. Only the exclusive rights of reproduction, distribution (including rental[108]), public performance, communication to the public by cable, broadcasting, or any other public communication of the audiovisual work, as well as the rights of subtitling and dubbing the text of the audiovisual work.[109] The list clearly shows that not only the primary exploitation rights, but, also, the secondary exploitation rights to an audiovisual work are transferred to its producer. Furthermore, the transfer is valid for the entire duration of the copyright in the work.[110]

679. The exhaustiveness of the listing of the rights, which are the object of the presumption of transfer, means that possible future rights are not presumed to pass to the producer, nor those rights which the CL 1993 explicitly recognizes as pertaining to authors, but not listed here. These are the right to import the audiovisual work,[111] the right of adaptation, and the right to remuneration for home copying. Unless otherwise provided in the audiovisual production contract, these rights therefore remain vested in the authors of the audiovisual work. The reasoning for this particular reservation cannot be discovered with certainty, but the Russian legislator probably desired to follow article 14bis (2) b) BC as closely as possible and, thus, rather lost sight of the congruence of this provision with the Copyright Law as a whole.

680. The moral rights of the authors of the audiovisual work are in no way presumed to be transferred to the producer of the work. The fact that no special provisions were made for the exercise of these moral rights might seriously impede the exploitation of these works. Who decides on the divulga-

105. Savel'eva 1993b, 36 and 53. This is a measure instituted after consultation with the Russian Union of Cinematographers and clearly inspired by art. 14bis (2) b) BC (Savel'eva 1993a, 803). Critical with regard to the presumption of transfer: Chernysheva 1995, 120-121.
106. Art. 4 (definition of "producer of an audiovisual work") CL 1993.
107. Art. 4 (definition of "producer of an audiovisual work") CL 1993. Compare art. 15 (2) BC. The producer of the audiovisual work moreover has the right to demand mention of his name or designation at every use of the work: art. 13 (2) para. 2 CL 1993.
108. Gavrilov 1996, 68, No. 12.
109. Art. 13 (2) para. 1 CL 1993.
110. Art. 13 (2) para. 1 CL 1993.
111. *Contra*: Gavrilov 1996, 68, No. 13.

tion of the audiovisual work? What is to be done with the unfinished work of one of the authors? Can a scriptwriter resist changes to the script during the production process? Do the authors of the audiovisual work retain a right of withdrawal?

681. With regard to the right to remuneration, when the audiovisual work is publicly performed only the author of the musical work (with or without text)[112] retains the right to remuneration for the public performance of his musical work.[113] There can be no doubt that this is due to the degree of organization among composers, who can collect their rights directly from the cinema owners, and others who screen films, through the collecting society in which they are united.

Nevertheless, this provision seems inequitable[114] and discriminatory towards the other authors of the audiovisual work, and particularly the director who is in fact undoubtedly the main author of the film.[115] The director can, at the signing of the film production contract, be fobbed off. This is all the worse given the fact that the director, by the very nature of his activity, cannot exploit his creative achievement independently of the audiovisual work,[116] which is naturally not a problem for the composer.[117]

682. The presumption of the transfer of rights of exploitation applies only to the authors of the audiovisual work. The presumption does not apply to the authors of pre-existing works.[118] Consequently, these authors can freely determine the extent of the transfer of their rights in the audiovisual adapta-

112. In contrast to what was the case in the definition of the authors of an audiovisual work (*supra*, No.674), there is here no mention between brackets that the composer is meant. Does this mean that the librettist/songwriter of music specially created for the film also has a right to remuneration for every public performance of the audiovisual work, even though he is not recognized as an author of the audiovisual work?
113. Art.13 (3) CL 1993.
114. Dietz 1994b, 151 and 1997, 24. This author refers to the French legislation in which all authors of an audiovisual work are given a right to remuneration.
115. Thus Sergeev (72-73) recognizes that the scriptwriter, artist, composer, cameraman, actors and other individuals all make a creative contribution to the creation of such a complex work as a cinema or television film, but that it is the director's art by which these contributions are synthesized to an original artistic entity which cannot simply be reduced to the sum of its constituent parts.
116. Sergeev 73.
117. Elst 1994, 134. We are assuming that the rule that authors retain copyright on their own works, and can therefore always exploit it separately from the audiovisual work, as provided in art.13 (4) CL 1993 with regard to the authors of pre-existing works and to authors of works used in an audiovisual work but who are not themselves considered authors of the whole work, also applies to the authors of the audiovisual work. They therefore retain all rights in the exploitation of their separate contributions (*e.g.*, the adaptation of a script into book, or the publication of film music as a sound recording). The presumption of transfer relates only to the rights of exploitation in the audiovisual work as a whole.
118. *Contra*: Gavrilov 1995a, 690 and 1996, 69-70.

tion contract. Authors of contributions to the audiovisual work brought about during the production of the film, such as the work of the chief cameraman, the set builder, the dialogue writer, etc., also escape the presumption of the transfer of rights. The producer of audiovisual works will, therefore, have to negotiate carefully with the authors of contributions to an audiovisual work for the transfer of the rights necessary to a normal audiovisual exploitation of the work.

683. If the authors of contributions used in the audiovisual work are themselves employed by the film producer, then the regulation concerning employee-created works does apply to them,[119] at least if the film producer is a legal entity. In that case, there is a rebuttable presumption of the transfer of the exclusive rights to the use of their contributions to the film to the film producer-employer,[120] and they thus lose—unless otherwise agreed—the right to exploit their creation themselves (or have it exploited) independently of the audiovisual work. In such a case, the agreement between producer and author does have to specify the amount and the method of payment of the author's remuneration for each kind of use of the contribution.[121]

684. If the authors of the audiovisual work are employed by the producer of the audiovisual work, who is a legal person, the regulation concerning employee-created works likewise applies. The rebuttable presumption of transfer for audiovisual works is then corrected by the rebuttable presumption of transfer for employee-created works. This has two legal consequences.

Firstly, it means that, unless otherwise agreed, the director, scriptwriter, and composer are presumed to have transferred *all exclusive* exploitation rights to the film producer-employer, and thus not only those exhaustively listed in article 13 (2) CL 1993. This is important with regard to the rights of adaptation and of importation. It makes, however, no difference for the (non-exclusive) right to remuneration for the home copying of sound recordings and audiovisual works.[122]

Furthermore, it means that the authors of the audiovisual work can no longer exploit their own contribution independently of the audiovisual work unless they have managed to negotiate otherwise in their contract. This is particularly important for the scriptwriter since a composer of film music is seldom an employee of the film producer, and the cinema director in any case, due to the nature of his activity, cannot exploit his own creation independently of the audiovisual work. A writer of a cinema script who is employed by a film producer can, consequently, no longer give his authorization to third parties to use the script, *e.g.*, for a theatrical performance.

119. *Supra*, Nos.661 ff.
120. Art.14 (2) para.1 CL 1993.
121. Art.14 (2) para.2 CL 1993.
122. Art.26 CL 1993.

§ 4. Composite Works

685. The compiler of a collection or another composite work (encyclopedia, anthology, database, etc.) enjoys copyright in his selection or arrangement of documents if this selection or arrangement represents the result of his creative labor. The CL 1993 calls this "compilership" (*sostavitel'stvo*).[123]

The compiler has, as a matter of course, to respect the rights of the authors of each of the works included in the composite work.[124] The authors of works included in the composite work have the right to use their works independently of the composite work unless they have transferred this right to the compiler.[125] Naturally, this is irrelevant to a compilation of unprotected documents.

The compiler's copyright has a very limited extent. The compiler can only bring action against a virtually identical selection or arrangement of documents and cannot prevent other persons from making an independent selection or arrangement of the same materials.[126]

686. The same article of the Copyright Law which regulates the copyright of the compilers of compilations and other collective works, provides that the publisher of encyclopedias, encyclopedic dictionaries, periodical and serial collections of scientific works, newspapers, magazines, and other periodical publications enjoys the exclusive rights to the use of these publications.[127]

In the Soviet period, an original copyright to such works in their entirety was vested in the organizations who published such works themselves (or through a publishing enterprise).[128] In the Fundamentals 1991,[129] this original copyright was changed to a presumption of the transfer of the right to use the work in its entirety to these organizations. With regard to the compiler of the collection, this was a *cessio legis*, with regard to the authors of the contributions a refutable presumption.

The CL 1993 provides yet another regulation. Firstly, the beneficiary of this measure is given as "the publisher" (*izdatel'*).[130] It is not clear whether

123. Art.11 (1) para.1 CL 1993. Compare with regard to electronic databases: art.5 and 8 Computer Law.
124. Art.11 (1) para.2 CL 1993.
125. Art.11 (1) para.3 CL 1993.
126. Art.11 (1) para.4 CL 1993. Compare, with regard to electronic databases, the identical measure in art.5 (4) Computer Law. Russian copyright recognizes no *sui-generis* right to the prevention of unauthorized access to the content of a database. Compare Directive 96/9/EC of 11 March 1996 concerning the legal protection of databases, *OJ*, L 77/20 of 27 March 1996. See, also, Prins 1994b, 177.
127. Art.11 (2) para.1 CL 1993.
128. Art.485 CC RSFSR.
129. Art.135 (4) para.3 Fundamentals 1991. *Supra*, No.604.
130. In common usage, the publisher (*izdatel'*), in contrast to the publishing house (*izdatel'stvo*), refers to a natural person. Art.11 (2) para.1 last sentence CL 1993 however provides that the publisher is entitled to indicate "his designation" (*naimenovanie*), a term normally only used for legal persons.

this refers to the initiator or organizer of the project (which could very well be a publisher, but just as well an academic or scientific institution) or to the enterprise entrusted with the technical aspects of publication.[131] In any case, the CL 1993 vests in this publisher all exploitation rights, including the right to remuneration, which is no longer considered a separate right. Apparently, no original copyright is vested in the publisher[132] but, rather, a derivative right to use the work in its entirety, and this due to a *cessio legis*.[133]

687. As the publisher has only a derivative right to use the copyrighted work, the question of who holds the original copyright remains open. By putting this measure concerning encyclopedias, periodical publications, and suchlike in the article regulating copyright on collections and composite works, the Russian legislator seems to want to consider such works to be collections or composite works. The compiler or collector is the original author of such works[134] and can, consequently, enforce his moral rights on the work to the full.

688. Even so, some confusion is still possible because article 11 (2) para. 2 CL 1993 provides that the authors of the works included in such publications *retain* the exclusive rights to use their works independently of the publication as a whole.

This provision could, in our view incorrectly, be read in such a way that the authors of the contributions included in encyclopedias, periodicals, and suchlike, would indeed by virtue of the law be deprived of their exclusive exploitation rights to such works *as a whole*, but would retain full control of the exploitation of their own contribution. This, however, presumes that encyclopedias, periodicals, etc., be considered works of co-authorship, which, given the place of this provision in the article dedicated to collections, appears at the least to be illogical; and is also rejected as a possible interpretation by the legal theory.[135]

131. In art. 485 CC RSFSR, this distinction was clearly made to the benefit of the scientific or other organization.
132. An additional argument is the fact that in the regulation of the duration of copyright protection (excepting the special rules for anonymous, pseudonymous and posthumously disclosed works) not a single provision is to be found which deviates from the principle that the author's death is the key date (art. 27 CL 1993. *Infra*, Nos. 739 ff.). In many other Central and Eastern European countries, the notion of collective work has been introduced, but with a special, short term of protection running from the date of publication (Dietz 1994b, 149).
133. This is probably also the meaning of what Savel'eva 1993b, 36 rather ambiguously writes on the matter: "The publisher is not considered to be the author but by virtue of the law is granted the exclusive economic right of use of a collective work. The publisher is thus an initial holder of exclusive economic rights." Gavrilov calls it a quasi-copyright, a kind of neighboring right (E.P. Gavrilov, "Pravo izdatelia periodicheskogo izdaniia i avtorskoe pravo zhurnalista", *Zakonodatel'stvo i praktika sredstv massovoi informatsii*, January 1999).
134. Art. 11 (1) CL 1993. See, also, art. 135 (4) Fundamentals 1991.

In our view, this provision has to be understood in the same way as the similar provision for collections in general,[136] that is to say, independently of the issue of copyright on the work as a whole. The fact that it is emphasized that the authors of contributions to encyclopedias, etc. "*retain* the exclusive rights to use their works independently of the publication as a whole",[137] instead of the simple "*have the right* to use their works independently of the composite work", as provided in the general regulation for composite works,[138] is in our view because the latter case provides the possibility of an agreement to the contrary, while the former does not.

689. Even if the authors of contributions to such specific compilations are in the employ of the publisher, the legal position of these authors is unaltered since the regulation concerning employee-created works is expressly declared not to apply to the works covered by article 11 (2) CL 1993.[139]

Section 3. The Author's Rights

Introduction

690. Articles 15, 16, 17 and 26 CL 1993 set out the rights of the author. Reading through them reveals systematization and modernity. Most rights are clearly divided into two categories: (moral) personal, non-property rights (*lichnye neimushchestvennye prava*) and (economic) property rights (*imushchestvennye prava*). And within each category, the rights are systematically covered.

691. The author's rights in scientific, literary, and artistic works arise from the very fact of creation. Registration of the work,[140] or compliance with any other formality, is not required for copyright to arise or to be exercised.[141] The rules governing obligatory deposit have no link with or consequence for copyright.[142]

The holder of exclusive copyright does have the right—but not the duty—to place the copyright symbol on each copy of the work, followed by the name or designation of the holder of exclusive copyright and the year of first publication.[143]

135. Sergeev (110) writes that the encyclopedic dictionary, periodical, scientific collection etc. are collections, and not works of co-authorship in the absence of a common creative labor. Such works are, after all, the result of the creative work of selecting and arranging the material, and this is done by persons other than the authors of the contributions. It is, however, unclear who these persons are, as according to Sergeev 101 such works have no authors whatever.
136. Art.11 (1) para.3 CL 1993 ("The authors of works included in the composite work have the right to use their works independently of the composite work, unless otherwise provided in the author's agreement").
137. Art.11 (2) para.2 CL 1993.
138. Art.11 (1) para.3 CL 1993.
139. Art.14 (4) CL 1993. However, for press agencies, such as Itar-Tass, this exception does not apply: U.S. 2nd Circuit Court of Appeals, *Itar-Tass Russian* v. *Russian Kurier, Inc.*, 27 August 1998.

§ 1. Moral Rights

692. The moral rights of the author have, for the first time, been brought together in a separate article (art.15 CL 1993) with not only a clear listing, but, also, a clear definition of the various rights.

1.1. The Right of Paternity

693. Traditionally the right of paternity is split into two separate rights in Russia: the *right of authorship* and the *right to be named*. The first is the right to be regarded by others as the author of the work,[144] and is, in other words, the legal basis for action against plagiarism. The right of authorship also provides grounds for the author, or rather the non-author, to oppose the use of his name at the disclosure of a work which he did not create. In the legal theory, the right of authorship is marked as the most important of the author's rights because all other rights (moral and economic) are derived therefrom.[145]

140. Only for computer programs and databases does art.13 Computer Law provide a *facultative* registration (Prikaz Rossiiskogo agentstva po pravovoi okhrane programm dlia EVM, baz dannykh i topologii integral'nykh mikroskhem (RosAPO), "Pravila sostavleniia, podachi i rassmotreniia zaiavok na ofitsial'nuiu registratsiiu programm dlia elektronnykh vychislitel'nykh mashin i baz dannykh", 5 March 1993, *I.S.*, 1993, Nos.3-4, 37-41 and 47-52. See, also, Sergeev 66-68). This registration in no way affects the protectability of these works, but does give procedural advantages in case of counterfeiting. An infringer bears the burden of proof, if he takes issue with the ownership of the registered computer program or the database (T.V. Grigor'eva, in Dement'ev 145; Prins 1994b, 169; Korchagin *et al.* 130-131; Martem'ianov 1994, 90; Sergeev 66: "registration [...] has no constitutive significance"). Agreements concerning the complete renunciation of all property rights on a registered computer program or database themselves also have to be registered, so that the advantage of the original registration not be lost (art.13 (5) para.1 Computer Law; Prikaz RosAPO, "Pravila registratsii dogovorov na programmy dlia elektronnykh vychislitel'nykh mashin, bazy dannykh i topologii integral'nykh mikroskhem", 5 March 1993, *Rossiiskie vesti*, 3 April 1993, *I.S.*, 1993, Nos.3-4, 45-46 and 58-59, *Zakon*, 1994, No.1, 50-51. See also Martem'ianov 1994, 91).
141. Art.9 (1) para.1 CL 1993; art.4 Computer Law.
142. Federal'nyi Zakon RF, "Ob obiazatel'nom ekzempliare dokumentov", 29 December 1994, *SZ RF*, 1995, No.1, item 1, *Rossiiskaia gazeta*, 17 January 1995; PP RF, "Ob obiazatel'nykh ekzempliarakh izdanii", 24 July 1995, *SZ RF*, 1995, No.31, item 3129, *Rossiiskaia gazeta*, 29 August 1995; PSMP RF, "O registratsii kino- i videofil'mov i regulirovanii ikh publichnoi demonstratsii", 28 April 1993, *SAPP RF*, 1993, No.18, item 1607.
143. Art.9 (1) para.2 CL 1993. See, also, the administrative instruction concerning title information which it is obligatory to mention in non-periodical publications: Prikaz Ministerstva pechati i informatsii RF, "Ob utverzhdenii perechnia vykhodnykh svedenii, razmeshchaemykh v neperiodicheskikh pechatnykh izdaniiakh", 28 June 1993, *BNA RF*, 1993, No.11, 58-59.
144. See, *e.g.*, also art.4 (4) Federal Law on science, which states that "a scientific worker has the right to be recognized as author of scientific and/or scientific-technical results": Federal'nyi zakon RF, "O nauke i gosudarstvennoi nauchno-tekhnicheskoi politike", 23 August 1996, *SZ RF*, 1996, No.35, item 4137, *Rossiiskaia gazeta*, 3 September 1996.
145. Sergeev 131.

The right to a name (which might better be described as the right to indication or mention by a name) is the right of the author himself to determine in what way his name will be indicated on the work or to have his name withheld from the use of the work by opting for anonymity or disclosure under a pseudonym.

1.2. The Right of Disclosure

694. The author's right to disclose or to authorize disclosure of his work in any form means that only the author can determine the time at which his work is to be considered complete, and ready for disclosure to the public, and in what form.[146]

The concept "disclosure" (*obnarodovanie*) is utterly new in Russian copyright law, a novelty which can be entirely accounted for by the old dispute over the double meaning given to the term "publication" (*opublikovanie*, or *vypusk v svet*).[147]

For those works directly protected by the Soviet legislation, this term had a broad meaning, namely the publication, public performance, broadcasting by radio or television, or the communication by any means of a work to an indefinite group of people.[148] This definition was adapted in the Fundamentals 1991, so that subsequently publication meant the work had been published, publicly performed, broadcast on radio or television, *built*, or in any way *had become accessible to an indefinite group of people with the author's permission*.[149]

For works which were indirectly protected in the Soviet Union, *i.e.*, by virtue of international agreements ratified by the USSR, the concept of "publication" as defined in those agreements was maintained.[150] In concrete terms this meant article VI UCC (Geneva, 1952), which defined publication much more narrowly as the reproduction in a material form and making available to the public of copies of a work allowing it to be read or visually perceived.

In the new CL 1993, the terminological confusion was removed by the use of two distinct terms, clearly as a compromise between the traditional Soviet copyright regulations and the requirements of the international conventions, especially the BC.[151] The term "disclosure" replaces the earlier "publication" in a broad sense, and is defined as the act accomplished with the consent of the author of making a work for the first time accessible to the public by means of publication (*opublikovanie*), public display, public performance, terrestrial broadcasting, or by any other means.[152]

146. Sergeev 144-145.
147. *Supra*, Nos.126 ff.
148. Art.476 CC RSFSR.
149. Art.134 (1) para.2 Fundamentals 1991. *Supra*, No.607, note 123.
150. Art.478 para.2 CC RSFSR; art.136 Fundamentals 1991.
151. Savel'eva 1993a, 801, note 14 and Savel'eva 1993b, 31.
152. Art.4 CL 1993. See also Sergeev 88-89.

In comparison with the definition of publication in the Fundamentals 1991, disclosure is given a more dynamic meaning. The point is no longer the work *becoming* accessible, but the work being *made* accessible. Furthermore, the issue is no longer accessibility to an indefinite group of people, but literally the making accessible "for general cognizance" (*dlia vseobshchego svedeniia*). The construction of a building is not mentioned as a form of disclosure, but can be considered to be among the "other means". Finally, the first form of disclosure is given not as printing (*izdanie*), but as publication (*opublikovanie* or *vypusk v svet*).

This last term, "publication", is given a much narrower meaning in the new CL 1993, *i.e.*, "the release into circulation of copies of a work or a phonogram with the consent of the author of the work or the producer of the phonogram, in quantities sufficient to satisfy reasonable needs of the public, with regard to the nature of the work or the phonogram";[153] therefore, it is only one of the possible forms of disclosure.[154] With regard to the publication of a work, this definition comes very close to the definition of the BC.[155] Explicitly excluded from the concept of "publication" in the BC are the performance of a dramatic, musico-dramatic, cinematographic or musical work, the public recital of a literary work, the communication by wire or the broadcasting of literary and artistic works, the exhibiting of a work of art, and the construction of an architectural work.[156] These exclusions also seem to apply for the term "publication" in the CL 1993 since the aforesaid actions are considered possible alternative means of disclosure *alongside publication*, either explicitly or under the phrase "other means".

It is clear from the definition of publication (*opublikovanie*) that the term is wider than simple issuing (*izdanie*) of a work in printed form. For instance,

153. Art.4 CL 1993. Compare art.1 (1) Computer Law: the publication of a computer program or database is "making available copies of computer programs and databases with the author's consent to an indefinite group of people (among which by means of loading into the computer's memory and issuing printed text), provided the number of these copies meets the requirements of this group and taking into consideration the character of the said works". The Computer Law did not yet use the concept of "disclosure" (Newcity 1993a, 363-364) and considered the "publication right" a property right (Art.10 Computer Law. See also Savel'eva 1993b, 42; Vermeer 165).
154. In the draft Copyright Law composed by *VAAP/GAASP* in the second half of 1991, one could find the following: "The disclosure of a work is not a synonym for the term 'publication' of a work" (art.1 point 8 Proekt Zakona RSFSR "Ob avtorskom prave i smeznykh pravakh", unpublished).
155. "The expression 'published works' means works published with the consent of their authors, whatever may be the means of manufacture of the copies, provided that the availability of such copies has been such as to satisfy the reasonable requirements of the public, having regard to the nature of the work" (art.3 (3) BC). See, also, Pozhitkov 56. With regard to the publication of a phonogram, see art.3 RC.
156. Art.3 (3) para.2 BC.

the offering for sale of cassettes or CD's also has to seen as the publication of a musical work,[157] just as the dissemination of a number of copies of a film to the cinemas has to be considered publication of a cinematographic work.[158]

The clarity hoped for from the use of two terms for two meanings instead of one term with a dual meaning has however not entirely been achieved, because of the sloppiness of the legislator. Thus, in the first paragraph of article 5 one of the issues relating to the area of application of the CL 1993 is the consideration of whether or not a work has been *disclosed*, while the subsequent second paragraph speaks of cases when a "work shall *also* be recognized to be *published* in the Russian Federation".[159] The provision for the period of protection of anonymous and pseudonymous works also mixes the concepts "disclosure" and "publication".[160]

It is remarkable that the right of disclosure remains in full force with regard to the authors of audiovisual works. Director, scriptwriter, and score composer consequently have the last word in the completion of the film, an issue over which the producer has no authority. An author who creates a work in the exercise of his duties also has the power to decide over its disclosure even if the refusal to disclose could be considered a breach of his terms of employment.[161]

1.3. The Right of Withdrawal

695. The Copyright Law also for the first time recognizes a *right of withdrawal* (*pravo na otzyv*) as part of the right of disclosure.[162] This means that the author has the right to withdraw an earlier decision to disclose his work. Due to the exorbitant character of this right—it allows a unilateral revocation of exploitation agreements—it is tied to a number of conditions. Thus, the exploiter of

157. In this regard, the definition of the Russian Copyright Law is still broader than that of the UCC, according to which only reproduction in material form and making available to the public of copies of work which allow it to be read or visually (but, thus, not auditively) perceived come under the term publication. Sergeev (90-91), therefore, also argues for the direct application of the UCC's definition to the internal legislation, ignoring the fact that the UCC is only applicable to international situations. In any case the double use of the term "publication" is hardly important now on the one hand Russia has joined the BC, whereby the UCC has considerably lost significance for the country, and on the other hand those free uses in the CL 1993 relating to *published* works (art.19 (3) and 20), only concern works of literature.
158. Nordemann *et al.* 62.
159. See also Dietz 1997, 19.
160. Art.27 (3) CL 1993.
161. Sergeev 146.
162. Art.15 (1) CL 1993. See Baryshev 185-186. Entine 553 speaks of "une sorte de révolution silencieuse grâce à la reconnaissance du droit de repentir—étape qui met l'auteur et l'utilisateur sur un pied d'égalité". The right of withdrawal does not appear in the Computer Law.

a withdrawn work has to be indemnified for damages suffered by the withdrawal (including loss of profit).[163] If the work has already been disclosed, the author has the right to take the already manufactured copies of his work out of circulation at his own expense on condition that he notifies the public of the work's withdrawal.[164]

The right itself is not conditional on any requirement of giving cause for the withdrawal. Grishaev does give changes in the ideological, artistic, or other opinions of the author as possible reasons for exercising this right.[165] And Sergeev, likewise, refers to the author's changing artistic outlook or philosophical stance, but, also, to changing external circumstances or the desire to use a different method of disclosure. This writer does, however, emphasize that these circumstances have no legal significance: the author is under no obligation to justify his decision.[166]

Nor does the Russian Copyright Law contain any provision—such as those in the French[167] or German[168] laws of copyright—which requires the author, if after a decision to withdraw the work he decides to have it published again after all, to offer it first to the first exploiter on the same terms as those fixed in the original exploitation agreement.

With regard to the duration of protection too, the right of withdrawal is very broadly conceived since this right is not limited to the author's lifetime but is recognized throughout the full period of copyright protection.[169] Employee-authors cannot exercise a right of withdrawal in relation to works made for hire.[170]

163. The first bill in which the right of withdrawal appeared (art.24 (2) "Proekt. Zakon RSFSR ob avtorskom prave", *Knizhnoe obozrenie*, 3 April 1992, 3) provided no obligation to indemnify the injured exploiter.
164. Art.15 (2) CL 1993.
165. Grishaev 1994, 93.
166. Sergeev 146. Compare Germany, where the "*Rückrufsrecht*" can be exercised on the grounds of non-exploitation of the work by the person to whom an exclusive right of use was granted (§ 41 Urheberrechtsgesetz van 9 September 1965) or because of changed convictions (§ 42 Urheberrechtsgesetz).
167. Art.L.121-4. Code de la propriété intellectuelle.
168. § 42 (4) Urheberrechtsgesetz. This obligation does not exist if the motivation of the withdrawal was non-exploitation by the holder of the exclusive right of use.
169. Art.27 (1) para.1 CL 1993. See, also, Elst 1994, 142.
170. "The provisions of this Subsection are not applicable to the employee-created works" (art.15 (2) *in fine* CL 1993). This formula is somewhat unfortunate, given that according to its letter the provisions of the previous subsection, namely art.15 (1) CL 1993, remain in full force. This cannot, however, be the intention since in art.15 (1) CL 1993 the right of withdrawal was in principle recognized as part of the right of disclosure, while the second subsection of art.15 CL 1993 only delineates the exceptional modalities for exercising this right. In our view the intention of the Russian legislator was clearly to deny employee-authors the right of withdrawal.

1.4. The Right to Protection of the Author's Reputation

696. The *right to protection of author's reputation* (*pravo na zashchitu reputatsii avtora*) is defined as the right to protection of the work, including its title, from any distortion or any derogation which may cause any prejudice to the honor and dignity of the author.[171]

This right replaces the former right to the integrity of the work[172] with the purpose of drawing a clearer distinction between the moral right to integrity, and the economic right to adaptation.[173] However, neither the new name, nor the new definition of the right can be considered an improvement.[174]

The name "the right to protection of the author's reputation" implies broader protection than intended by the legislator.[175] While the name suggests that the reputation of the author is protected *tout court*, which would in practice make this right identical to the general civil right to the protection of the honor, dignity, and business reputation of citizen or legal entity,[176] the definition of the author's moral right in question makes clear that the reputation of the author is only protected by this right to the extent that a work created by the author be distorted or otherwise treated in a degrading fashion.[177]

Not only is the name too broad: conversely, the contents have shrunk.[178] Where under the Soviet legislation the author could oppose any alteration to his work or its title,[179] now—evidently under the influence of article 6bis BC—it is necessary that the alteration held to be a distortion or attack be prejudicial to the honor and dignity of the author. Thus, the new CL 1993 clearly limits the right to integrity and reduces it to the minimum level required by the BC (which was not necessary for accession to the BC).

171. Art.15 (1) *in fine* CL 1993.
172. Art.479, 480 and 481 CC RSFSR. Art.9 Computer Law still speaks of the right to integrity or—and this terminology is entirely new—the right to intactness (*pravo na tselostnost'*). The definition given to this is, however, virtually identical to that in the 1993 Copyright Law.
173. Savel'eva 1993a, 804 and Savel'eva 1993b, 39.
174. *Contra*, at least with regard to the name: Sergeev 138.
175. Elst 1994, 136-137. Dozortsev 1994, 25 calls this name "most unfortunate" (*vriad li udachno*).
176. Art.152 CC RF. See also Gavrilov 1993a, XIX—XX.
177. It is not necessary that alterations be made to the work itself. Sergeev (143-144) writes in his commentary on the right to protection of the author's reputation that the placing of a sculpture in a context for which it was not intended, contrary to the creative thinking of the author, in itself constitutes an infringement of this right. In doing so, however, he refers to a sentence from 1981 (*i.e.*, when Soviet legislation still spoke of the right of integrity) concerning a sculpture created for an exhibition, but placed on a monument for soldiers killed in action.
178. Elst 1994, 137.
179. Art.480 CC RSFSR.

§ 2. Economic Rights

2.1. Introduction

697. The patrimonial rights are regulated by three articles. Article 16 describes in general the author's rights of exploitation, while article 17 provides certain specific rights for the author of works of visual art. Article 26 finally grants the author a right to remuneration for "home copying".

In discussing the Fundamentals 1991, we indicated an improved structure in the recognition of author's rights.[180] This position can be defended even more forcefully with regard to the new CL 1993. There is again a collection of exploitation rights, "the exclusive rights to the use of his work *in any form and by any means*".[181] This expression leaves jurisprudence sufficient space to include future methods of use among the exclusive claims of the author.[182] Nevertheless, some authors argue, on the basis of the introductory sentence of article 16 (2) CL 1993,[183] in favor of the exhaustiveness of the listed exploitation rights.[184]

2.2. Exclusive Exploitation Rights

2.2.1. "Corporeal" Use

a) The Right of Reproduction

698. The first right of the author is the right of reproduction (*pravo na vosproizvedenie*), *i.e.*, the right to manufacture one or more copies of a work or part of a work in any material form, including sound and video recordings, to manufacture one or more copies of a two-dimensional work in three dimensions, and to manufacture one or more copies of a three-dimensional work in two dimensions.[185]

Consequently, in the CL 1993 the right of reproduction is much more limited than was the case in the CC RSFSR and the Fundamentals 1991, when

180. *Supra*, No.607.

181. Art.16 (1) CL 1993.

182. Sergeev (126-127 and 152) who as arguments for the non-exhaustiveness of the list in art.16 (2) CL 1993 refers to (1) the mentioning in the CL 1993 of other rights, besides arts.15 and 16 (such as the *droit de suite*, art.17; the right of composers of film music to remuneration for the public performance of an audiovisual work, art.13 (3) etc.), (2) the fact that the right of publication is not mentioned in the CL 1993, and nevertheless can clearly be deduced from its provisions, particularly the distinction between disclosure and publication (like the earlier right of authorship); and (3) the open formula of art.16 (1) CL 1993. See, also, the non-exhaustive list of property rights on computer programs and databases in art.10 Computer Law. In the same sense: Baryshev 187-188.

183. "The exclusive rights of the author to the use of the work consist of the right to perform or to authorize performance of the following acts: [...]" (art.16 (2) CL 1993).

184. Gavrilov 1993a, XX; Korchagin *et al.* 181.

185. Art.4 CL 1993. Saving a work in the memory of a computer also counts as reproduction: art.4 CL 1993 (definition of "reproduction") and art.1 (1) Computer Law (definition of "reproduction of a computer program or a database").

it covered not only the multiplication of a work in copies, *i.e.*, in a material form, but, also, immaterial reproductions of a work.

The CL 1993 does however also have a narrower concept of reproduction, to wit "reprographic reproduction" (*reprograficheskoe vosproizvedenie* or simply *reprodutsirovanie*), *i.e.*, facsimile reproduction in any size or form of one or more copies of the originals or copies of written and other graphic works by means of photocopy or by any other technical means other than publication in printed copies.[186,187]

699. In order to exercise the right to reproduce his work, the visual artist can demand access to his work from the owner (*right of access*).[188] Part of Soviet legal theory accepted the existence of this right although it was never explicitly recognized in law. The right to access does not extend to allowing the author to demand that the owner allow him to remove the work.[189]

In the Federal Law on architectural activity in Russia dated 17 November 1995, the author is furthermore recognized as having the right, specifically in relation to works of architecture (including landscape gardening) of requiring the owner or possessor of the building (or the garden created, the construction, etc.) to allow him the opportunity to make photographic or video recordings of the construction, unless otherwise agreed.[190]

b) The Rights of Distribution, Rental, and Importation[191]

700. The distribution right (*pravo na rasprostranenie*) is the right to distribute copies of the work by any means, such as selling or renting.[192] The internal, national exhaustion (*ischerpanie*) of the distribution right is unambiguously recognized for the first time.[193]

701. The exclusive right to rental, *i.e.*, to provide a copy of a work for temporary use for direct or indirect commercial profit-making purposes,[194] is entirely new, but it is not certain that the Russian legislator has fully understood the position of rental rights in the context of the exhaustion of rights. The Copyright Law provides that the author has the right to distribution of the copies of the work by means of rental regardless of the right of ownership in these copies.[195] The issue of rental rights is here being confused with that of the distinction between ownership of the *corpus mechanicum* and copyright on the *corpus mysticum* of a work.[196] What was probably meant was that the

186. Art.4 CL 1993 (definition of "reprographic reproduction").
187. Reprographic reproduction does not include storage or reproduction of the said copies in electronic (including digital), optical or other machine-readable form.
188. Art.17 (1) CL 1993.
189. Art.17 (1) CL *in fine*.
190. Art.18 (2) Federal'nyi Zakon R.F."Ob arkhitekturnoi deiatel'nosti v Rossiiskoi Federatsii", 17 November 1995, *SZ RF*, 1995, No.47, item 4473, *Rossiiskaia gazeta*, 29 November 1995.

rental rights are not exhausted by sale or any other form of distribution of the original or the copies of the work protected by copyright.[197]

702. The Copyright Law recognizes no public lending right of a non-commercial nature (or if it does, it would not survive the exhaustion of the distribution right), except apparently for computer programs and databases.[198]

703. The right to importation (*pravo na import*) means the right to import copies of the work for purposes of distribution. This covers not only copies made abroad without authorization but, also, copies manufactured with the authorization of the holder of the exclusive author's rights (*i.e.*, parallel im-

191. Note that alongside copyright, the author also has an "export right" on the "cultural treasures" he has created. Art.40 of the Law on the export and import of cultural treasures provides that: "The author has the right to export, in accordance with the fashions provided by this law, the cultural treasures created by him in any amount irrespective of whether he leaves Russia temporarily or permanently. The legal and natural persons that export cultural treasures while the author is still alive, or in the course of 50 years after his death, have to be able to provide evidence of the legality of their acquisition of these cultural treasures. The Federal service for the administration of cultural treasures has to inform the author or his heirs of the legal export of his works by other persons" (Zakon RF, "O vyvoze i vvoze kul'turnykh tsennostei", 15 April 1993, *Rossiiskaia gazeta*, 15 May 1993). Naturally this is not an exclusive export right in the sense of copyright. The legislation concerning foreign trade also provides that the export/import of (rights on) the results of intellectual activity can be prohibited or limited, on the basis of interests of state, such as the maintenance of public morals and legal order, the protection of the cultural heritage of the peoples of the Russian Federation, the protection of cultural treasures from illegal import or export and the transfer of property rights, the support of the foreign payments balance of the RF etc.: art.19 Federal'nyi Zakon RF, "O gosudarstvennom regulirovanii vneshnetorgovoi deiatel'nosti", 13 October 1995, *Rossiiskaia gazeta*, 24 October 1995.
192. According to T.V. Grigor'eva, in Dement'ev 140 the offering for sale of, for instance, computer programs (*e.g.*, advertising their sale) is also a form of distribution.
193. Art.16 (3) para.1 CL 1993.
194. Art.4 CL 1993. Compare art.1 (2) Directive 92/100 of 19 November 1992 concerning rental rights, lending rights and certain neighboring rights in the field of intellectual property, Pb. L 346/63 of 27 November 1992.
195. Art.16 (3) para.2 CL 1993.
196. "La loi russe est, d'ailleurs, moins claire ici parce qu'elle semble confondre le problème de l'épuisement du droit de distribution et la réserve du droit de location avec le problème de la séparation du droit de propriété des exemplaires d'une part, et du droit d'auteur, d'autre part." (Dietz 1994b, 157. Compare Wandtke 570).
197. "[... L]e droit de distribution [...] combiné avec un concept d'épuisement du droit après la première mise en circulation par voie de vente. Mais le droit de location comme une forme de distribution est réservé et n'est donc pas couvert par cet épuisement du droit qui ne concerne que des actes de vente ultérieure." (Dietz 1994b, 155-157). Compare art.1 (4) Directive 92/100 of 19 November 1992 concerning rental rights, lending rights and certain neighboring rights in the field of intellectual property, *OJ*, L 346/63 of 27 November 1992.
198. Dietz 1997, 25 and 28.

port).[199] Russian copyright, consequently, does not recognize the international exhaustion of the right of distribution.[200]

In this light, it is impossible to explain the provision contained in article 48 (4) CL 1993 which stipulates that copies of works protected in the Russian Federation that have been imported into the Russian Federation without the consent of the holder of copyright (and neighboring rights) from a state in which these works and phonograms were never protected or have ceased to be protected, are to be considered counterfeit.[201] According to this provision, it would appear that the crime of counterfeiting does not extend to the importation of copies from a country where the work in question is still protected and where they were made legitimately, *i.e.*, with the authorization of the legal rightholder, even though this action comes under the definition of the right of importation as provided in article 16 (2) CL 1993. The rejection of the international exhaustion of the right of distribution is thus again drawn into question.[202]

c) The Right to Exhibit

704. The "right to the public display of a work" (*pravo na publichnyi pokaz*), or the right to exhibit, is defined as the public[203] showing of the original or a copy of the work, either directly or on screen by means of a film, slide, television image, or by any other technical means, as well as the showing of separate images of an audiovisual work regardless of the sequence in which they are shown.[204] It is primarily relevant to works of visual art although the right to public display is not limited to these works; for such works, the right to exhibit is pretty much the counterpart of the right to public performance.[205]

The CL 1993 does not limit this right to unpublished works[206] as does, for instance, the German legislation.[207] The question of the relation between this right to exhibit and the exhaustion of the right to distribution is not clarified by the CL 1993.

199. Art. 16 (2) CL 1993.
200. Dietz 1994b, 159.
201. This provision seems to be inspired by art. 16 (2) BC which provides for the confiscation of such counterfeit copies.
202. Elst 1994, 137; Elst 1998, 93. Compare the identical situation with regard to computer programs: art. 10 juncto art. 1 (1) Computer Law on the one hand (recognizing the right to prevent parallel imports), and art. 17 (1) and (3) Computer Law on the other (description of counterfeiting).
203. For the meaning of the term "public", see *infra*, No. 720.
204. Art. 4 CL 1993 (definition of "display of a work"). If the images are shown in the correct order (*e.g.*, a cinema screening) the Russian CL 1993 speaks of public performance. This definition was adopted literally from the American Copyright Law, Title 17, U.S.C., § 101 (Definitions, "To display"). See also Grishaev 1991, 51.
205. On the distinction between the right to "public display" and the right to "public performance", see Korchagin *et al.* 182-183; Sergeev 160.
206. Gavrilov 1996, 93, No. 23 (who proposes such a limitation); Sergeev 160.

Nor does the CL 1993 set any limits to this right with regard to the purpose of the exhibition. If a work is displayed in a public salesroom with the aim of its future sale, the author's permission would therefore be required.[208]

d) Translation and Adaptation Rights

705. Finally, Russian copyright law recognizes the right to translate (*pravo na perevod*) and the right to "arrange" or otherwise adapt a work (*pravo na pererabotku*).[209] The translator or adaptor can naturally enjoy an independent copyright if their translation or adaptation meets the criteria for copyright protection, but translation or adaptation is itself subject to the permission of the author of the original work.[210]

e) Specific Rights for the Architect and Designer

706. The exclusive rights of the author to the use of design, architecture, town-planning and garden and park art projects also include the practical realization of these projects.[211] In other words, the transformation of the aforesaid works from a two-dimensional (*e.g.*, technical drawing) or a three-dimensional (*e.g.*, a model) project into the three-dimensional[212] completion of the project cannot take place without the permission of the author of the project, *i.e.*, the architect, the designer, or the landscape gardener.

707. More particularly, with regard to the author of an architectural project, there is further provided that he is entitled to demand that the commissioner grant him the right to participate in the realization of his project during the preparation of the documents for the building, and during the erection of the building or construction itself, naturally on the condition that the commissioner accept the architectural project. This regulation can be contractually set aside.[213] In any case, the author of the architectural drawings has—according to the law governing architectural activity in the Russian Federation—the moral right to exercise control over the elaboration of the plans for the building and supervision over the building process of the construction itself in a way determined by a federal organ for architecture and urban planning.[214]

207. § 18 Urheberrechtsgesetz of 9 September 1965.
208. Elst 1994, 138. Compare Gavrilov 1996, 93, No.23.
209. On the specific meaning of the right to translation, modification (*modifikatsiia*) and adaptation (*adaptatsiia*) of computer programs and databases, see arts.1 (1), 10 and 15 (2) Computer Law. See, also, Savel'eva 1993b, 42-43.
210. Art.12 (1) CL 1993.
211. Art.16 (2) para.2 CL 1993. See art.135 (2) Fundamentals 1991.
212. In the case of design, the end-product can occasionally be two-dimensional, *e.g.*, wallpaper.
213. Art.16 (2) para.2 CL. See, also, PP RF, "Polozhenie o tvorcheskoi arkhitekturnoi deiatel'nosti i ee litsenzirovanii v Rossiiskoi Federatsii", 22 September 1993, *SAPP RF*, 1993, No.39, item 3618, *Zakon*, 1994, No.6, 26-28 (esp. point 9); art.17 (1) Federal'nyi Zakon RF, "Ob arkhitekturnoi deiatel'nosti v Rossiiskoi Federatsii", 17 November 1995, *SZ RF*, 1995, No.47, item 4473, *Rossiiskaia gazeta*, 29 November 1995.

2.2.2. Incorporeal Use

a) The Right of Communication to the Public?

708. In the list of definitions, the term "to communicate" is described as follows: it is the displaying, performance, broadcasting, or other execution (with the exception of the distribution of copies of a work) by means of which the works become accessible for aural and/or visual perception irrespective of whether they are actually perceived by the public.[215] Such communication of a work is public (literally "for general perception", *dlia vseobshchego svedeniia*), if it takes place directly or by any technical means in a place open for free visiting or in a place where a significant number of persons not belonging to the normal family circle are present. It is irrelevant whether the works are perceived at the place where they are communicated or at another place where they can be received simultaneously with the communication.[216]

Given this definition, the Russian Copyright Law could, in our view, simply have recognized, beside the various rights to corporeal forms of exploitation, a general right to communicate a work to the public. This would make all methods or forms of exploitation by which a work was made accessible to the public without copies of the work being made available subject to the author's permission, which is obviously becoming more and more important in a digital environment. This did not however occur: the Russian legislator instead opted for the express and separate mention of the rights of public performance, of broadcasting, and of communication to the public by cable.

b) The Right of Public Performance

709. The right of public performance (*pravo na publichnoe ispolnenie*) refers to the presentation of works by means of acting, declaiming, singing or dancing, in a live performance or by technical means (television and radio broadcasts, cable television, and other technical means), in a place open for free visiting or in a place where a significant number of persons not belonging to the normal family circle are present, irrespective of whether the works are perceived at the place where they are performed, or at another place where they can be received simultaneously with the performance.[217] Whether or not access to the place where the performance occurs is for free or subject to a charge, is irrelevant to determining the public character of the performance.[218]

214. Art. 18 (1) Federal'nyi Zakon RF, "Ob arkhitekturnoi deiatel'nosti v Rossiiskoi Federatsii", 17 November 1995, *SZ RF*, 1995, No. 47, item 4473, *Rossiiskaia gazeta*, 29 November 1995.
215. Art. 4 CL 1993 (definition of "to communicate").
216. Art. 4 CL 1993 (definition of "public display, public performance or public communication").
217. Art. 4 CL 1993 (combined definitions of "performance" and "public display, public performance or public communication"). This also includes the public display of images (whether or not accompanied with sound) in their correct order, *e.g.*, a cinema screening.

c) The Right to Broadcast

710.Besides the right of public performance, the Copyright Law also recognizes a broadcasting right (*pravo na peredachu v efir*) and a right of communication to the public by cable (*pravo na soobshchenie dlia vseobshchego svedeniia po kabelia*).[219] The broadcasting right covers not only the first broadcast but, also, (non-simultaneous) re-broadcasting of a work on radio or television.[220]

The broadcasting right includes the right to satellite broadcasting, which is understood as the transmission of the signals from the terrestrial station to the satellite and from the satellite (to the earth) by means of which the work is communicated to the public. It does not matter whether this satellite transmission of the work is actually received by the public.[221] The broadcasting right, finally, also includes the exclusive right to the transmission of a work by cable.

711.Neither for broadcasting nor for cable transmission does the Russian copyright law provide any special measure concerning the obligatory collective administration of these rights. These rights are, therefore, exercised by the holders of the rights on an individual basis unless they voluntarily associate themselves and transfer the administration of their rights to authorized collecting societies. If a collecting society were authorized by its members to administer broadcasting and cable rights collectively, it would be able to sign agreements with the broadcasters and cable companies in the name of non-members.[222] Such non-members could demand their share of the remuneration from the collecting society, or demand that their works be excluded from these collective agreements.[223]

2.3. Remuneration Rights

a) Remuneration for the Exercising of an Exclusive Right

712.The right to remuneration is no longer listed as a separate right.[224] After all, the granting of authorization for the use of a work in some form or other or by some method or another already entails that the author can require remuneration from the user.[225] The remuneration is linked to the use of the work, *i.e.*, to the other property right[226] and, consequently, does not arise as an independent right, unconnected to any exploitation.

218. Point 21 Part III of Appendix 1 to PP RF, "O minimal'nykh stavkakh avtorskogo voznagrazhdeniia za nekotorye vidy ispol'zovaniia proizvedenii literatury i iskusstva", 21 March 1994, *SAPP RF*, 1994, No.13, item 994.
219. Art.16 (2) CL 1993.
220. Art.16 (2) juncto art.4 (definition of "subsequent broadcast") CL 1993.
221. Art.4 CL 1993 (definition of "broadcasting in the air").
222. Art.45 (3) para.2 CL 1993.
223. Art.47 (2) CL 1993.
224. Savel'eva 1993a, 805. The former right to remuneration was linked to state regulation of the remuneration of authors: Savel'eva 1993b, 41.
225. Sergeev 169.
226. Gavrilov 1993a, XXII.

The amount and the method of calculation of the author's remuneration is determined in an author's contract or in agreements between collecting societies and users, and for each sort of exploitation separately,[227] and in any case no lower than the rates set by the authorities.

Nonetheless, the CL 1993 recognizes two cases of remuneration rights which are not tied to the exercise of an exclusive right: remuneration for the home copying of audiovisual and audio recordings, and the *droit de suite*.

b) Remuneration for Home Copying

713. Audiovisual works and sound recordings may be reproduced for personal ends without the permission of the author (or of the performing artists or the producer of the phonogram) but on payment of remuneration.[228] Those who pay the remuneration are the manufacturers or importers of the apparatus (tape recorders, video recorders, and suchlike) and of the material carriers (audio and video tape and cassettes, laser disks, compact discs, and other material carriers) used for such reproduction.[229] This remuneration is collected and distributed by a collecting society for copyright and neighboring rights, in principle at the rate of 40% to the authors and 30% each to the performing artists and to the producers of phonograms.[230] The producers of videograms are left in the cold[231] even though the levy is also applied to video machines and video cassettes. The extent and conditions of payment of the remuneration are to be determined by an agreement between the aforesaid manufacturers and importers, on the one hand, and the collecting society on the other. If they fail to reach agreement, the extent and conditions of payment of the remuneration are to be determined by a specially empowered body of the Russian Federation.[232] At present, this right is not applied in practice.[233] In an attempt to get out of the deadlock President El'tsin issued an Edict, stating that from 1 February 1999 the importation of the said apparatus and material carriers is subject to the payment of a remuneration by the participants of this foreign trade. The Edict does not, however, determine the amount of the remuneration but apparently considers the Government as the aforementioned specially empowered body of the Russian Federation, which should take the initiative if no agreement can be reached between interested parties.[234]

227. Art.16 (4) CL 1993.
228. Art.26 (1) CL 1993.
229. Art.26 (2) para.1 CL 1993. Equipment and material carriers intended for export and professional equipment not intended for use in a domestic context are exempt from this levy (art.26 (3) CL 1993).
230. Art.26 (2) para.2 CL 1993.
231. Dietz 1997, 30.
232. Art.26 (2) para.3 CL 1993.
233. Gavrilov 1996, 125, No.12; V.N. Litovkin, V.A. Rakhmilovich and O.N. Sadikov, "Kontseptsiia razvitiia grazhdanskogo zakonodatel'stva", in L.A. Okun'kov, Iu.A. Tikhomirov and Iu.P. Orlovskii (eds.), *Kontseptsii razvitiia rossiiskogo zakonodatel'stva*, Moscow 1998, 109-110.

c) The Droit de Suite

714. The introduction of a *droit de suite* (*pravo sledovaniia*) in Russian law is one of the most striking and unexpected innovations[235] but, at the same time, the least successful as it is unrealistically formulated.[236]

In each case of public resale of a work of visual art at a price no less than 20% higher than the previous one, the author has the right to receive from the seller a remuneration of 5% of the resale price.[237] The category of works of visual art is given a wide interpretation, including *inter alia* paintings, sculptures, engravings, designs, graphic stories, and comics.[238] Photographs or manuscripts are not subject to the *droit de suite*.

A sale is public, if it takes place in an auction, an art gallery, an artistic salon, a shop, etc. This is a very broad conception (in effect only a sale agreed between individuals at home is exempt[239]), which is in itself laudable but, unfortunately, as good as impossible to enforce for sales outside auction houses.

715. The linking of the *droit de suite* to a price increase of at least 20% also lacks a sense of reality.[240] The application of this rule requires great administrative discipline. It would, therefore, have been better to link the *droit de suite* simply to the public sale itself and not to price differences between two sales.

Nevertheless, the reason behind the introduction of this measure is very understandable given the motives of the "inventors" of the *droit de suite*. After all, the right was to serve as compensation for visual artists who sell their works at very low prices when they are unknown, and then at the height of their fame look on unremunerated as their earlier works are sold on at sometimes fabulous prices.[241] In this context, it is understandable the *droit de suite* be linked to an increase in price in consecutive sales of the work: there is no need to compensate the visual artist for the sale of his work at a loss.[242] The experience of Western Europe shows, however, that any complication compromises the effectiveness of the *droit de suite*.[243]

234. Ukaz Prezidenta RF, "O merakh po realizatsii prav avtorov proizvedenii, ispolnitelei i proizvoditelei fonogramm na voznagrazhdenie za vosproizvedenie v lichnykh tseliakh audiovizual'nogo proizvedeniia ili zvukozapisi proizvedeniia", 6 December 1998.
235. Nowhere in the legal theory was any call for the introduction of a *droit de suite* to be found, nor was there even any sign of acquaintance with the concept.
236. Furthermore, in art.16 (5) CL 1993 the *droit de suite* is unfortunately termed "a limitation to the exploitation rights as indicated in art.16 (2) CL 1993".
237. Art.17 (2) para.2 CL 1993.
238. Art.7 (1) CL 1993.
239. Sergeev 168.
240. In the copyright bill drafted by *VAAP/GAASP*—from which the measure in art.17 CL nevertheless proceeds—there was no mention of the requirement of a 20% price increase: art.17 "Proekt. Zakon RSFSR ob avtorskom prave i smezhnykh pravakh", unpublished.
241. Sergeev 167.
242. Elst 1994, 139; Elst 1998, 93-95.
243. Dietz 1994b, 157.

716. Only the seller is indicated as the person from whom payment of the *droit de suite* can be required. This too is a weakness since the seller of the work is often difficult to identify. It would have been better to make not just the seller, but, also, the purchaser, the organizer of the auction, etc. collectively liable for payment of the *droit de suite*.

717. The *droit de suite* is inalienable.[244] It may be passed down only to the author's legal heirs for the duration of copyright protection.

Section 4. Limitations of Copyright

Introduction

718. Soviet copyright was characterized by extensive exceptions to the rights of the author in a long series of free uses and a number of compulsory licenses. The Fundamentals 1991 were a true turning-point at which the free uses were strictly limited and all compulsory licenses were abolished. The CL 1993 again lengthens the list of free uses (to 17 in total) and again introduces a compulsory license. This should not be seen as regression from the Fundamentals 1991 but, rather, as a sign of greater realism.

719. The exceptions to the author's rights only relate to property rights: the moral rights of the author remain untouched. Furthermore, all exceptions to copyright discussed below are subject to the general condition that the use of the work not unrightfully damage the normal exploitation of the work and not groundlessly harm the legitimate interests of the author.[245] At this point, the Copyright Law goes beyond the BC in which a comparable condition only applies to limitations upon the right of reproduction, not to the limitations upon other rights (article 9 (2) BC). In article 13 TRIPS, this condition is applied to the limitations upon all rights.

§ 1. Use for Personal Purposes

720. The personal life of the end user is already taken into account in the formulation of the author's rights of *public* display, *public* performance, broadcasting *to the public*. The display, performance, or broadcasting is public if they occur directly or indirectly in a place open for free access, or in a place where a significant number of people not belonging to the normal family circle are present.[246] If a work is communicated in a place that is not freely accessible, in a place where no significant number of people is present, or in a place where

244. Art.17 (2) para.2 CL 1993.

245. Art.16 (5) CL 1993. Compare art.25 (3) CL 1993 on the exceptions to copyright in computer programs and databases, which repeats this qualification, in our view redundantly, apparently because of a desire to keep as close as possible to art.6 (3) Directive 91/250/EEC of the Council of 14 May 1991 concerning the protection of rights on computer programs, *OJ*, L 122/42 of 17 May 1991.

246. Art.4 CL 1993 (definition of "public display, public performance or public communication").

only family members are present, no authorization of the author is required nor is the payment of a remuneration.

721. Apart from this, the CL 1993 determines exceptions to the property rights in favor of the personal interest of the end user. The reproduction of a work, that was lawfully disclosed, is allowed for personal purposes without the author's authorization and, as a rule, even without any obligation to pay a remuneration to the author[247] except for the so-called home copy of audiovisual and audio recordings of works.[248]

The premise is, therefore, completely free reproduction (*vosproizvedenie*) of a lawfully disclosed work exclusively for personal purposes,[249] the term "reproduction" meaning not only reprography but, more generally, the manufacturing of one or more copies of the work or part of it in any material form.[250] The reproduction method used is consequently irrelevant.

For other methods of exploitation, the permission of the author is required (*e.g.*, translation or adaptation) unless these are in themselves limited to a public use (*e.g.*, public performance). On this point, the Fundamentals 1991 were more generous towards the private user by allowing not only reproduction but any (private) use of the work.[251]

The CL 1993 does not go into the question of whether the reproduction has to be carried out by the individual whose personal purposes the copies are to serve, or whether such reproduction can be carried out by third parties (a copy shop, a library) on behalf of the individual concerned.[252]

722. The reproduction of a legitimately disclosed work is only permitted if it is done "for personal purposes". In the Fundamentals 1991, it was still the use of another's work "for the satisfaction of personal needs",[253] which seems a more restrictive formulation. According to Gavrilov and Sergeev, the requirement of "personal" purposes means that the advantage of free reproduction only applies to citizens and, thus, not to legal persons (organizations).[254] According to this reasoning, the reproduction of a work for internal use in a company would not come under this exception to copyright.[255]

723. The exclusive right of reproduction does, however, recover its full force, despite the reproduction having been made by the user for personal

247. Art.18 CL 1993.
248. Art.26 CL 1993.
249. Art.18 (1) CL 1993.
250. Art.4 CL 1993.
251. Art.138 (3) Fundamentals 1991. See, also, art.493 CC RSFSR.
252. See, however, in connection with reprography for scientific purposes: art.20 point 2 CL 1993, *infra*, No.730. Compare also art.20 (1) and (3) Federal'nyi Zakon, "Ob obiazatel'nom ekzempliare dokumentov", 29 December 1994, *SZ RF*, 1995, No.1, item 1, *Rossiiskaia gazeta*, 17 January 1995 (obligatory deposit).
253. Art.138 (3) Fundamentals 1991.
254. Gavrilov 1993a, XXIII and 1996, 102; Sergeev 189.

purposes, in cases concerning: (1) the reproduction of a work of architecture (*i.e.*, an architectural plan, the documentation based on it, or the ultimate erection) in the form of buildings and analogous erections; (2) the reproduction of databases or essential parts of them;[256] (3) the reproduction of computer programs excepting those cases provided for in article 25 of the CL 1993, *i.e.*, the adaptation of a computer program to the hardware, the making of a backup copy and the de-compilation of a computer program;[257] and (4) the reprographic reproduction of books (in their entirety) and of musical scores.[258] The permission of the author and a remuneration for the author are not required for the copying of part of a book, or for the copying of articles in their entirety, if this is done for personal purposes, while the reprographic reproduction of scores (in their entirety or even partially?) or of entire books for personal use does fall under the exclusive right of the author. One can, of course, wonder whether the introduction of a system of fees for reprography would not be a more realistic way of serving the interests of the author.

724. In one case, remuneration is due for the reproduction of a work for private use, to wit in the case of the home copying of audiovisual and audio recordings.[259] In such a case, there is a compulsory license, whereby a collectively administered remuneration is paid on both the apparatus which enables reproduction, and on the material carriers. This remuneration is divided as follows: 40% to the authors, 30% to the performing artists, and another 30% to the producers of phonograms.[260]

255. The history of the law seems to confirm this. Art.18 of the Copyright Bill drafted by *VAAP* in 1991 ("Proekt. Zakon RSFSR ob avtorskom prave i smezhnykh pravakh", unpublished), on which arts.18 to 26 CL 1993 are based, contained a measure concerning free reproduction of works for personal (incl. scientific and scholarly) purposes the wording of which barely differs from that of art.18 CL 1993, except that the reproduction of entire books and of scores was also permitted without the author's consent or remuneration. In contrast to the 1993 Copyright Law, *VAAP*'s draft also had a parallel measure regarding free reprographic reproduction "for the internal purposes of legal persons", in which case there was a compulsory license by which the author could claim reasonable remuneration (art.29). The dropping of this compulsory license and the simultaneous retention of the free reproduction of works for personal purposes lead us to conclude that the Russian legislator did indeed intend to reserve free use for personal purposes to natural persons.
256. The essential components of a database are not understood to include the contents of the database, which cannot be monopolized by the author. This is the only provision specifically concerning databases in the general CL 1993: Prins 1994b, 178.
257. *Infra*, Nos.725, 737 and 738.
258. Art.18 (2) CL 1993. In the Fundamentals 1991, there were no exceptions to the limitation of the rights of exploitation on a published work for the fulfillment of personal needs.
259. Art.26 CL 1993.
260. For more details, see *supra*, No.713.

§ 2. Use for Archival Purposes

725. Closely related to the use of a work for personal purposes, the legitimate possessor of a copy of a computer program or of a database is granted the right to make a copy of it, on the condition that this copy is intended only for archival purposes (*i.e.*, a back-up).[261]

726. Libraries and archives are allowed to make a single non-profit-making copy of a legitimately published work, either to repair or replace copies of a work which have been lost or damaged or to provide this copy to other libraries which for some reason have lost the works concerned from their collection.[262] This limitation to copyright does allow the reprographic reproduction of an entire book under strictly defined conditions, which is not the case with regard to a copy made for the personal purposes of a citizen.[263] This free reproduction does not allow a library or archive to copy a work which it never possessed in order to complete its collection. The work copied must be (or have been) present in the collection.

§ 3. Use for Scientific/Academic, Educational, Religious, Legal, and Social Purposes

727. Quotation from any legally disclosed work in the original or in translation is permitted for scientific/academic, research, polemical, critical, and informative purposes. The quotation must be limited to an extent justifiable by the purpose of the quotation. The reproduction of extracts from newspaper and magazine articles in the form of press reviews is also, just as in the Berne Convention,[264] included under "freedom of quotation".[265] Self-evidently, the name of the author quoted and the source of the quotation must be mentioned.[266]

728. The "right to quote" has a particular application in the free reproduction, broadcasting, or public cable transmission of works of visual art, architecture,[267] or photography which are permanently located in a place which is

261. Art.25 (1) point 2 CL 1993. Compare the somewhat different provision in art.15 (2) Computer Law.
262. Art.20 point 1 CL 1993. Compare art.20 (2) Federal'nyi Zakon R.F. "Ob obiazatel'nom ekzempliare dokumentov", 29 December 1994, *SZ RF*, 1995, No.1, item 1, *Rossiiskaia gazeta*, 17 January 1995: the institutions and organizations responsible for ensuring the permanent preservation and the use of an obligatory, free copy of unpublished documents (dissertations, reports on the results of scientific research and experimental construction, deposited scientific works, algorithms and programs) and of audio and audiovisual productions guarantee the copying, for a fee, at the request of libraries, organs of scientific-technical information, of other enterprises, institutions and organizations (but apparently not of citizens).
263. Art.18 (2) CL 1993.
264. Art.10 (1) BC.
265. Art.19 point 1 CL 1993.
266. Art.19 preamble CL 1993. Compare art.10 (3) BC.
267. Works of urban planning and landscape gardening do not come under this measure.

freely accessible.[268] This is on the condition that the representation of the work not constitute the basic subject of such reproduction, broadcast, or transmission,[269] and that the representation of the work not be used for commercial purposes.[270]

729. The use of lawfully disclosed works and excerpts therefrom as illustrations in publications, in radio and television broadcasts, and in sound and video recordings for teaching is permitted to the extent justified by the established purpose.[271]

730. Non-profit reprographic reproduction of separate articles and small works lawfully published in collections, newspapers, and other periodical publications, and of short excerpts from lawfully published written works (with or without illustrations) is permitted on condition that the reproduction is carried out either by libraries and archives at the request of natural persons for study and research purposes[272] or by educational institutions for auditorium lectures.[273] In any case, the reproduction is limited to a single copy, which considerably limits its educational usefulness.[274] This free use is, on the whole, more restrictively formulated than the comparable free use set out in the Fundamentals 1991 allowing the reprographic reproduction of "one copy of a published work for non-profit-making scientific, study and educational purposes".[275] No limitations were included either on the extent of the copied work or concerning the institutions or persons authorized to carry out such reprography.[276] Nevertheless, in our view, the absence of any right of remuneration for the reprographic reproduction of works even in the current CL 1993 is too far-reaching a limitation to the rights of the author.[277]

268. Korchagin *et al.* (187) gives the examples of a sculpture in the street or in a museum, a work of decorative art in an exhibition.
269. According to Korchagin *et al.* (187), the work may not take a "dominant position".
270. Art.21 CL 1993.
271. Art.19 point 2 CL 1993. Compare art.10 (2) BC. Gavrilov 1993a, XXV points out that this is a new exception to copyright, the breadth of which is not yet clear. He wonders whether anthologies (*khrestomatiia*) can be compiled on the basis of this provision. Sergeev 180 answers this question in the negative.
272. Art.20 point 2 CL 1993. In Russia, it is very seldom that a reader in a library is allowed to make photocopies themselves: a remnant of the old government fear of uncontrolled and uncontrollable flows of information.
273. Art.20 point 3 CL 1993.
274. Korchagin *et al.* 187.
275. Art.138 (2) point 4 Fundamentals 1991.
276. With regard to the extent of the reprographic reproduction permitted, Gavrilov 1993a, XXVII writes that "works of small extent" should be taken to include prose works of up to one author's list (*i.e.*, 40,000 keystrokes) or poems of up to 100 verses, while "short excerpts" may not exceed 20-25% of the total extent of the work and may not include more than one author's list (100 verses).
277. In the same sense, Dietz 1994b, 169.

731.Musical works can be freely performed during religious or official ceremonies, and funerals, albeit only "to an extent justified by the nature of these ceremonies".[278] Works subject to copyright may be freely reproduced for court proceedings to the extent justified by this purpose.[279]

A specific limitation with a clear social purpose is the permitting of non-profit[280] reproduction of lawfully disclosed works in raised characters or by other special means for the blind with the exception of works specifically created for such methods of reproduction.[281]

§ 4. Use for Current Reporting

732. The Copyright Law contains a number of limitations upon the rights in certain works protected by copyright for the purpose of the rapid dissemination of information. It should, incidentally, also be indicated that the free exchange of information is naturally already guaranteed at the level of principles, namely by the exclusion of pure ideas,[282] and of official documents, and informational communications on events and facts, from the area of application of the Copyright Law.[283]

733.Articles on current economic, political, social, and religious issues[284] lawfully published in newspapers or magazines, or broadcast in works of the same nature, may be reproduced in newspapers (but not in magazines[285]), and in broadcasts or public cable transmissions in cases where such reproduction, broadcasting, or communication by cable has not been specifically forbidden by the author.[286] The most important novelty is that broadcast works may also be reproduced on the conditions given whereas the Fundamentals 1991 only allowed such reproduction with regard to published articles.[287] The influence of the Berne Convention can be felt here too.[288]

734.Reproduction in newspapers, broadcasting, or communication to the public by cable of the political speeches, addresses, lectures, and other analo-

278. Art.22 CL 1993.
279. Art.23 CL 1993.
280. This limitation was lacking in art.138 (2) point 5 Fundamentals 1991, but in practice Braille publication is seldom commercially available.
281. Art.19 point 6 CL 1993.
282. Art.6 (4) CL 1993.
283. Art.8 CL 1993. Compare art.2 (8) BC. See also *supra*, Nos.655-666.
284. Gavrilov 1993a (xxvi) interprets this measure very broadly. He gives the examples: newspaper articles on the economic situation, on armed conflict, on the work of a statesman; astrological prognostications; a "burningly current" poem broadcast on the radio, a contemporary caricature shown on television.A caricature printed in a newspaper or magazine does not, in the same author's view, come under the said free use.
285. Gavrilov 1993a, XXVI.
286. Art.19 point 3 CL 1993.
287. Art.138 (2) point 2 Fundamentals 1991.
288. Art.10*bis* (1) BC, which furthermore does not mention the use of articles concerning current *social* affairs.

gous works, delivered in public, is also permitted to the extent justified by the informational purpose.[289]

The CL 1993 also recognizes the informative quotation, *i.e.*, the reproduction or communication to the public by means of photography, broadcasting, or communication to the public by cable of works seen or heard in the course of events covered in current-affairs overviews to an extent justified by the informational purpose.[290]

With regard to both the informative quotation and the free use of political speeches, the author retains the right to publish such works in collections.[291] This provision is, in our view, redundant and even misleading: *redundant* because the inclusion of a work or a political speech in a collection in any case goes beyond the bounds of the informational purposes which limit both free uses; *misleading* because the false impression is given that the author retains *only* the right to publish his work or speech in a collection whereas, in reality, he retains all his rights not expressly limited by these free uses in the specific contexts in which they apply.[292]

§ 5. Use for the Effectuating of Acquired Rights of Use

735. In this category, we include those limitations which were introduced in order to enable the users of works to effectively exercise lawfully acquired rights of use. Too strict an application of the author's exclusive rights would, indeed, go against the economy of the system of copyright protection itself.

736. This would seem to be the first motivation for free recording of works for short-term use by broadcasting organizations ("ephemeral recording") which the right to broadcast such works entails. This freedom applies only if such recording is carried out by a broadcasting organization[293] by means of its own facilities and for use on its own broadcasts. The broadcaster is obliged to destroy such recordings within six months of making them unless a longer term is agreed with the author of the work recorded. Such a recording may be preserved in official archives without the consent of the author of the work if the recording is of an exceptional documentary nature.[294] One may wonder whether, given the exclusive nature of the author's right to broadcast, this free

289. Art.19 point 4 CL 1993. Compare art.2*bis* BC.

290. Art.19 point 5 CL 1993. Compare art.10*bis* (2) BC. Art.138 (2) point 3 Fundamentals 1991 did not mention that the works concerned "had to be seen or heard in the course of current events". Published literary and art works could thus be the main object of a report, but only "to an extent according with informative purposes".

291. Art.19 point 4 and 5 CL 1993.

292. Let us, incidentally, remark that these are the only provisions mentioning a separate right of publication.

293. This exception can, therefore, not be claimed by a cable company: Gavrilov 1996, 118, No.8.

294. Art.24 CL 1993. Compare art.11*bis* (3) BC.

use has any significance[295] since in any case the broadcaster will have to acquire the author's permission to broadcast the work and can use that occasion to acquire the right to record it.[296]

737.Lawful possessors of a copy of a computer program or database is entitled, unless otherwise agreed, to carry out all actions necessary to make the computer program or database function on their hardware including the right to introduce alterations or correct obvious errors.[297]

§ 6. The De-Compilation of Computer Programs

738. The user of a computer program has, within certain strictly defined limits, the right to decompile such a program.[298]

Section 5. The Duration of Protection

§ 1. The General Term

739. By passing the Fundamentals 1991 the Soviet Union, on the very eve of its downfall, came into line with the countries of the Berne Union by extending the term of copyright protection from 25 to 50 years *p.m.a.*[299] The CL 1993 and the Computer Law confirm this general term[300] and reiterate that this term is calculated from the death of the longest living co-author in cases of co-authorship.[301] All terms are counted from 1 January of the year following the year in which the juridical fact took place on the grounds of which the calculation of the term begins.[302]

With regard to audiovisual works, this means that the term of protection lasts for 50 years from the death of the longest living of the exhaustively listed persons who, by virtue of the law, are considered the authors of the audiovisual work: the director, the scriptwriter, and the composer of music specially composed for the work.[303]

295. Nordemann *et al.* 130 also points out that this limitation is only significant in such countries as have introduced a compulsory license for the broadcasting of a work.
296. These temporary recordings of works for purposes of delayed broadcasting are not to be confused with the obligation, imposed on the broadcasters by the media legislation, to conserve the "materials" of their own already-broadcast radio and television programs for at least one month as evidence in case of legal disputes (*e.g.*, concerning the right of reply): art.34 NMA R.F.
297. Art.25 (1) point 1 CL 1993; art.15 (1) Computer Law.
298. Art.25 (2) CL and art.15 (3) Computer Law. See, also, Savel'eva 1993b, 47. This exception was undoubtedly inspired by art.6 Directive 91/250/EEC of the Council of 14 May 1991 concerning the legal protection of computer programs, *OJ*, L 122/42 of 17 May 1991. See also Prins 1994b, 173.
299. Art.137 (1) para.1 Fundamentals 1991. *Supra*, No.611.
300. Art.27 (1) para.1 CL 1993 and art.6 (1) Computer Law. Compare art.137 (1) para.1 Fundamentals 1991.
301. Art.27 (4) CL 1993 and art.6 (2) Computer Law. Compare art.137 (1) para.2 Fundamentals 1991.
302. Art.27 (6) CL 1993.
303. Art.13 (1) CL 1993.

§ 2. Anonymous and Pseudonymous Works

740. Works disclosed anonymously or under a pseudonym are protected for 50 years from the date of their lawful disclosure unless the identity of the author is revealed earlier or is no longer in doubt, in which case the normal term applies.[304] This measure differs from that comprised in the Fundamentals 1991 on two points. Firstly, under the CL 1993 the exceptional term gives way to the normal term of protection when the author's identity is no longer in doubt, which was not automatically the case under the Fundamentals 1991. Furthermore, in the CL 1993 the exceptional term starts to run at the disclosure of the work, and not at the publication of the work as in the Fundamentals 1991. However, this terminological shift entails no real change since the difference between the meanings of the term "disclosure" in the CL 1993 and the term "publication" in the Fundamentals 1991 is pretty minimal.[305] The moment the exceptional term of protection starts running is, in other words, *de facto* unaltered, namely being the moment at which the work is made accessible to the public anonymously or under a pseudonym.

Nevertheless, both concepts have played tricks on the 1993 legislator; in the first subsection of article 27 (3) CL 1993, which sets out the exceptional term of protection, there is mention of the anonymous or pseudonymous *disclosure* of a work, while the second subsection of the same paragraph, which sets out the cases in which the normal term applies to anonymous or pseudonymous works, speaks of its *publication*. As discussed above, the term "publication" has a much narrower meaning in the CL 1993 and indicates only one form of disclosure, namely the release into circulation of copies of a work or a phonogram in quantities sufficient to satisfy reasonable needs of the public, with regard to the nature of the work or the phonogram.[306] The fact that the rule for calculating the term is in the first subsection, leads one to suspect that it is nevertheless disclosure which is meant as the moment from which the exceptional term is to be calculated.

Let us finally mention that the possibility of reviving rights which existed under the Fundamentals 1991 in a case where the identity of the author was revealed more than 50 years after the publication of the work, but before the expiry of the normal term of protection,[307] is no longer provided in the CL 1993 as the revelation of identity or the end of any doubt concerning it must take place during the exceptional term of protection.[308]

304. Art.27 (3) CL 1993 and art.6 (3) Computer Law. Compare art.137 (1) para.3 Fundamentals 1991.
305. *Supra*, No.694.
306. *Supra*, No.694.
307. *Supra*, No.611.
308. If the identity of the author becomes known more than 50 years after the first disclosure of the work, the expired term does not start running again: Gavrilov 1993a, XXIX.

§ 3. Posthumously Published Works

741. Copyright on posthumously published works lapses 50 years after such publication.[309] The Copyright Law does not, however, require that such publication take place within the normal term of protection[310] so that the author's rights on an unpublished work which has come into the public domain by the expiry of the period of protection can be revived by publication at a date more than half a century after the author's death.[311]

The exceptional term of protection only affects posthumously *published* works, *i.e.*, works, copies of which have been released into circulation with the consent of the author in quantities sufficient to satisfy reasonable needs of the public, with regard to the nature of the work.[312] Other forms of disclosure, such as the posthumous public performance or exhibition, broadcasting, etc. of a work, do not activate the exceptional term of protection. This in contrast with the measure in the Fundamentals 1991 which also required posthumous publication[313] but which gave this term a much broader meaning and in any case included the aforesaid methods of disclosure.[314]

§ 4. Works by Rehabilitated Authors

742. In the wake of the measure for posthumously published works a provision was also included in the Copyright Law concerning the rights of rehabilitated authors.[315] If an author was suppressed and posthumously rehabilitated, the term of the protection of the rights provided in article 27 is calculated from 1 January of the year following the year of rehabilitation.[316]

309. Art.27 (5) para.1 CL 1993. The draft bill submitted to the Supreme Soviet at the end of 1992 contained no provisions concerning posthumous works, so that it seemed as though there would be a return to the situation of CC RSFSR in which no special regulation with regard to such works was to be found. The current measure is also thanks to the presidential veto of the bill as passed by the Supreme Soviet (*supra*, No.619). See Newcity 1993b, 7.
310. Compare art.137 (2) Fundamentals 1991.
311. "The moment of the author's death has no significance for the calculation of the terms [of protection of posthumously published works]" (Korchagin *et al.* 189). The legislator must have been aware of the consequences of this provision, since in an earlier draft, prepared by a group of experts attached to the Commission of the Council of Nationalities concerning the cultural and natural heritage of the peoples of the RSFSR, the favorable regulation with regard to posthumously published works was limited to those works published within the general term of copyright protection (art.36 (5) "Proekt. Zakon RSFSR ob Avtorskom Prave", *Knizhnoe obozrenie*, 3 April 1992, 7). This proposal was not adopted by the Russian parliament.
312. Art.4 CL 1993 (definition of "publication"). It is naturally very much the question how a work can be published posthumously *with the author's consent* (except in the case of a testamentary statement), especially when the date of publication is long after the author's death.
313. Art.137 (2) Fundamentals 1991. *Supra*, No.611.
314. Art.134 (1) para.2 Fundamentals 1991. *Supra*, No.607, note 123.

The motivation for the introduction of an exceptional term for rehabilitated authors (after the Presidential veto) is obvious: authors who, particularly under Stalin, were persecuted for political reasons, sent to punishment camps, or even executed,[317] and their heirs, were unable to benefit from the fruits of their artistic labor during the normal term of copyright protection. If their rehabilitation is posthumous, their heirs at least should be given the opportunity to make up the losses suffered. This is only possible through the institution of a new term since the term which ran before rehabilitation was in, any case, economically insignificant.

743. The redaction of the special measures of protection for posthumously rehabilitated authors in the 1993 Copyright Law gives rise to a number of questions. When was an author a victim of repression (*repressirovan*)? Does this presume a judicial condemnation on political grounds? Or is a *de facto* repression sufficient, which consisted *e.g.*, in denying 'suspect' authors the possibility of publishing any work through the official channels? Directly linked to this is naturally the issue of the meaning of the term "rehabilitation". Does this mean an official rehabilitation or a *de facto* rehabilitation implied by the first official publication of books by authors who had long been suppressed,[318] or the first public screenings of banned films?[319] Presumably the former, both because a *de facto* rehabilitation is often a gradual process the beginning of which cannot be accurately determined, and because the Russian parliament has passed legisla-

315. An unpublished Decree of 27 May 1957 already contained a special regulation for the calculation of the term of protection for works by posthumously rehabilitated authors (*supra*, No.111), but this measure did not survive the introduction of the CC RSFSR (*supra*, No.114, note 131). Even if it had, this unpublished Decree would certainly have lost its legal force after the obligation of publishing legal norms was introduced in 1990 (*supra*, No.200, note 19) and reconfirmed in the Constitution 1993 (*supra*, No.205).

316. Art.27 (5) para.2 CL 1993. The direct source of inspiration for this rule was the draft bill worked out in 1992 by a group of experts of the Commission of the Soviet of Nationalities concerning the cultural and natural heritage of the peoples of the RSFSR (art.36 (3) "Proekt. Zakon RSFSR ob Avtorskom Prave", *Knizhnoe obozrenie*, 3 April 1992, 7: "If an author had lost his rights and was rehabilitated after his death, copyright on his works lapses after the passing of 50 full calendar years following the year of the author's rehabilitation"). In the press a not fully developed proposal was presented that monies received for the publication of a book banned by the censors, after the deduction of production costs, be deposited in cultural funds and that from the date of publication of such works a new term of copyright protection begin to run: G. Krasnikov, "Gonorary Pushkina i Bulgakova—na blago literatury", *Literaturnaia gazeta*, 20 March 1991.

317. *Supra*, No.61.

318. Thus, the books of Mikhail Bulgakov were completely taboo for a quarter of a century after his death in 1940. The first appearance of a version (moreover distorted by the censors) of his "The Master and Margarita" was only in 1966. Only under Gorbachev was the work published in its original version. But Bulgakov was never officially condemned and, thus, never officially rehabilitated.

319. I. Christie, "The Cinema", in Graffy/Hosking 43-77.

tion specifically concerning the judicial process of rehabilitation of victims of political repression.[320]

744.The special regulation only concerns authors who were rehabilitated after death.[321] For an author rehabilitated during his lifetime, and for his legal successors, the general regulations concerning the term of protection are, after all, more advantageous.

In our view, it should also be assumed that this measure does not apply when a work by a posthumously rehabilitated author is first published after his rehabilitation since, in such a case, the general regulation for posthumously published works[322] is more advantageous for (the heirs of) the rehabilitated author.[323]

The area of application of article 27 (5) para.2 CL 1993 is therefore limited to the works of authors who were victims of repression and were posthumously rehabilitated by judicial process:

(1) if these works were first disclosed before the rehabilitation—which is only conceivable for works disclosed during the author's lifetime but before he became the victim of repression,[324] or for works which were disclosed posthumously when the official taboo on the author was fading but he had not yet been officially declared rehabilitated;[325] or
(2) if these works were disclosed after the official rehabilitation by a means other than publication;[326] or
(3) if these works were not disclosed even after the official rehabilitation.[327]

320. Zakon RSFSR, "O reabilitatsii zhertv politicheskikh repressii", 18 October 1991, *VSND i VS RSFSR*, 1991, No.44, item 1428-1429, *VSND i VS RF*, 1992, No.28, item 1624, *VSND i VS RF*, 1993, No.1, item 21, *Rossiiskaia gazeta*, 15 October 1993. During the period 1989-2000 no less than 4.5 million people were politically rehabilitated, while 400,000 more applications were still pending ("400,000 political rehabilitation requests under consideration", *RFE/RL Newsline*, Part I, 10 April 2001).
321. Pozhitkov (62) expresses amazement at this: "Are authors excluded who have been rehabilitated while they were still alive?"
322. Art.27 (5) para.1 CL 1993.
323. If a work by a (rehabilitated) author is first disclosed by a means other than publication at a date subsequent to rehabilitation, the special rule for rehabilitated authors will have to be applied, as the general rule concerning posthumous works only relates to posthumous *publication*: *supra*, No.741.
324. In such a case, the general term of 50 years *p.m.a.* runs, and from rehabilitation the specific term for rehabilitated authors.
325. In such a case, the term for posthumously published works runs first, or the general term of 50 years *p.m.a.* if it is a posthumous disclosure by some means other than publication, and from rehabilitation the specific term for posthumously rehabilitated authors.
326. In a case of publication after rehabilitation, the term for posthumous publication is after all more beneficial: *supra*, No.741. In the period between posthumous rehabilitation and subsequent posthumous publication of a work, the specific term of protection for unpublished (whether or not disclosed) works by a rehabilitated author does apply.

In these three cases, "the term of protection of the rights provided for in [art.27] starts running from 1 January of the year following the year of the rehabilitation". In other words, this special measure fixes the beginning of a period of protection of 50 years[328] independent of the general term of protection which in any case began to run from the creation of the work. If the author is rehabilitated at a time when the general term of protection is still running, this specific measure in fact amounts to an extension of the period of protection. If, however, the author is officially rehabilitated at a time when the lapsing of the general period of protection has already brought the author's work into the public domain, this measure amounts to a restitution of copyright, a 're-privatization' of an already public work.

745. Just like posthumous publication, posthumous rehabilitation also entails a diminution of the permanent character of the public domain.[329] True enough, the circumstances concerned are exceptional, and the number of authors relatively limited, but in many cases the authors concerned are very popular and their works still often published or performed to this day. Furthermore, account has to be taken of the still to be discussed transitional law that ensures that even rehabilitations which took place long before the coming into effect of the 1993 Copyright Law still entail the said copyright consequences.[330]

§ 5. Extension Due to Circumstances of War

746. The period of protection is extended by four years if "the author worked during or participated in the Great Patriotic War".[331] This entirely novel regulation in Russian law was only introduced after the presidential veto, and to the best of our knowledge no legislative proposal suggested this solution. It is, therefore, no surprise that this measure bears the marks of over-hastiness and will be difficult to apply in practice.[332]

327. Undisclosed works by authors who were the victims of repression, are first protected during the general term of 50 years *p.m.a.* and from rehabilitation by the specific term of protection for rehabilitated authors.
328. This point of departure is somewhat clumsily placed at 1 January of the year following the rehabilitation, rather than on the day of rehabilitation itself, so that in theory there is a "protection gap". This is only real if the rehabilitation takes place over 50 years after the author's death, *i.e.*, if the work has fallen into the public domain and is fished out again by the rehabilitation.
329. In theory, a work can even be removed from the public domain twice, on condition that it was not published more than 51 years prior to the posthumous rehabilitation of the author, and this rehabilitation itself takes place only after the general term of protection has passed.
330. *Infra*, Nos.880 ff.
331. Art.27 (5) para.3 CL 1993. From a legal perspective, it would undoubtedly have been better to put this measure in a separate paragraph, and not in the paragraph regulating the term for posthumously published works, as the extension of copyright due to circumstances of war affects all the terms mentioned in art.27 CL 1993.
332. Voronkova 1995, 27.

After all, this is not a simple extension of a period of protection which was already running during the Second World War, nor an extension of the period of protection of works published before a certain date. The CL 1993 introduces a much harder to apply criterion for the application of the extension. The requirement is that the author "worked" during the Second World War or "participated" in it. What is certain is that an extension of the period of protection for works the authors of which died before the Second World War (1939? 1940? 1941?) is excluded. This aside, it is very much the question what is meant by the requirement that the author worked: does this mean produced artistic work? Or does it include, for instance, work as an educationalist? And what about a retired artist who occasionally takes up the hammer and chisel? The phrase "participated in the ...War" is also open to multiple interpretations. Is the requirement active service in the Red Army? Or as a partisan? Or even as a member of enemy forces?[333] And did the suffering civilians of Leningrad and Stalingrad participate in the war?

It is, furthermore, most remarkable that the extension of the period of protection due to circumstances of war was introduced into the legislation 48 years after the end of the War. Given the short period of protection (15 years *p.m.a.*, later 25 years *p.m.a.*) under the Soviet law until 1992, at first sight the measure can only have a very limited area of application, namely to the works of authors who survived the war by a long time. But the provisions of the transitional law, which will be discussed below,[334] considerably broaden the area of application so that for a large number of works there is in fact a period of protection of 54 years from the author's death, from posthumous publication, or from the posthumous rehabilitation of the author.[335]

§ 6. Period of Protection of Moral Rights

747. The right of authorship, the right to name, and the right to the protection of the reputation of the author are protected without any limitation of time, *i.e.*, in perpetuity,[336] and therefore have to be respected after a work has entered the public domain.[337]

333. "Is an author granted such an extension who participated in the war but on the 'wrong' side?" (Pozhitkov 62).
334. *Infra*, Nos.880 ff.
335. In theory, the extension also takes place for works disclosed anonymously or by way of a pseudonym, so that their protection can extend to 54 years after legal disclosure (art.27 (3) para.1 juncto (5) para.3 CL 1993). However, given the fact that the extension of duration is only granted to authors who worked during or took part in the Great Patriotic War, this rule can by definition only be applied if the identity of the author is known. Anybody wanting to take advantage of this extension therefore has to reveal the identity of the author so that the general term of protection must be applied (art.27 (3) para.2 CL 1993).
336. Art.27 (1) para.2 CL 1993 and art.6 (4) Computer Law. See also Voronkova 1995, 25.
337. Art.28 (2) CL 1993.

For the other moral rights, namely the right of disclosure and the right of withdrawal, the general period of protection of 50 years *p.m.a.* applies. With regard to the right of withdrawal this is, in our view, aberrant[338] given the serious infringement of the rights of third parties which the exercising of this right entails. The right of withdrawal should, in our view, be denied to the author's heirs or, at least, be limited to those cases in which it can be shown that it was the author's will to withdraw his work, but he was for some reason prevented from doing so himself. We shall return later to the exercising of these rights after the author's death.[339]

§ 7. *A Paying Public Domain*

748. The CL 1993, finally, provides for the possible introduction of a system of *paying public domain*. The legislator grants the Government of the RF the authority to introduce a levy[340] on the use of works which are in the public domain in Russia. The amount of the levy may not exceed 1% of the profits made from the exploitation of the work and should be paid to the professional funds of the authors or to the collecting societies.[341] As yet, no such mechanism has been introduced. In the publishers' world, one warns that the introduction of a *domaine public payant* in Russia could prove to be particularly damaging to new small private publishing houses which had established themselves through the publication of public domain works.[342]

338. According to Gavrilov 1996 (127), this right of withdrawal lapses at the author's death, but no textual argument is presented to support this claim.
339. *Infra*, Nos.1011 ff.
340. Gavrilov 1996 (131) calls it a "culture tax".
341. Art.28 (3) CL 1993.
342. L. Owen, "Publishers and copyright in Europe: A comparative survey", in C. Keane, (ed.), *Legislation for the book world*, Council of Europe Publishing, 1997, 80.

Chapter II. Contract Law

Introduction

749. The changing economic context has profoundly affected the area of the law of contracts, also in the field of copyright. The administrative straight-jacket, into which authors' contracts had been forced, was buried alongside the planned economy. In its stead came civil-law principles which allow the autonomy of the will of the parties to be expressed, but simultaneously maintain the social character of copyright by protecting the author, as the weakest party in the cultural market, from too far-reaching a liberalism. In the Fundamentals 1991, this protection went no further than a declaration of intent, in the CL 1993 there were concrete measures which—while safeguarding the fundamentals of the market economy—protect authors from their own carelessness and structural vulnerability and from greedy exploiters. They provide an important supplement to the provisions of the new Civil Code of the Russian Federation on the general law of obligations and contracts.[1]

According to article 1211 CC RF, Russian contract law as described below applies on an author's contract, if so agreed upon by the contracting parties. In the absence of such provision, Russian law is to be applied, if the licensor has its official place of residence or its main center of activities in Russia, unless otherwise follows from the clauses or the essence of the contract, or from the whole of (mutual) obligations.

Section 1. Types of Authors' Contracts

750. The property rights of the author, indicated in article 16 CL 1993 (and, thus, excluding the *droit de suite* and the right to remuneration for home copying of audiovisual and audio recordings) may be transferred (*peredavaetsia*) by an author's contract.[2]

751. The CL 1993 contains no provisions on specific authors' contracts divided according to the method of exploitation, such as the publication contract, the performance contract, the audiovisual production contract, etc. The CL 1993 just mentions "the" author's contract[3] but, nevertheless, distinguishes between an author's agreement for the transfer of exclusive rights on the one hand, and an author's agreement for the transfer of non-exclusive rights on the other hand.[4]

The former permits the use of the work in a particular way and within the boundaries provided by the agreement only by the person, to whom these rights have been transferred, and gives this person the right to forbid similar

1. For a general comment, see, *e.g.*, R. Khametov, "Kakim byt' avtorskomu dogovoru", *I.S.*, 1997, Nos.3-4, 53-63, with a reply by E. Morgunova at 63-64.
2. Art.30 (1) para.1 CL 1993.
3. See, however, art.31 (3) para.3 CL 1993.
4. Art.30 (1) para.2 CL 1993.

use of the work by others[5] and to take legal action against counterfeiters.[6] If, however, no action is taken, the author remains entitled to protect the rights transferred against infringement.[7]

The latter permits the user to use the work on an equal footing with the holder of the exclusive rights, and/or with[8] others, who have received permission to use the work in the same fashion.[9]

Section 2. The Contracting Parties

752. The introduction of specific provisions on contract law in most copyright acts of continental Europe is based on the feeling that mere formal equality of contracting parties, which is one of the basic principles of contract law, plays in reality to the advantage of the cultural industries. With all their economic weight, they are very often in such position that they can acquire all rights from the author against a minor remuneration. An author may have wonderful artistic talents; he is usually not a professional negotiator. For social reasons it is, therefore, justified to provide some protective measures in the field of contract law in favor of the author as a corrective to the freedom of parties to determine the contents of their contract. Of course, this normally should signify that these measures may be invoked solely by the author, perhaps also by his heirs, but not by other legal successors (employer, producer, collecting society, etc.). This does not seem to be the case in Russian copyright law.

753. The parties to an author's contract are not defined in the CL 1993 except in relation to a contract in which the client commissions the creation of a work. The author then undertakes to create a work in agreement with the contractual provisions and transfer it to the client; the latter is obliged to pay the author an advance which can be deducted from the contractually agreed

5. Art.30 (2) para.1 CL 1993. Naturally it is not the author's contract, but one of the contracting parties that gives permission for the use of a work, and this by means of an author's contract.
6. Art.30 (2) para.2 CL 1993. The introductory phrase of art.49 CL 1993 also confirms that the "owners of exclusive author's and neighboring rights" (*obladatel' iskliuchitel'nykh avtorskikh prav*) can take action against a counterfeiter. A clause in an exclusive licensing agreement, in which the right of the publisher to take on his own legal action to defend the exclusive rights transferred to him against infringement (*e.g.*, by imposing the publisher to cooperate in such event with the author), is invalid (Point 7 of the informational letter No.47 of the Presidium of the RF Supreme Arbitration Court of 28 September 1999 ("Obzor praktiki rassmotreniia sporov, sviazannykh s primeneniem zakona Rossiiskoi Federatsii 'Ob avtorskom prave i smezhnykh pravakh'"), see <www.rao.ru/law/lawarbitrage.htm>.
7. Art.30 (2) para.2 CL 1993.
8. Grammatically, "this person" stands level with "the user", and not with "the holder of the exclusive rights", but this must be an error. In the same sense, see the German translation in *Grur Int.* 1993, 859-860; English translation in *Copyright, Laws and Treaties*, Russian Federation—Text 3-01, 010.
9. Art.30 (3) CL 1993.

remuneration of the author.[10] Other provisions also show that for a contract to be qualified as an author's contract, the author must be a party thereto.[11]

According to some commentators, the author should be understood as including the heirs[12] or even other legal successors.[13] They can argue from the description of the author's agreement on the transfer of non-exclusive rights, which speaks of "the holder of exclusive rights" (*obladatel' iskliuchitel'nykh prav*). This is the umbrella term for the "author" (*avtor*) and his "legal successor" (*pravopreemnik*). And this last term, which denotes the holder of a derivative right, refers both to the heir (*naslednik*) and to the natural or legal persons who acquired the copyrights during the author's lifetime. An additional argument can be drawn from the yet to be discussed Government Decree of 21 March 1994 which fixes minimum rates of remuneration for authors for particular forms of exploitation and which provides that the actual extent of the remuneration and the method and terms of payment be determined by the parties at the signing of an agreement between the user of the work on the one hand, and its author, the right holder or the organization which collectively administers the copyrights on the other.[14] This means that, in principle and quite illogically, not only the author, but, also, his legal successors may invoke the application of the provisions on contract law in the CL 1993 against the second party—except no doubt in such cases as the CL 1993 expressly reserves the protective measure to the author.[15]

The other contracting party is "the user", *i.e.*, the legal or natural person who reproduces, broadcasts, communicates to the public, etc. the author's work. The collecting societies are not considered "users". Therefore, the agreements of the author, his heirs, or any other holder of the author's rights (and neighboring rights) with the collecting societies are not author's contracts, so the provisions of articles 30-34 CL 1993 do not apply.[16]

Section 3. The Content of the Author's Contract

§ 1. Rules of Interpretation

754. The CL 1993 contains two construction rules with regard to the extent of the rights granted. In the case of unclear formulations, these rules give an interpretation to the contractual clauses which is in the author's favor.

10. Art.33 CL 1993. See, also, art.34 (1) CL 1993.
11. Art.31 (5) and (6) CL 1993.
12. Gavrilov 1993a, XXX; Korchagin *et al.* 192-193; Sergeev 212-213.
13. Gavrilov 1993a, XXX; Korchagin *et al.* 192-193.
14. Point 2 PP RF, "O minimal'nykh stavkakh avtorskogo voznagrazhdeniia za nekotorye vidy ispol'zovaniia proizvedenii literatury i iskusstva", 21 March 1994, *SAPP RF*, 1994, No.13, item 994, *Rossiiskaia gazeta*, 2 April 1994.
15. Art.31 (5) and (6) CL 1993.
16. Art.45 (2) para.1 CL 1993.

The *first rule* states that "the rights transferred by an author's contract are deemed to be non-exclusive unless explicitly provided otherwise in the author's contract".[17] Vague formulations concerning the nature of the transfer or the complete absence of any provision in this regard are, thus, interpreted in the author's favor: the least far-reaching form of the transfer of rights applies. However, according to the Supreme Arbitration Court, the "explicit" provision of the exclusiveness of the transfer does not mean that the contract need mention *expressis verbis* "the transfer of exclusive rights": the exclusiveness may be derived from the content of the whole contract according to the general interpretation rules valid in contract law (art.431 CC RF).[18] In our opinion, the Supreme Arbitration Court fails to consider the interpretation rule contained in article 30 (4) CL as a *lex specialis* to the interpretation rules of contract law.

The *second rule* states that "all rights to the use of the work which are not explicitly transferred by the author's contract, are considered as not transferred".[19] In other words, the user only gets those rights which the author explicitly assigns him.

These rules of interpretation prevent ambiguously formulated clauses from being interpreted in such a way that the author have transferred more than he actually intended, but they cannot prevent that in clearly formulated clauses the author may cede his rights to a great extent, under pressure from the stronger negotiating position of his co-contracting party.

For this reason, the legislator intervenes, both to determine which clauses have to be in the author's contract, and by providing complimentary, non-obligatory rules which are to be applied in the absence of such clauses.

§ 2. Obligatory Contents

755. By virtue of article 31 (1) CL 1993, an author's contract must contain the following elements: the exploitation methods; the term and territory for which the right is transferred; the amount of remuneration and/or the procedure for determining the amount of remuneration for each exploitation method, the procedure and terms of payment thereof; and other clauses, which the parties consider to be essential for the given contract.

756. First of all, an author's contract has to indicate the methods of use of the work which are transferred. And to prevent the author from placing the economic component of his copyright to that work entirely in the hands of

17. Art.30 (4) CL 1993.
18. Point 6 of the informational letter No.47 of the Presidium of the RF Supreme Arbitration Court of 28 September 1999 ("Obzor praktiki rassmotreniia sporov, sviazannykh s primeneniem zakona Rossiiskoi Federatsii 'Ob avtorskom prave i smezhnykh pravakh'"); see <www.rao.ru/law/lawarbitrage.htm>.
19. Art.31 (2) para.1 CL 1993.

the co-contracting party in a clear, but very generally worded, clause without properly understanding the legal consequences of his action, the Copyright Law adds that it has to deal with the "concrete rights transferred by this contract" (the so-called specification obligation).[20] In our view a clause in which the author transfers "all rights to the use of his work" to the other party is contrary to this requirement[21] and, consequently, null.[22] Those rights of use catalogued in article 16 (2) CL 1993, which the author desires to assign to the other party, must therefore be mentioned explicitly in the author's contract.

757. The author's contract also must specify a term for which the rights are transferred to the other party. There is nothing to prevent the parties from transferring the rights for the entire duration of copyright. However, in the absence of any clause fixing the term for which the rights are transferred, the author has the right to rescind the author's contract after the expiry of five years from the conclusion of the agreement, on condition that six months written notice be given.[23]

758. The territory for which the copyright is transferred also has to be specified in the author's contract, and in the absence of such a clause the transfer is limited to the territory of the Russian Federation.[24]

759. The author's contract also has to specify the amount of remuneration and/or the procedure for determining the amount of remuneration for each separate method of use. The procedure and terms of payment also have to be provided in the author's contract.[25]

In general, the remuneration is to be specified in the author's contract as a percentage of the income[26] for the respective methods of use of the work.[27] This not only neutralizes the effects of hyperinflation but, also, makes the authors and exploiters true partners: both are dependent on the market success of the work.[28] If the nature of the work or the particularities of its use make it impossible to determine a percentage of the income as remuneration, the contract can instead fix a lump sum or specify some other method of remuneration (*e.g.*, a multiple of the minimum wage).[29]

20. Art.31 (1) CL 1993.
21. *Contra*: Gavrilov 1993a, XXXII and 1996, 141.
22. Art.31 (7) CL 1993.
23. Art.31 (1) para.2 CL 1993.
24. Art.31 (1) para.3 CL 1993.
25. Art.31 (1) CL 1993.
26. According to Gavrilov 1995c (24), this is gross income (*e.g.*, a percentage of the retail price of books or cassettes), not net profit.
27. Art.31 (3) para.1 CL 1993. In art.139 (1) para.4 Fundamentals 1991, this was still formulated merely as a possibility.
28. Gavrilov 1995c, 24.
29. Art.31 (3) para.1 CL 1993. See, also, Gavrilov 1995c, 24.

In practice, many publishers still prefer—as in former Soviet times—to make payment on the basis of the number of copies printed rather than making periodic payments related to actual sales. Their aim is often to sell substantial quantities immediately on publication to private wholesalers and to clear their stock within a matter of weeks of publication in order to maintain an adequate cash flow.[30]

If in a publishing contract or a contract for the transfer of some other right derived from the reproduction right (*e.g.*, for the recording of musical works on phonograms) the remuneration is determined as a lump sum, a maximum print run of the work must be fixed in the contract.[31] In a sense, this is a kind of "success clause". When the maximum print run is exhausted, the author gets a new opportunity to negotiate with the publisher and to profit from the apparent success of his work.

760. A potentially important mechanism for the protection of authors is the possibility of the Council of Ministers RF to fix minimum rates for authors' fees which—if they are fixed lump sums—are to be indexed with the indexation of minimum wages.[32] This measure is a direct survival from the Soviet era when the authorities fixed not only minimum but, also, maximum levels for the remuneration of authors. By retaining the possibility of the government imposing minimum levels, a serious limitation to the freedom of contract is introduced, but conversely a powerful instrument is created for the protection of the authors as the socially and economically weaker party. This prevents the author's contract fixing the author's remuneration for each right of use transferred at an exceptionally low level, which is not impossible purely on the basis of the general provision that the author's contract must fix the amount of the remuneration.

761. To date the Government, on 21 March 1994, has passed one Decree "on the minimum rates of the remuneration of authors for certain sorts of use of works of literature and art" (hereinafter: "Decree on minimum rates").[33] Three appendices were attached to this with rate schedules and clarificatory comments on the minimum rates for the remuneration of authors for the public performance of works (appendix 1), for the reproduction of works by means of sound recording and the rental of copies of sound recordings and of

30. L. Owen, "Publishers and copyright in Europe: A comparative survey", in C. Keane (ed.), *Legislation for the book world*, Council of Europe Publishing, 1997, 85.
31. Art.31 (3) para.3 CL 1993.
32. Art.31 (3) para.2 CL 1993. This provision was only introduced at the third reading of the bill, *i.e.*, after the presidential veto, see Savel'eva 1993b, 41. Compare also art.17 (4) Federal'nyi Zakon RF "Ob arkhitekturnoi deiatel'nosti v Rossiiskoi Federatsii", 17 November 1995, *SZ RF*, 1995, No.47, item 4473, *Rossiiskaia gazeta*, 29 November 1995; art.54 para.6 Fundamentals on culture.
33. PP RF, "O minimal'nykh stavkakh avtorskogo voznagrazhdeniia za nekotorye vidy ispol'zovaniia proizvedenii literatury i iskusstva", 21 March 1994, *SAPP RF*, 1994, No.13, item 994, *Rossiiskaia gazeta*, 2 April 1994.

audiovisual works (appendix 2), and for the industrial reproduction of works of visual art and multiplication of works of applied, decorative art (appendix 3).[34]

By this Decree, a number of earlier schedules dating from the Soviet period were entirely[35] taken out of force.[36] A number of other schedules do, however, remain in force at present—at least with regard to the minimum rates—such as, for instance, the Decree of the Council of Ministers of the RSFSR of 19 December 1988 on the rates of the remuneration of authors for the publication of works of science, literature and art.[37] Since this fixes the (minimum and maximum of the) authors' remuneration as a lump sum, galloping inflation has, in fact, made the Decree utterly worthless as a means of protecting the author from the economically more powerful publishing enterprises.

It is also remarkable that the Decree on minimum rates of 21 March 1994 deals with precisely those forms of use which are generally administered collectively by collecting societies.[38] The Government hereby recognizes that contractual practices require the owners of the rights to be well-organized and able to employ robust, experienced authors' societies to represent them, and that in the reality of present-day Russia, these conditions do not yet exist.[39] The schedules, approved by the aforesaid Government Decree, are very similar to the regulations used in collecting societies to determine the remuneration which the users owe for a particular sort of use. Furthermore, in the three Appendices to the Decree, it is explicitly provided that the organizations for the collective administration of authors' property rights can act as representatives of the authors with regard to the granting of permission for use, and the calculation and the collection of the remuneration for that use, and that they themselves can institute proceedings to defend the rights and legally protected interests of those whom they represent.[40] It is precisely in those areas where the individual author faces the user organizations alone that the authorities have still to act.

34. The future development was announced of rate schedules for the use of neighboring rights (*infra*, No.780), for the creation and use of works of architecture, for the use in cinematography of works of literature, science and art, and for the publication of works of literature and art.
35. Since the coming into effect of the Fundamentals 1991 the maximum rates fixed in the various schedules had already lost all force, so that in any case only the minimum rates were still effective: *supra*, No.608.
36. Point 5 Decree on minimum rates.
37. PSM RSFSR, "O stavkakh avtorskogo voznagrazhdeniia za izdanie proizvedenii nauki, literatury i iskusstva", 19 December 1988, *SP RSFSR*, 1989, No.5, item 23.
38. Dietz 1994b, 177-179; Gavrilov 1996, 146, No.22.
39. Renard 51.
40. Point 25 Part III Appendix 1; point 3 Part II Appendix 2; and implicitly point 4 para.2 Part II Appendix 3 of the Decree on minimum rates.

762.If we look at the contents of the three appendices to the Decree on minimum rates of 21 March 1994, the first thing that stands out is that it is expressly confirmed that the minimum remunerations are to be applied

> unless otherwise determined in the contract between the user and the author, his legal successor or the organization which collectively administers the property rights of the authors within the limits of the authority granted them and the amount of the remuneration is the object of dispute between the interested parties.[41]

In other words, according to these provisions, the absence of an indication of the remuneration per method of exploitation in an author's contract does not lead to the nullity of that contract (due to the lack of an essential part of the contract) but, rather, leads only to the application of the minimum rates.[42] This will undoubtedly lead to these minimum rates becoming the rule. Only in exceptional cases will the author be in a position to negotiate a more favorable remuneration.

It is also remarkable that for the uses listed above the minimum remuneration is, in each case, expressed as a percentage (of the income from the sales of tickets, of the retail price of a reproduced copy of a work, of the income from rental, etc.), never as a lump sum. The favoring of a proportional fee prevents the possibility of the author's being "bought out" for a one-off payment. Conversely, the calculation of the proportional fee does assume a right of the author to inspect the user's books.[43] In our view, the system of a proportional fee checked by a right of the author or his representative to inspect the accounts of the user cannot—due to the high administrative costs—be maintained in all cases of public performance. Thus, the Decree on minimum rates of 21 March 1994 provides that when musical works are being performed by means of phonograms in cafés, restaurants, and suchlike, the owner must pay an author's fee equal to (at least) 0.1% of the income he obtains from his main activity.[44] Practice will have to show whether this is a realistic approach and whether, in this case, a fixed sum (varied in accordance with the nature of the publicly accessible place, the surface area, the nature of the sound system, etc.) would not be more effective after all.

If we compare Appendix 1 of the Decree on minimum rates of 21 March 1994 with the Decree of the Council of Ministers RSFSR on the rates of the remuneration of authors for the public performance of works of literature and

41. Point 1 para.2 Part II Appendix 1; point 1 Part II Appendix 2; point 2 Part II Appendix 3 of the Decree on minimum rates.
42. If the amount of the remuneration is in dispute at the moment that the negotiations for the contract are in progress, there is no meeting of minds concerning an essential part of the contract, and there is consequently no contract.
43. Point 27 Part III Appendix 1; point 4 Part II Appendix 2; point 4 para.2 Part II Appendix 3 to the Decree on minimum rates.
44. Point 24 Part I Appendix 1 to the Decree on minimum rates.

art of 19 December 1988,[45] the similarity in the structure of the rate schedules is remarkable, but so is the substantial increase in the percentages to which authors have a right.[46] On the whole, the new measure is an important step forward for the author.

§ 3. Future Works and Methods of Exploitation

763. An author cannot contractually transfer economic rights which are, as yet, unknown at the time the agreement is concluded[47] nor rights to the use of works which the author will create in future.[48] In this way, the author is prevented by the legislator from becoming totally dependent on his contracting party.

With regard to signing away future methods of use, this absolute prohibition is certainly praiseworthy, but whether the total ban on the sale of author's rights in future works is equally fortunate is, in our view, more doubtful. It is, indeed, desirable that the author be protected against clauses in which he transfers the rights to all his future works to the other party to the contract for an unlimited period of time. But should the author also be forbidden from transferring copyright on a limited number of future works for a limited time in a sufficiently concretely specified fashion? Is it, furthermore, not reasonable that, for instance, a publisher investing in a beginning writer also be recompensed for taking such a risk and—in the case of success—be able to reap a just reward at least for a limited time and/or for a particular number of works? A complete ban on the transfer of rights in future works seems to go too far.

Furthermore, the legislator ought to clarify the relationship between the prohibition of the transfer of rights on future works and the presumption of transfer in favor of the employer[49] with regard to works created in the execution of duties or tasks as an employee.[50] A comparable question arises in connection with the relationship between this rule on future works and the rule concern-

45. PSM RSFSR, "O stavkakh avtorskogo voznagrazhdeniia za publichnoe ispolnenie proizvedenii literatury i iskusstva", 19 December 1988, *SP RSFSR*, No.4, item 21.
46. Thus the author of a stage play written in Russian prose and comprising three acts had, by virtue of the Decree of 1988, a right to 6% of the income from the sale of tickets for the performance of his work; according to the Decree of 1994 the authors of the same work would have a right to 11%, split 8% for the author of the play and 3% for the set builder and the costume designer. For a concert with symphonic works or chamber music, once 7%, now 10% of the income from ticket sales must be paid to the composer.
47. Art.31 (2) para.2 CL 1993.
48. Art.31 (5) CL 1993.
49. Art.14 (2) CL 1993.
50. According to Gavrilov 1996 (147, No.29), the employer can agree a valid contract with an employee in which the arrangements for future employee-created works are regulated. Such a contract may, however, not entail a transfer of the rights to works which the employee may create in the future and which could not be seen as employee-created works.

ing specifically commissioned works.[51] Is the latter rule to be considered a *lex specialis*[52] or should one assume that, at the moment the work is commissioned, no rights can be transferred?

§ 4. Other Protective Measures

764. The Copyright Law, furthermore, provides that the acquirer of the author's rights may not reassign these rights to third parties in whole or in part unless this power was explicitly granted to him in the initial contract concluded with the author.[53]

765. Another provision intends to prevent private censorship and exaggerated loyalty of the author to the first user organization. It states that any clause in an author's contract, which limits the author's future creation of works on a given subject or in a given field, is null and void.[54] A publishing enterprise naturally has an interest in the author of a book they have published on a particular theme or in a particular field not bringing a similar book onto the market through a different publisher within the first few years. The first publisher could, therefore, introduce a clause in the author's contract which prohibits the author from creating works in that field or on that theme, whether or not for a particular period. The Copyright Law invalidates such clauses as they would be a limitation of the author's fundamental and constitutionally guaranteed freedom of creation.

766. Authors' contracts have to be concluded in writing, with the exception of an author's contract concerning the use of a work in the periodical press, for which oral agreement suffices.[55] According to Gavrilov, this is not a requirement for validity (except for contracts which regulate a foreign economic transaction) as the written form only functions as proof of contract.[56]

767. The Copyright Law does not in any way oblige the user to exploit a work, and therefore leaves it entirely up to the contracting parties to reach agreement on this issue.[57] The absence of an obligation to exploit is somewhat surprising as there was one both in the CC RSFSR[58] and in the Fundamentals 1991.[59] Now, the obligation to exploit has disappeared completely, which

51. Art.33 CL 1993.
52. Gavrilov 1996, 147, No.29.
53. Art.31 (4) CL 1993.
54. Art.31 (6) CL 1993.
55. Art.32 (1) CL 1993 and art.14 (2) Computer Law. The exception does not extend to the electronic media: E. Gavrilov, "Avtorskie dogovory v SMI", *Zakonodatel'stvo i praktika sredstv massovoi informatsii*, November 1999.
56. Gavrilov 1993a, xxxi. See, also, Korchagin *et al.* 194; Sergeev 221-222. With regard to computer programs and databases the so-called shrink-wrap license (*obertochnaia litsenziia*) is permitted: art.32 (2) CL 1993 and art.14 (3) Computer Law. On this see: T.V. Grigor'eva, in Dement'ev 143-144; Pozhitkov 1994, 69; Prins 1994b, 175; Savel'eva 1993b, 52-53; E.B. Sulimova, in Dement'ev 169.

could surely be problematic, especially when exclusive rights are assigned for a long period of time. The possibility of rescinding the contract after five years is not much use if the author's contract explicitly determines the duration of the transfer.[60] Yet, before the expiry of the contract, the author could make use of his right of withdrawal but would then have to pay recompense to the user.[61]

Section 4. Contractual Liability

768. With regard to contractual liability, the Copyright Law states that the party failing to properly fulfill its obligations is required to reimburse the damages caused to the other party (including lost profit).[62,63] This considerably extends the liability of the contracting parties,[64] particularly of the user, who under the Soviet legislation was liable only for the author's fee on failing to abide by the contract, which could only be small part of the real damages arising from a breach of an author's contract.[65] For the sake of clarity, it should be added that in case of failure to pay the authors remuneration agreed upon in the author's contract, the provisions of article 49 CL, and especially the possibility to demand a compensation of up to 50,000 times the monthly minimum wage do not apply.[66]

57. R. Khametov, "Kakim byt' avtorskomu dogovoru", *I.S.*, 1997, Nos.3-4, 62; Sergeev 232 and 253. See, also, point 8 of the informational letter No.47 of the Presidium of the RF Supreme Arbitration Court of 28 September 1999 ("Obzor praktiki rassmotreniia sporov, sviazannykh s primeneniem zakona Rossiiskoi Federatsii 'Ob avtorskom prave i smezhnykh pravakh'"), see <www.rao.ru/law/lawarbitrage.htm>.
58. Arts.503 and 510 CC RSFSR. This exploitation obligation did not apply for license agreements, or for script contracts or the agreement by which a work of art was commissioned.
59. Art.139 (1) para.2 Fundamentals 1991.
60. Art.31 (1) para.2 CL 1993.
61. Art.15 (2) CL 1993.
62. Art.34 (1) CL 1993. Previously, lost profits only had to be indemnified if this was provided in the contract itself: I.V. Savel'eva, in Sukhanov 1993, II, 263. See, also, Korchagin *et al.* 194-195.
63. With contracts of commission, an author failing to deliver the work in accordance with his contractual obligations is obliged to reimburse the real prejudice caused to the commissioner (art.34 (2) CL 1993). This excludes foregone profit (Gavrilov 1993a, xxxv; Korchagin *et al.* 195).
64. Gavrilov 1993b, 13; Sergeev 237.
65. Gavrilov 1993b, 13.
66. Point 11 of the informational letter No.47 of the Presidium of the RF Supreme Arbitration Court of 28 September 1999 ("Obzor praktiki rassmotreniia sporov, sviazannykh s primeneniem zakona Rossiiskoi Federatsii 'Ob avtorskom prave i smezhnykh pravakh'"); see <www.rao.ru/law/lawarbitrage.htm>.

Chapter III. Neighboring Rights

Section 1. General Remarks

769. The Fundamentals 1991 acknowledged the separate category of neighboring rights, but this regulation was particularly summary and left many questions unanswered,[1] contained unclear terminology in its description of the categories of holders (*e.g.*, the "creator of audio and visual fixations") and was, moreover, incomplete because the limitations of the neighboring rights (except the limitation in duration) had to be specified by further legislation.[2] The Copyright Law 1993 was, thus, a great step forward because a separate part of it was dedicated to the neighboring rights.

770.The Copyright Law acknowledges four categories of holders of neighboring rights: performing artists, producers of phonograms, broadcasting organizations, and cable companies.[3] They can only exercise their rights on the condition of observing the rights of the authors, and for phonogram producers, broadcasting organizations, and cable companies also on the condition of observing the rights of the performing artists.[4] The neighboring rights originate and are exercised without any formality.[5]

Visual fixations (videograms) are no longer the subject matter of a neighboring right.[6] The publishers—much to their regret[7]—were not granted specific publishing rights.

The acknowledgement of the neighboring rights is certainly an important element in the convergence between Russia and Continental European copyright legislation, and is justified in the Russian legal theory by reference to the important role which the performing artists, phonogram producers, and broadcasting organizations play in the distribution of authors' works.[8]

Section 2. The Performing Artists

§ 1. Definition

771. The performing artist (*ispolnitel'*, literally "the performer") is defined by the Copyright Law as "the actor, singer, musician, dancer or other person who

1. *Supra*, Nos.612 ff.
2. Savel'eva 1993a, 807.
3. Art.36 (1) CL 1993.
4. Art.36 (2) and (3) CL 1993.
5. Art.36 (4) CL 1993.
6. Perhaps Dozortsev 1993, (531) was thinking of this when he wrote that "authors are granted certain rights and then within one year it transpires that these rights not only no longer exist but it is as if they never existed at all" .
7. See, *e.g.*, the Vice-Chairman of the Association "Authors and publishers against piracy", Georgii Andzhaparidze in V.V. Kovalevskii, "Piratov knizhnogo rynka zhdet vozmezdie", *Zakon*, 1994, No.4, 72-73.
8. Sergeev 265. According to Dozortsev, the producers of phonograms and the broadcasting organization are protected because of their organizational activity in the area of art, their *prodiuserstvo* or *kvazi-tvorchestvo* (quasi-creation), whereas the protection of performing artists is based on their creative activity (Dozortsev 1994, 36 and 55).

performs, recites, declaims, sings, plays on a musical instrument or in any other way presents a literary or artistic work (including a variety turn, circus act or puppet show), and also the producer or director of a show and the orchestra conductor".[9] When this definition is combined with the definition of "performance", a term which also includes performance with technical aids,[10] the upshot is that, for instance, a disc jockey could be considered a performing artist, which was probably not intended.[11]

This definition was clearly inspired by article 3 (a) of the International Convention for the protection of performing artists, the producers of phonograms and the broadcasting organizations of 26 October 1961 (hereinafter: the Convention of Rome or RC), but takes it further by, on the one hand, making explicit that theatrical directors and conductors are also performing artists, and on the other hand by adding that variety and circus artistes, as well as puppeteers, should be considered performing artists. This widens the category of performing artist to persons who do not perform copyright protected work, such as the magician or the tightrope-walker. It would be a good idea to make explicit that it also covers persons performing expressions of folklore.

§ 2. The Rights of the Performing Artist

772. The performing artist has, because of the creative nature of his activity, moral as well as property rights.[12] In this the Russian Copyright Law goes further than the RC, which does not acknowledge moral rights, but follows the line set out by ever more European national legislations and by article 5 of the WIPO Performances and Phonograms Treaty.

773. The moral rights of the performing artist are the right to name (the mention of the name) and the right to the protection of the performance from any distortion or other derogation which could harm the honor and dignity of the performing artist.[13] The copyright law here uses exactly the same terms as it does in the definition of the author's moral rights so that the analysis with regard to content, given above,[14] can *mutatis mutandis* also be applied to the moral rights of the performing artist.

774. The performing artist also has an exclusive right to the use of the performance in any form, including the right to remuneration for every kind of use of the performance.[15] This not only involves a "right to prevent", as in

9. Art.4 (definition "performing artist") CL 1993. In art.141 (1) Fundamentals 1991, directors and conductors were still placed as a separate category next to (and thus not among) the performing artists.
10. Art.4 (definition "performance") CL 1993.
11. Elst 1994, 147.
12. Sergeev 267.
13. Art.37 (1) CL 1993.
14. *Supra*, Nos.692 ff.
15. Art.37 (1) CL 1993.

the RC[16], but, also, a right to execute certain actions oneself or to allow or refuse their execution by third parties.

The following actions fall under the performer's exclusive right in his performance:

— the broadcasting or the communication of the performance to the public by cable. This right only applies if the performance was not previously broadcast[17] or fixed on a material carrier. In other words, the performing artist has the exclusive right to the live broadcasting and communication of his "live" performance to the public by cable. This right is more limited than the comparable right provided in article 7.1. (a) RC, which not only provides a right to the communication to the public by cable, but, also, to any other kind of communication to a public which is not present at the actual performance, *e.g.*, by loudspeaker.
— the (first) fixation of his "live" performance on video or phonogram.[18]
— the reproduction[19] of a non-authorized fixation of the performance, or of an authorized fixation if the reproduction is made for other purposes than those for which the performing artist[20] or the law itself (and namely article 42 CL 1993, which describes the exceptions to the neighboring rights) allowed the fixation.[21] This provision conforms to article 7 (1) c) RC.
— the broadcasting or the transmission by cable of a fixation of the performance if this fixation was not made for commercial purposes.[22] In the contrary case, the performing artist together with the producer of the phonogram has only a right to remuneration.[23]

16. Art.7 (1) RC. On the reason of this "right to prevent", see the *Guide to the Rome Convention and to the Phonograms Convention*, WIPO, Geneva, 1981, 34-36.
17. The performing artist has, consequently, no control whatsoever over the re-broadcasting of his performance. This is not in contradiction with the RC, which leaves this decision to the national legislator (art.7 (2) (1) RC).
18. Art.4 CL 1993.
19. Art.37 (2) point 3 and (3) CL 1993. The reproduction right was not explicitly mentioned in the Fundamentals 1991, but this problem was solved by the non-exhaustive nature of the listed rights: *supra*, No.613.
20. If *e.g.*, a musician has given his authorization for the fixation of his performance of a musical piece with the intention of marketing these phonograms, he cannot object to the reproduction of that fixation for commercial distribution among the public, but he can object to the reproduction of that performance in the soundtrack of a film.
21. The use (*e.g.*, fixation and reproduction in some copies) of a performance for educational purposes is possible without the authorization or remuneration of the performer. If, however, this fixation were later reproduced for other, *e.g.*, commercial, purposes, the performing artist's exclusive reproduction right applies to the full.
22. Art.37 (2) point 4 CL 1993.
23. Art.39 CL 1993. See *infra*, Nos.776 and 783.

— the rental of a phonogram published for commercial purposes, on which the performance is recorded with participation of the performing artist.[24] The Copyright Law, however, subjects this right to a *cessio legis* in favor of the producer of the phonogram. The performing artist does, however, retain the right to remuneration for the rental of copies of such a phonogram.[25]

This rental right is an entirely independent right; it is not formulated as an exception to the exhaustion of a distribution right, as no such right is granted to the performer.

This rental right only applies to phonograms, not to the audiovisual fixation of performances.[26] Moreover, this is only a commercial rental right.[27] The Copyright Law does not acknowledge non-commercial, public lending right in phonograms.[28]

775. Authorization for the use of the performance should be given by the performing artist or by the leader of the collective of performing artists in a written agreement with the user.[29] The director of a show is, however, not the leader of a collective: his authorization to use the show does not relieve the user from asking the authorization of the other performing artists featured in the performance (and, of course, also the author's authorization).[30]

776. Apart from the above-mentioned exclusive rights, the performing artist also has a number of remuneration rights:

— for the home copying of audio and audiovisual works. The apparatus which allow such reproduction, as well as blank tapes, are subject to a levy, 30% of the proceeds from which go to the performing artist. Collection and repartition of the remuneration should be undertaken by a collecting society.[31]

24. Art.37 (2) CL 1993.
25. Art.37 (2) point 5 CL 1993. On the confusing reference to art.39 CL in connection with this, see Gavrilov 1996, 171.
26. Gavrilov 1996, 171.
27. Art.4 CL 1993 defines rental as "making a copy of a work or phonogram temporarily available for direct or indirect commercial profit".
28. The fact that this is not about forgetfulness, appears from the explicit resistance of the Russian delegation in the Committee of Experts on a Possible Instrument on the Protection of the Rights of Performers and Producers of Phonograms (Committee of Experts on a Possible Instrument on the Protection of the Rights of Performers and Producers of Phonograms, First Session (Geneva, 28 June to 2 July 1993), *Copyright*, July-August 1993, 202, No.28).
29. Art.37 (4) CL 1993.
30. Art.36 (2) para.2 CL 1993.
31. Arts.26 and 42 (2) CL 1993. For a discussion, see *supra*, No.713.

— one-half of the remuneration for the secondary use of phonograms.[32] For more details, we refer to the discussion of the rights of the producers of phonograms.[33]

777. Article 7 (2) RC leaves it to the national legislator to decide on granting the performing artist, in his relation with the broadcasting organizations, protection against simultaneous re-broadcasting by another broadcasting company ("re-broadcasting"), fixation for broadcasting purposes, and reproduction of such fixation for broadcasting purposes, once the performing artist has given the broadcasting company his authorization to broadcast the performance.

Article 37 (5) CL 1993 provides that a license for the broadcasting and the fixation of a live performance and for the reproduction of such a fixation is not required for (non-simultaneous, delayed) re-broadcasting of the performance, for the making of the fixation for the broadcasting and the reproduction of such a fixation by broadcasting organizations or cable exploiters, if these are explicitly provided for in an agreement between the performing artist and the broadcasting organizations or cable exploiters. This agreement should also fix the size of the remuneration of the performing artist for such a use. This confusing provision has, in our opinion, to be interpreted in such a way that explicit authorization to broadcast and record a live performance, and to reproduce such a fixation, automatically implies authorization for delayed broadcasts, for the fixation of the broadcast and the reproduction of such a fixation by the broadcasting organizations themselves,[34] albeit on the condition of the provision in the initial contract of a remuneration for these actions. In fact, this provision is superfluous: it states that broadcasting organizations and cable exploiters are allowed to do something if they have agreed upon this with the performing artist.[35]

778. A performing artist's consent to collaborate in the creation of an audiovisual work also means the loss of control over the further use of his performance,[36] at least as far as this concerns the use of the performance in the audiovisual work itself. The rights to the separate use of the sound or image recorded in the audiovisual work remain, unless otherwise specified, the performing artist's.[37] This means that an actor, who signs an agreement with a producer to play a role in a film, has no say in the reproduction of this film in the form of videograms, nor in the broadcasting of the film on television.

32. Art.39 CL 1993.
33. *Infra*, No.783.
34. Apparently, the condition that it has to serve for "broadcasting purposes" is not linked to such reproduction, only that it has to be done by the broadcasting organizations themselves.
35. Dietz 1997, 54.
36. Art.37 (6) para.1 CL 1993. Compare art.19 RC.
37. Art.37 (6) para.2 CL 1993. See, also, Dietz 1997, 54-55.

This also applies to a musician performing music for a film; he does, unless otherwise specified, retain his rights to the use of his performance other than as part of the audiovisual work.

779. The performing artists' exclusive rights to use, provided in article 37 (2) CL 1993, can be contractually transferred to third parties.[38] The right to remuneration for every kind of use of the performance is in the first paragraph of article 37 CL 1993 and is, thus, apparently not transferable. This is explicitly confirmed for the performing artist's right to a remuneration for the rental of phonograms on which the performance is fixed.[39] The remuneration rights for the secondary exploitation of a phonogram and for home copying are also, just like a performing artist's moral rights, non-transferable.

780. The CL 1993 does not provide special measures to protect the performing artist in his relations with other contracting parties. However, on 17 May 1996, a Government Decree was approved on the rates for the remuneration of performing artists for some methods of exploitation of their performance.[40] It contains rates for the terrestrial broadcasting of a performance, for the reproduction and other use of the performance, including on a phonogram, for the reproduction, including on industrial products, of a performance fixed in an audiovisual work or a computer program of the interactive type (multimedia), for the rental of copies of audiovisual works and computer programs, and for the public performance of a work fixed phonographically or audio-visually, in a place open to the public, whether or not for a fee.

In contrast with the rates which were fixed for certain methods of using an author's works,[41] these are not legally binding minimum fees but, rather, "recommended" rates, and, as para. 1 of the first Appendix clarifies, in fact rates of supplementary legal value. This means that the contracting parties (the performing artist, his legal successor or the collecting society on the one side, and the user on the other) can freely determine the remunerations for the use of the performance and, thus, also set them at a lower level than that provided by the Governmental Decree. If, however, they neglect to determine any remuneration in their agreement, the remunerations which are fixed in Appendix 2 to 5 of the Governmental Decree are automatically applied.

38. Art.37 (7) CL 1993.
39. Art.37 (2) point 5 CL 1993.
40. PP RF, "O stavkakh voznagrazhdeniia ispolniteliam za nekotorye vidy ispol'zovaniia ispolneniia (postanovki)", 17 May 1996, *Rossiiskaia Gazeta*, 30 July 1996. See para.3 PP RF, "O minimal'nykh stavkakh avtorskogo voznagrazhdeniia za nekotorye vidy ispol'zovaniia proizvedenii literatury i iskusstva", 21 March 1994, *SAPP RF*, 1994, No.3, item 994.
41. *Supra*, Nos.761-762.

Section 3. The Phonogram Producers

§ 1. Definition

781. A phonogram is any fixation exclusively of the sound of a performance or of other sounds.[42] It is, thus, not necessarily the fixation of a copyright protected work.

Concerning the definition of the producer of a phonogram, the remarkable phenomenon occurs that in the list of definitions a definition for the term *izgotovitel' fonogrammy* is given, but the expression does not appear again in the law. In the chapter on neighboring rights, however, another term, *proizvoditel' fonogrammy*, is used to refer to the phonogram producer.[43] This term is also used in the unofficial translations of the Conventions of Rome and Geneva.[44] In our opinion, one has to assume that both terms are synonymous[45] and that, therefore, the definition which is given for the one (*izgotovitel'*) also applies to the other (*proizvoditel'*).[46]

The producer of a phonogram is, then, the natural or legal person that has taken the initiative of, and the responsibility for, the first sound fixation of a performance or of other sounds.[47] This definition, in any case, excludes a sound engineer from being considered the producer of a phonogram as was the case under the Fundamentals 1991.[48]

§ 2. The Rights of the Phonogram Producer

782. The phonogram producer has the exclusive right to exploit his phonogram in any form. This also includes the right to remuneration for every such form of use.[49]

The following actions come under the exclusive and assignable[50] exploitation right of the phonogram producer:[51]

— the reproduction of the phonogram. This is the only right, which also appears in the Convention of Rome.[52] This right gives the producer control over the production of copies of a phonogram.

42. Art.4 CL 1993 (definition "phonogram"). Compare art.3 (b) RC.
43. Arts.26, 38, 39, 42, 43 (2) and (7) and 44 (1) CL 1993.
44. See, *e.g.*, in the law collection of the research center for private law: *Prava na rezul'taty intellektual'noi deiatel'nosti*, V.A. Dozortsev, (ed.), M., Izd. De-Iure, 1994, 290-304 (Convention of Rome) and 305-311 (Convention of Geneva).
45. Gavrilov 1993a, xxxvii.
46. Compare the term used for the producer of an audiovisual work (*izgotovitel' audiovizual'nogo proizvedeniia*), in the list of definitions (art.4 CL 1993) as well as in the material copyright (art.13 (2) CL 1993).
47. In the absence of proof to the contrary, producership is assumed to be by the natural or legal persons named in the usual manner on the phonogram and (or) on the sleeve of the phonogram: art.4 CL 1993 (definition "producer of phonogram").
48. Art.141 (2) Fundamentals 1991. *Supra*, No.614.
49. Art.38 (1) CL 1993.
50. Art.38 (4) CL 1993.
51. Art.38 (2) CL 1993.

— the adaptation or reworking in any other manner of the phonogram.[53] With this, the Russian legislator is ahead of international developments. In the Memorandum of the International Bureau of WIPO, which functioned as a basis for the discussions of the Committee of Experts on a Possible Instrument on the Protection of the Rights of Performers and Producers of Phonograms, it was proposed that the producers of phonograms (but, also, the performing artists) be acknowledged as having an adaptation right to those phonograms (performances) because of "the widespread practice of digital manipulation of fixations of performances, and the subsequent combination of various fixations".[54] Because of the fierce resistance of many negotiating parties,[55] the final text of the WIPO Performances and Phonograms treaty does not recognize such adaptation right.
— the distribution of copies of the phonogram by sale, rental, etc.[56] This distribution right in a copy is exhausted by the first sale thereof.[57] The commercial rental right, however, remains safeguarded.[58] The Copyright Law does not acknowledge a non-commercial, public lending right in phonograms.
— the importation of copies of the phonogram for the purposes of distribution including copies made with the authorization of the producer of that phonogram.[59]

52. Art.10 RC. Compare art.2 GC.
53. In the Fundamentals 1991, such an adaptation right on phonograms was not yet acknowledged (art.141 (2)).
54. Committee of Experts on a Possible Instrument on the Protection of the Rights of Performers and Producers of Phonograms, First Session (Geneva, 28 June to 2 July 1993), *Copyright*, July-August 1993, (142), 150, No.48 and 151, No.55. In the second Memorandum of the International Bureau the proposition to introduce an adaptation right for performing artists and for phonogram producers was maintained, see "Committee of Experts on a Possible Instrument on the Protection of the Rights of Performers and Producers of Phonograms, Third Session (Geneva, 12-16 December, 1994), *Copyright*, 1994, 251, No.55 (motivation) and 253, No.63 and 255, No.67 (text proposals).
55. It is not coincidental that the delegation from the USA expressed itself positively on the proposition (*Copyright*, 1993, 200, No.21), whereas other delegations were much more reserved ("some subjects did not seem ripe for inclusion in the new instrument, including the right of adaptation", UK, *Copyright*, 1993, 203, No.31; see Burkina Faso, *Copyright*, 1993, 206, No.42; ALAI, *Copyright*, 1993, 208, No.46; International Confederation of Music Publishers, *Copyright*, 1993, 213, No.62), if not completely negative (CISAC, *Copyright*, 1993, 212, No.61) on the adaptation right for performing artists and/or phonogram producers. For a summary of the discussion, see *Copyright*, 1993, 220-221, Nos. 105-113.
56. Compare Art.2 GC.
57. Art.38 (3) para.1 CL 1993. For the discussion of this provision, we can refer to what we have said in connection with the author's distribution right, as here identical phrasing is used: *supra*, No.700.
58. Art.38 (3) para.2 CL 1993. See, also, Pozhitkov 1994, 70; Sergeev 275.
59. Compare Art.2 GC. For comment on this right, see the discussion of the importation right of the authors, *supra*, No.703.

783.Apart from his exclusive rights the producer has, in execution of article 12 RC, a right to remuneration for the secondary use of his phonogram, together with the performing artist whose performances were recorded on the phonogram. By secondary use is meant public performance, terrestrial transmission to the public of a phonogram which was published for commercial purposes.[60] Neither the permission of the producer of the phonograms nor of the performing artists is required for any of these secondary uses of the phonogram. However, for each secondary use individually a remuneration has to be fixed, either by contract, or by a specially empowered body of the Russian Federation.[61] Such a body has, to the best of our knowledge, not yet been empowered.

The collection, repartition and payment of this remuneration are effected by one of the organizations which administer the rights of the producers of phonograms and of the performing artists on a collective basis.[62] In principle the collected remuneration is divided between the producers of the phonograms and the performing artists in two equal parts.[63]

The fact that such remuneration right exists is less obvious than it might first seem as article 16 RC offered the national legislator the possibility to formulate a reservation with regard to the regulation of the secondary use of commercial phonograms.[64] It is, moreover, a good thing that the CL obliges the performing artists and the producers of phonograms to unite so that they can speak with one voice in their negotiations for remuneration with the broadcasting enterprises, the cable companies, and the persons and organizations that use phonograms for public communication (restaurants, supermarkets, organizers of sports events, etc.).

Finally, the fact that the legislator also allocates part (in principle, one-half) of the pie to the performers, is positive, considering that article 12 RC did not exclude the possibility that all the remuneration for the secondary use of phonograms would go to the producers of the phonograms.

784.The producers of phonograms also have the right to 30% of the collectively administered levy on reproduction apparatus and blank tapes due to home copying of phonograms.[65]

60. Art.39 (1) CL 1993.
61. Art.39 (3) CL 1993.
62. For the time being, there does not seem to be an agreement between the organizations claiming to administer this remuneration right: E. Gavrilov, "Smezhnye prava v deiatel'nost' elektronnykh SMI", *Zakonodatel'stvo i praktika sredstv massovoi informatsii*, July-August, 1999.
63. Art.39 (2) CL 1993.
64. See, also, Dietz 1994b, 181; Wandtke 571.
65. Arts.26 and 42 (2) CL 1993. For a discussion, see *supra*, No.713.

Section 4. The Broadcasting Organizations and Cable Companies[66]

§ 1. Protected Subject Matter

785. The Copyright Law does not give a definition of the last two categories of beneficiaries of a neighboring right, the broadcasting organizations and the cable companies, but of the protected subject matter, namely transmissions (*peredacha*) by broadcasting or a cable distribution organization. This relates to broadcasts created by a broadcasting organization or a cable company itself, or commissioned from another organization and paid for by the broadcasting organization or cable company.[67] It immediately becomes apparent that the cable and broadcasting organizations are not holders of a neighboring right due to the *mere transmission* of broadcasts but, rather, due to the *creation* of their own broadcasts or broadcasts commissioned by them from *e.g.*, independent production houses. In these cases, the cable company functions as a broadcasting organization. The question, hence, is whether the cable companies should have been mentioned as a separate category.

§ 2. The Rights of the Broadcasting Organizations and the Cable Companies

786. The broadcasting organizations and cable companies have the exclusive rights to use their broadcasts in any form.[68] They can prohibit or allow third parties to carry out the following actions:[69]

— the simultaneous broadcasting of the program by another broadcasting organization (for the broadcasting organizations), respectively the simultaneous transmission of the program by cable by another cable company (for cable companies) (*pravo na retransliatsiiu peredachi*).[70] A non-simultaneous *re*-broadcasting by another broadcasting organization does not fall under this right, but presupposes a fixation of the program, which does fall under the right of fixation.
— the communication of the broadcast to the public by cable (for broadcasting organizations), or its broadcasting (for cable companies).[71]
— the fixation of their broadcasting. On the basis of this, the broadcasting organizations control the non-simultaneous re-broadcasting of their broadcasts by other broadcasting organizations.[72]

66. See, also, Parker 449-452.
67. Art.4 CL 1993 (definition "program of a broadcasting organization or a cable company").
68. Arts.40 (1) and 41 (1) CL 1993.
69. Arts.40 (2) and 41 (2) CL 1993.
70. Compare art.13 (a) RC. See, also, Sergeev 276.
71. No right to the cable transmission of broadcasting organization's programs is granted by the Rome Convention: *Guide to the Rome Convention and to the Phonograms Convention*, Genève, WIPO, 1981, 24, No.3.17 and 54, No.13.8.
72. Sergeev 277.

— the reproduction of the fixation of the broadcast. Just like the performing artists' reproduction right, this right does not extend to the reproduction of fixations of broadcasts which were made with the authorization of the broadcasting organization or according to the legal exceptions to the neighboring rights listed in article 42 CL 1993.[73] If, for instance, a television program is fixed for study purposes (for which the authorization of the broadcasting organization is not required[74]), reproduction is also allowed for the same purpose but not for another (*e.g.*, commercial) purpose.
— the communication of the broadcast to the public in places where a charge is made for admission. In contrast to the R.C,[75] this right not only concerns television programs but, also, radio programs.

Section 5. Exceptions to Neighboring Rights

787. Just as with copyright, the limitations upon the neighboring rights are made subordinate to a general clause of reasonableness. Indeed, the application of the limitations provided for in article 42 CL 1993 must not prejudice either the normal exploitation of the phonogram, performance, or broadcast, or fixations thereof, or the normal exploitation of the literary, scientific, or artistic works incorporated therein; it shall, likewise, not prejudice either the legitimate interests of the performer, the phonogram producer, or the broadcasting or cable distribution organization, or those of the authors of the works in question.[76] This formulation is, at the same time, more absolute and more narrow (and in other words allows fewer limitations upon the neighboring rights) than the comparable formula which sets out the limitations of the exceptions to copyright. The limitations upon copyright could only not cause *unjustified* damage to the normal exploitation of the work or prejudice the author's legitimate interests *in an unjustified manner.*[77]

The absolute prohibition of prejudice to the normal use of the objects of neighboring rights and to the limitation of the legitimate interests of the holders of the neighboring rights could lead to a more restrictive interpretation of exceptions to neighboring rights than to comparably formulated exceptions to copyright. In concrete cases, this could mean that the author's permission would not be required but that of the holder of the neighboring rights would be. To avoid the holders of the neighboring rights from thus acquiring more extensive rights than the authors, the general clause (drafted in absolute terms), which indicates the boundaries of the limitations upon the neighboring rights,

73. Art.40 (3) CL 1993 (broadcasting organizations) and art.41 (3) CL 1993 (cable companies).
74. Art.42 (1) point 2 CL 1993.
75. Art.13 (d) R.C.
76. Art.42 (4) CL 1993.
77. Art.16 (5) CL 1993. See *supra*, No.719.

is also applied to the authors whose works are performed, fixed on phonogram, or broadcast or transmitted by broadcasting or cable organizations.

788. From the same perspective of preventing the holders of the neighboring rights from being granted more rights than the authors, all exceptions to the author's economic rights are also declared applicable to the neighboring rights.[78] Apart from that, however, five free uses are also explicitly mentioned:

— the fixation of small fragments of performances, phonograms, and broadcasts for overviews of current affairs.[79] With this, the Russian legislator takes an option left to the national legislator by the Convention of Rome.[80]
— the use of performances, phonograms, and broadcasts for the sole purposes of study or scientific research.[81] Here too the suggestion comes from the Convention of Rome itself.[82]
— the quotation of small fragments from a performance, phonogram, or broadcast for informative purposes.[83] This provision cannot, however, serve as a basis for the broadcasting organizations and the cable companies to avoid their obligation to remunerate the producers of phonograms for the secondary use of their commercial phonograms. Article 39 CL 1993 remains, in other words, untouched.[84]
— the private use of a broadcast or of a fixation of a broadcast is allowed without authorization and remuneration of the performing artists, the producer of the phonogram, or the broadcasting or cable organization.[85] The reproduction of a phonogram for personal purposes is, on the contrary, subject to a compulsory license: the authorization of the holders of the copyright and neighboring rights is not required, but a remuneration is levied on the sales price of reproduction apparatus and on blank tapes. This remuneration is divided among the authors, performing artists, and the producers of phonograms in the proportions 40%–30%–30%.[86]
— the so-called ephemeral fixation of a performance or broadcast, which is made by a broadcasting organization using its own technical equipment and for its own broadcasts. This is permitted without additional authorization or remuneration on the condition that: (a) the broadcasting organization

78. Art.42 (1) point 4 CL 1993.
79. Art.42 (1) point 1 CL 1993.
80. Art.15 (1) (b) RC.
81. Art.42 (1) point 2 CL 1993.
82. Art.15 (1) (d) RC.
83. Separate mention of this exception is, on our view, superfluous, since the possibility of quoting short fragments from speeches, phonograms and broadcasts for informative purposes is entirely subsumed in the broader exception to copyright with regard to quotation and the making of press reviews (art.19 point 1 CL 1993), an exception which was also declared applicable to the neighboring rights (art.42 (1) point 4 CL 1993).
84. Art.42 (1) point 3 CL 1993. See also Sergeev 278-279.
85. Art.42 (2) CL 1993.
86. Arts.26 and 42 (2) CL 1993. *Supra*, No.713.

has the authorization to broadcast the performances or broadcasts which it fixes for a short period with the purpose of broadcasting; and (b) the fixation is destroyed within the term determined in a mutual agreement between the broadcasting organization and the author of the work recorded.[87]

This limitation, however, goes beyond what is allowed under the Convention of Rome,[88] and what is allowed in the relationship with the author,[89] because not only the fixation for ephemeral use is allowed but, also, its reproduction. Moreover, the reproduction of phonograms which were published for commercial purposes is also allowed without the authorization of the holders of neighboring rights if it is done by a broadcasting organization with the help of its own technical equipment and for its own broadcasts.[90]

Section 6. The Term of Protection

789. The duration of protection for the rights of performing artists, phonogram producers, broadcasting organizations, and cable companies is respectively 50 years after the first performance;[91] 50 years after the first publication of the phonogram or 50 years after the first fixation of the phonogram if it was not published within this term;[92] 50 years after the effecting of the broadcasting organization's first broadcast;[93] or 50 years after the cable company's effecting of the first cable transmission.[94] These terms are calculated from 1 January of the year following that in which the legal act occurred that marked the starting point of the period.[95] With this term of 50 years, the Russian Copyright Law clearly goes further than the 20 years required by the Convention of Rome and is in line with most laws in Western Europe.

790. The two moral rights vested in performing artists, namely the right to be named and the right to protection of the performance from any distortion or other derogation,[96] are—following the example of the moral author's rights[97]—protected without temporal limitation.[98]

87. Art.42 (3) CL 1993. Compare art.24 CL 1993. The Copyright Law provides no period if the fixation for brief use does not concern a copyrighted work.
88. Art.15 (1) (c) RC.
89. Art.24 CL 1993.
90. Art.42 (3) CL 1993. For the broadcasting of this reproduced phonogram, the remuneration right of the performing artists and the phonogram producers applies: art.39 CL 1993.
91. Art.43 (1) para.1 CL 1993. In fact, each performance is protected separately, so the reference to the *first* performance is misleading.
92. Art.43 (2) CL 1993.
93. Art.43 (3) CL 1993.
94. Art.43 (4) CL 1993.
95. Art.43 (5) CL 1993.
96. Art.37 (1) CL 1993.
97. Art.27 (1) para.2 CL 1993.

791. There exists a special manner of calculation of the protection term for performing artists who were victims of repression and were posthumously rehabilitated. Furthermore, the term of protection is extended by four years for performing artists who worked during the Second World War or participated therein.[99]

For a discussion of the formulation of both special regulations, we refer the reader to the analysis of the identical provisions on the duration of copyright protection.[100] At first sight, the introduction of this regulation in regard to the neighboring rights seems meaningless. The neighboring rights were only introduced into Russian legislation in 1992, *i.e.*, with the coming into force of the Fundamentals 1991 on Russian territory. The special regulation increasing the duration of protection because of the circumstances of war cannot be applied at all as it is hard to increase a term for performances, which were not protected at all until 1992, *i.e.*, forty-seven years after the end of the Second World War. The other special regulation with regard to posthumously rehabilitated performing artists too seems to be of limited importance if it only applies to those who were rehabilitated after the coming into force of the Copyright Law. Remember that the bulk of rehabilitations took place first under Khrushchev and then under Gorbachev. Why would one remunerate posthumously rehabilitated performers for the impossibility of effectively exploiting their rights during the Stalin repression if, at the time of that repression, no performing artist even held any exclusive right?[101] The "sense" of both special regulations will, however, become clear later, when we discuss the rules of transitional law.[102]

98. Art.43 (1) para.2 CL 1993. In the Fundamentals 1991, this only applied to the name of the performing artist (art.141 (5) para.2).
99. Art.43 (6) CL 1993.
100. *Supra*, Nos.742 ff.
101. Elst 1994, 148.
102. *Infra*, Nos.880 ff.

Chapter IV. The Collecting Societies

Section 1. The Legal Provisions Concerning Collecting Societies

792. For the first time in the history of Russian copyright law, a regulation has been provided for the collective administration of copyright and neighboring rights. The Russian legislator thus recognizes the growing importance of collecting societies in administering the economic rights of authors, performing artists, producers of phonograms, and other holders of copyright and neighboring rights in cases where the exercise thereof is hampered by difficulties of a practical nature (as with public performance, including on radio and television, the reproduction of the work by means of a mechanical, magnetic, or other recording, reprographic reproduction, etc.).[1]

793. The collecting societies should be created directly by the holders of these rights[2] and, thus, no longer by the state.[3] This provision undermined one pillar of the state agency *RAIS*, namely its function as a collecting society.[4]

794. The landscape of collecting societies can look very differently depending on the number of collecting societies established and their respective functions. It is, however, significant that the Copyright Law not only considers separate organizations for particular rights and particular categories of holders of rights permissible, but, also, expressly allows a single universal society to be set up to administer all copyrights and neighboring rights on Russian territory.[5] While a state monopoly is thus excluded, a private monopoly is explicitly permitted.

795. In a market economy, the actual (or legal) monopolies of collecting societies are *Fremdkörper* which demand a special justification. This is not the place to set out the advantages of a monopolization of the collective administration of copyright and neighboring rights. We will merely indicate the virtual impossibility of economically effective collective management in a situation where the organizations concerned do not have a monopoly on certain manners of exploitation and/or categories of works. It is, on the other hand, important to check what mechanism the legislator has provided to prevent this monopolization from leading to abuses.

796. First, though, we must pause by a decision of the Constitutional Court RF, which was rendered on 28 April 1992, *i.e.*, about eighteen months before the approval of the new Copyright Law. The Court considered the conversion of the Soviet State Agency for copyright and neighboring rights (*GAASP*) to the All-Russian Agency for Copyrights (*VAAP*), as ratified by a Decree of the Presidium of the Supreme Soviet RSFSR of 3 February 1992,

1. Art.44 (1) CL 1993.
2. Art.44 (1) para.2 CL 1993.
3. Savel'eva 1993b, 58.
4. On the Russian Agency for Intellectual Property *RAIS*, *supra*, Nos.585-587 and 626.
5. Art.44 (2) CL 1993.

to be unconstitutional as contrary to, *inter alia*, the constitutionally recognized freedom of association and the anti-monopoly legislation.[6]

The Statutes of the new Russian *VAAP* explicitly stated that the agency "shall file suit in court in its own name as representative of the authors [...], shall conduct civil cases in all judicial institutions with all such rights as are granted by law to the plaintiff, the defendant, third parties [...]". According to the Constitutional Court, the Presidium of the Supreme Soviet, by ratifying the Statutes of the new *VAAP*, instituted a system of legal representation, which denied the author the option of exercising his rights himself. This system of legal representation was considered to be contrary to the then article 45 para.2 Constitution 1978, according to which the rights of the authors were protected by the state.

In our view, the Constitutional Court was mistaken in seeing this as the institution of a system of legal representation, due to a selective reading of the provisions of the Statutes of the new *VAAP*.[7] These Statutes show that the new *VAAP* was to work on a basis of voluntary membership and would grant licenses to users on the basis of the rights voluntarily transferred to *VAAP* by its members. Furthermore, it is astounding that the Decree of the Presidium of the Supreme Soviet be judged by article 45 para.2 Constitution 1978, given the vagueness of this article which appears to be no more than a statement of intent.

797. The Constitutional Court then went into the issue of monopolization: "The Presidium of the Supreme Soviet of the Russian Federation by its deed [the ratification of the Statutes of *VAAP*] creates a situation in which the protection of the right of authors not only is not guaranteed, but, on the contrary, preconditions are created for their infringement." According to the Constitutional Court, the Decree of the Presidium of the Supreme Soviet, and the Statutes of the *VAAP* which it recognized, led to the contravention of the constitutional principles of the economic system of the Russian Federation applicable in 1992, according to which the state guarantees the development of market mechanisms and does not allow monopolies.[8]

> In this way, special conditions are created for the economic activity of the All-Russian Copyright Agency. Other organizations are deprived of the opportunity to compete with it and to fight for [their share in] the market and a clientele of authors on equal conditions. The very opportunity to create such organizations is restricted. Associated with this is a

6. PKS RF, "Po delu o proverke konstitutsionnosti postanovleniia Prezidiuma Verkhovnogo Soveta RSFSR ot 3 fevralia 1992 goda No. 2275-I 'OVserossiiskom agentstve po avtorskim pravam'", 28 April 1992, *VSND i VS RF*, 1992, No.21, item 1141; English translation in *SD*, 1994, No.3, 48-53. See *supra*, No.586.
7. *Ustav Vserossiiskogo Agentstva po avtorskim pravam VAAP*, unpublished.
8. Art.17 para.2 Const.1978, as amended.

> reduction in the quality and an increase in the cost of services to authors, especially in the protection of their interests abroad. The All-Russian Copyright Agency, thereby, acquires the opportunity to exercise *diktat* in relation to its client, the author.

On the basis of an article from the Constitution then in force, which forbad monopolization in general terms, the Constitutional Court ruled that the Decree and the Statutes of *VAAP* created a monopoly to the disadvantage of authors. This would not be a legal, but an actual monopoly following from the transfer of the assets of the former *GAASP* (a state agency with a monopoly) to the private-law new authors' association *VAAP*. The founding of other authors' associations was not forbidden but would be extremely difficult given the head start which this Decree gave the new *VAAP*. The Constitutional Court further indicated the possible abuses and the risk of a lack of efficient administration following from such a monopoly. Reference was made, with tangible distaste, to conditions under the old *VAAP*.[9]

798. While the Constitutional Court rightly attacks the possible abuses which can follow from the powerful position of a monopolistic collecting society, in our view it reached the mistaken conclusion that such monopolies must be banned without question. Such a prohibition fails to take into account the advantages related to the existence of a single authors' association for one or more than one sort of work and/or method of exploitation, or even for all works and all methods of exploitation which are difficult to administer on an individual basis. Such a universal collecting society can work at relatively lower cost than a plurality of divided collecting societies each, in effect, holding their own monopoly in the area entrusted to them. Furthermore, authors and the holders of neighboring rights would be in a stronger negotiating position in relation to institutional users. For the users too, it would be much easier to work with a single collecting society.

799. If such monopolies are useful, they are, however, also dangerous as the Constitutional Court quite rightly indicated. Abuses can be prevented in two ways: either an independent government agency can be charged with monitoring the foundation and operation of collecting societies, or the legislator can directly impose a number of obligations on these societies. The Russian legislator took the second option.

This choice is certainly remarkable and in some ways unexpected, since the Russian Agency for Intellectual Property, *RAIS*, apart from its temporary function of collecting society, was also clearly destined to be a government agency monitoring the still-to-be-established private-law collecting agencies.

9. "All of this already took place in the activity of the former All-Union Copyright Agency and the State Agency of the USSR on Copyrights and Related Rights. The repetition of a similar legal situation would signify a reduction in the guarantees of the observance of constitutional norms concerning the protection of authors' rights by the state."

The legislator has—probably deliberately, given the then fierce contest between parliament and president—let pass the opportunity of integrating *RAIS* into the copyright system. Thus the second pillar of *RAIS*, its function as an organ of state acting as umbrella for the various collecting societies, also collapsed.[10]

The Russian legislator went even further, refusing not only to set up a special regulating body but explicitly excluding the application of anti-trust legislation to the collective administration of copyright and neighboring rights.[11] This provision can be understood as a reaction to the past when government intervention in matters of private law (including copyright law) was extensive. Nonetheless, this exclusion is much too radical. The Russian legislator apparently takes for granted that the dominant market position of a collecting society is, by definition, not disadvantageous and cannot give rise to abuses. This is certainly naive.[12]

800. The Russian legislator did opt for the regulation of the activities of collecting societies, providing rules to strengthen both the authors and holders of neighboring rights, and the users, in their respective relations to a monopolistic collecting society.

801. This was expressed, first of all, in the legally enacted duty of collecting societies to represent and grant licenses. This means, on one side, that a collecting agency cannot refuse to administer the rights and push the claims of an author or a holder of neighboring rights, if asked to do so, insofar as the management of the given category of rights falls within the statutory activity of this collecting society in question;[13] on the other side, it means that a collecting society is obliged to grant rights of use (licenses) for the rights it administers on non-discriminatory conditions to anybody who requests them.[14] Refusing a license to an applicant is not allowed "without valid reason".[15] This prohibition of discrimination is generally met by the collecting society using detailed tariff schedules for all users according to the use of the rights it administers. This ensures the equal treatment of equivalent situations.

The collecting societies cannot themselves exploit the rights entrusted to them[16] and cannot, in general, exercise any commercial activity.[17]

10. On the double function of *RAIS*, see *supra*, No.587. On the collapse of the first pillar, see *supra*, No.793.
11. Art.45 (1) para.2 CL 1993. This is primarily the Russian Law of 22 March 1991 on competition and the limiting of monopolistic activities in commodity markets: Zakon, "O konkurentsii i ogranichenii monopolisticheskoi deiatel'nosti na tovarnykh rynkakh", 22 March 1991, *VSND i VS RSFSR*, 1991, No.16, item 499. On this legislation, see *supra*, Nos.429 ff.
12. See, also, Dietz 1997, 45.
13. Art.45 (2) para.2 CL 1993.
14. Art.45 (3) CL 1993.
15. Art.45 (3) CL 1993.
16. Art.45 (2) para.3 CL 1993.
17. Art.45 (1) para.1 CL 1993.

The holders of copyright and neighboring rights voluntarily transfer their rights to the collecting societies, which then, on the basis of the rights transferred to them and in accordance with their Statutes, grant licenses to the users who request them.[18] The priority must be the interests of the holders of copyright or neighboring rights represented by the collecting society.[19]

The relationship of authors and the holders of neighboring rights with the collecting societies are regulated on the basis of written contracts as well as of international agreements with foreign organizations administering analogous rights. The Copyright Law confirms that such contracts are not authors' contracts so that the provisions of articles 30 to 34 of the Copyright Law are not applicable.[20] This means that rules such as directory provisions on the term of the transfer and the territory for which the rights are transferred[21] do not apply. The prohibition of the transfer of rights to future works[22] is not applicable to these contracts. To prevent an author from only transferring administration of his least successful works to the collecting societies, it is in practice indeed an absolute necessity that the author transfer all of a particular category of rights, possibly for a limited period, to all his existing and future works.

According to legal theory the contract of authors and holders of neighboring rights with the collecting societies has legally to be seen as an "agreement of authorization"[23] or a representation agreement.[24]

802. On the basis of the rights, which the authors and the holders of neighboring rights transfer to the collecting society, this society grants "licenses" to the users.[25] Such licenses give authorization for the use, in the manners provided for, of all works and subject matter of neighboring rights and are granted in the name of all holders of copyright or neighboring rights including those who transferred no rights to the organization.[26]

This institutes an assumption that the collecting societies exercise the rights of all holders, and this with the purpose of making the enforcement of the rights easier for the collecting society. In relation to the granting of such wide powers to the collecting societies to act and to conclude exploitation contracts, the question again arises of regulation by an independent government agency.[27] This is all the more true in a situation in which two or more concurring collecting societies administer the same rights. How can they all be presumed to represent outsiders?

18. Art.45 (2) para. 1 and (3) para.1 CL 1993.
19. Art.47 (1) preamble CL 1993.
20. Art.45 (2) para.1 CL 1993. See, also, *supra*, No.753.
21. Art.31 (1) para.2 and 3 CL 1993.
22. Art.31 (5) CL 1993.
23. Gavrilov 1995a, 694.
24. Sergeev 119.
25. Art.45 (3) para.1 CL 1993.
26. Art.45 (3) para.2 CL 1993.
27. Dietz 1994b, 189-191 and 1997, 46.

This is, in fact, the reason why it proves so difficult to administer neighboring rights on a collective basis. Numerous collecting societies for the rights of performing artists were established, mostly at a local level, but users refuse to pay them as each collecting society pretends on the basis of the Copyright Law to represent all performers.

803. The CL 1993 also provides two cases of compulsory collective administration: the remunerations for home copying sound and audiovisual works,[28] and the remunerations for the secondary use of commercial phonograms.[29] A single collecting society will be charged with the administration of one or both of these remuneration rights. It will negotiate the level of the fee respectively with the manufacturers and importers of reproduction apparatus and blank audio and video supports, and with the (associations of) users of commercial phonograms,[30] and then has to collect and distribute them.

804. The remunerations collected on the basis of the licenses granted, or of the compulsory collective administration of the two aforesaid remuneration rights, are subject to repartition less the administration costs and the deductions for special funds instituted by the society with the consent and in the interests of the represented holders of copyrights and neighboring rights.[31] That both sorts of deductions were given explicit legal grounds is due to the criticism of the former Soviet state copyright agency *VAAP* relating to just these two deductions in the late eighties.

The fees collected are to be divided in proportion to the actual use of the works and the objects of neighboring rights.[32] The collecting society has to distribute payments regularly[33] and, at the same time as making payments, must report to its members on the use of their works and achievements.[34]

805. We have already indicated above the assumption of representation of all holders of rights in the field of activity of a collecting society, according to which fees are also collected for the use of the works or achievements of persons who are not members of the collecting society in question. The question then is what is to be done with these fees.

This question is yet more pressing in the cases of compulsory collective administration (home copying, secondary use of commercial phonograms). On the one hand, it is not desirable that individual holders should themselves try to enforce their remuneration right. On the other, they cannot be excluded from the system. The fee for home copying, for instance, is paid on reproduc-

28. Art.26 (2) CL 1993.
29. Art.39 (2) and (3) CL 1993.
30. Art.46 point 3 CL 1993.
31. Art.47 (1) point 3 CL 1993.
32. Art.47 (1) point 3 CL 1993.
33. Art.47 (1) point 3 CL 1993.
34. Art.47 (1) point 1 CL 1993.

tion apparatus and cassettes, not according to the works of the authors. For these forms of compulsory collective administration, the collecting societies administer the remuneration of non-members.

The Russian legislator has solved this problem by allowing non-member right holders to demand payment of the remuneration due to them from the collecting society according to the normal repartition.[35] Remunerations not claimed for three years go into the common "pot" of sums to be divided or are assigned to other ends in the interest of the members of the collecting society.[36] In cases of the voluntary collective administration of rights, non-members can also request that their works and the subject matter of neighboring rights be excluded from the licenses issued by the collecting societies.[37]

This possibility is problematic where the exercise of the exclusive right to the retransmission of a work by cable is concerned. Since this involves the *simultaneous* retransmission of broadcasts, the cable company cannot know the content of the broadcasts transmitted; it is, therefore, impossible to obtain the authorization of individual right holders: the cable company cannot know the identity of these holders. In our view, it would have been preferable to make collective agreements on cable rights between collecting societies and cable companies compulsory and to exclude every possibility of individual contracts, as is the case in the European Directive 93/83/EEC of 27 September 1993 for the coordination of certain provisions concerning copyright and neighboring rights in the field of satellite broadcasting and cable transmission.[38]

Section 2. The Collecting Societies in Russia

806. At the time of the ratification of the new Copyright Law, Russia had a single copyright agency, *RAIS*. We have seen[39] how this state agency had a double function: it was both an ordinary collecting society and a state body empowered to work out the details of the government's copyright policy. In this last capacity, it was also given a regulatory function when private-law collecting societies were founded.

The new Copyright Law destroyed the legal foundations for *RAIS*'s continued existence since, under the Copyright Law, the state can no longer found a collecting society, and the Copyright Law did not provide for a regulatory body. The Copyright Law does mention "an agency of the Russian Federation especially empowered" which is to determine the amount and the method of payment of: (a) remuneration for home copying if the collecting societies and the producers and importers of reproduction apparatus and blank cassettes fail

35. Art.47 (2) CL 1993.
36. Art.45 (4) CL 1993.
37. Art.47 (2) *in fine* CL 1993.
38. *OJ*, L 248/15 of 6 October 1993.
39. *Supra*, No.587.

to reach agreement;[40] and (b) remuneration and methods of payment for the secondary use of commercial phonograms if the users of phonograms and the organizations administering the rights of the phonogram producers and the performing artists fail to reach agreement.[41] This agency is also to undertake the enforcement of the rights of authorship, the right to be named, and the right to the protection of the reputation of the author in the absence of heirs or after the expiry of the legal term of copyright.[42] But these three elements did not suffice to maintain an independent body exclusively concerned with these functions.

President El'tsin reached the only possible conclusion and abolished *RAIS*.[43] This could be done without problems because, in the mean time, the authors with contracts with *RAIS* had founded their own "Russian Authors' Association" (*Rossiiskoe avtorskoe obshchestvo*, *RAO*). The President placed *RAO* under his aegis (*pod pokrovitel'stvom*) and recognized *RAO* as the legal successor of *RAIS*.[44] The funding and most of the staff of *RAIS* were taken over by *RAO*.[45]

807. The Statutes of *RAO* were ratified on 12 August 1993 by the Founding Meeting and were registered with the Ministry of Justice on 30 September 1993.[46] *RAO* is an association of authors and their legal successors, working "on the principles of voluntary and equal membership, democratic self-administration and openness".[47] It is a universal collecting society: very diverse rights and claims on all sorts of works are administered including the right to remuneration for home copying, the collective administration of which the law makes compulsory. *RAO* does not administer neighboring rights.

808. Besides *RAO* and a whole series of regional associations, on 17 January 1994 a Russian Association of Right Holders in the Audiovisual Field (*Rossiiskoe obshchestvo pravoobladatelei v audiovizual'noi sfere*, *ROPAS* for short)

40. Art.26 (2) para.3 CL 1993.
41. Art.39 (3) para.1 CL 1993.
42. Art.27 (2) para.2 and art.29 para.3 CL 1993.
43. Point 1 Ukaz Prezidenta R.F, "O gosudarstvennoi politike v oblasti okhrany avtorskogo prava i smezhnykh prav", 7 October 1993, *SAPP RF*, 1993, No.41, item 3920, *Rossiiskaia gazeta*, 14 October 1993.
44. Punkt 3 Ukaz Prezidenta R.F, "O gosudarstvennoi politike v oblasti okhrany avtorskogo prava i smezhnykh prav", 7 October 1993, *SAPP RF*, 1993, No.41, item 3920, *Rossiiskaia gazeta*, 14 October 1993.
45. For more on the early history and activities of *RAO*, see Gavrilov 1994b, 392-393. Sergeev (118) applauds this continuity in material, organization and personnel because this both prevented works formerly in the *RAIS* repertoire from being temporarily without effective protection, and ensured that a sufficiently powerful organization for the exercising and protection of copyright was created at short notice and at the least expense.
46. Dozortsev 1994, 197-208.
47. In 1995, 6,000 authors and about 100 heirs of authors had contracts with *RAO*: A.Veimarn, "Bespredel dlia umnykh i uchenykh", *I.S.*, 1995, Nos.5-6, 31.

was founded.[48] *ROPAS* collectively administers the rights of the authors of audiovisual works including the remuneration for the private copying (*chastnoe kopirovanie*) of works from the *ROPAS* repertoire. However, the function of compulsory collective administration of the remuneration for the home copying of audiovisual works is also claimed by *RAO*. A mutual agreement between the two organizations will have to solve this problem since the Copyright Law assigns the administration of this remuneration right to a single organization.[49]

809. In June 2000 a number of private persons, including *RAO*, established the Russian Society for Multimedia and Digital Networks (*Rossiiskoe obshchestvo po mul'timedia i tsifrovym setiam*, in short *ROMS*), in order to manage "digital" rights on a collective basis.

810. On 11 November 1993 a number of record companies of Russian and foreign origin set up the Association of Producers of Audio Products (*Assotsiatsiia proizvoditelei audioproduktsii*).[50] This association, in the first place, administers the rights of phonogram producers including the right to remuneration for the secondary use of commercial phonograms, which is subject to compulsory collective administration.[51] But—remarkably—it also administers the rights of the performing artists and the authors to these phonograms without giving them the right of membership.

811. Finally, in 1997 the Interregional Copyright Agency (*Mezhregional'noe agentstvo avtorskikh prav*, or *MAAP*) was established in Moscow at the initiative of the Russian Federal Service for television and radio broadcasting. Its aim is to monitor the compliance by regional television channels of the rights in television and video productions. On the enormous territory of the Russian Federation, about 1200 small and medium officially registered broadcasting organizations are said to function, so that in any town of 50,000 inhabitants or more there is a local broadcasting organization. The use of unauthorized copies of audiovisual works by such organizations is said to be more the rule than the exception. *MAAP* monitors their broadcasts. It is not so much a collecting society but, rather, an interest group defending the rights of film producers and broadcasting organizations. Most members of *MAAP*'s monitoring board are representatives of state bodies, Associations of Broadcasting Organizations, *RAO* and the Russian Anti-Piracy Organization.

812. *RAO*, *ROPAS*, *ROMS* and *APA* are not state agencies but private-law organizations. Collective administration is thus removed from the sphere of ideology. By transferring the properties and funds of the liquidated state

48. Dozortsev 1994, 223-233. See, also, Gavrilov 1995a, 695.
49. Art.26 (2) para.2 CL 1993.
50. Dozortsev 1994, 209-222. See, also, Gavrilov 1995a, 695 and 1996, 212 (which mentions the Russian Phonogram Association, *Rossiiskaia fonograficheskaia assotsiatsiia* (*RFA*). It is not clear whether this is the same organization).
51. Art.39 (2) CL 1993.

agency for copyright (*GAASP—RAIS*) to *RAO*, the most important private-law collecting society, the state gives important support, which is absolutely necessary to get through the financially difficult early stages of the foundation of a collecting society.

Nevertheless, we would like to add one note critical of this development. It seems logical that the collective administration of private rights be entrusted to private organizations. But even so, collecting societies with a public-law status must not, in our view, be seen in an entirely bad light (to do with politicization, inefficient management, lack of initiative, etc.).[52] They can, after all, act against irresponsible users with more authority. This is, in our view, of the greatest importance in Russia, as a large proportion of users is still made up of state enterprises or institutions and the widespread phenomenon of piracy is partly maintained by these enterprises. Time will show whether the privatization of the collective administration of copyright and neighboring rights was the right decision in order to obtain a better and more efficient protection and enforcement of the rights of (primarily) authors and performing artists.

52. If only because a number of these shortcomings can easily be found in monopolistic private-law collecting societies with a monopoly.

Chapter V. Protection of Foreign Works, Performances, Phonograms, and Broadcasts

Introduction

813. If the US and the EU so strongly insisted on the Russian Federation's entry into the most important multilateral treaties in the area of copyright and neighboring rights, this had obviously to do with calculated self-interest: the West would like to see works originating in America or Western Europe protected in as potentially large a market as Russia. The principles of assimilation and minimum protection would do their work after Russia's entry to the Berne and Rome Conventions. For the European Union, Russia's accession to the BC and the RC was considered, moreover, a beginning, a minimum common basis, on which a further pan-European harmonization of copyright legislation could be built. Instrumental to this was the conclusion of a bilateral agreement obliging Russia to implement EU directives in the field of copyright into their national legislation.[1] The status of foreign works and achievements in Russia, hence, should be studied thoroughly.

Section 1. National Legislation

§ 1. Copyright

814. The Russian Copyright Law is applicable to three categories of works:

— those disclosed in the territory of the Russian Federation[2] irrespective of the nationality of the author or his legal heirs;
— those not disclosed but located in the territory of the Russian Federation in an objective form[3] irrespective of the nationality of the author or his legal heirs;
— those created by Russian authors either disclosed abroad or located abroad in an objective form.[4]

1. On the external pressure on Russia from the US and the European Union, *supra*, Nos.542 ff.
2. The "disclosure of a work" is the act performed with the author's consent which first makes the work accessible to the public by publication (*opublikovanie*), public presentation, public performance, broadcasting or other means (art.4 CL 1993). See, also, *supra*, No.694.

   By virtue of art.5 (2) CL 1993, a work is also considered to have been published in the Russian Federation if it was published on the territory of the Russian Federation in the course of thirty days after the date of first publication abroad. Hence, foreign authors and publishers can protect their work even if they do not enjoy protection by a treaty (Newcity 1993a, 362). Note that here the term is "publication" of a work, *i.e.*, "the putting into circulation of copies of the work with the consent of the author of the work in sufficient quantity to meet the reasonable needs of the public, due account being taken of the character of the work" (art.4 CL 1993. See *supra*, No.694). Other forms of disclosure can, thus, not lead to the application of this particular rule.
3. The phrase "objective form" as one of the copyright requirements for protection cannot be taken as equivalent to "fixation on a material support" (*supra*, No.645), but as a point of attachment in conflict of laws it can hardly be understood in a different manner.
4. Art.5 (1) CL 1993.

815.Article 5 (3) CL 1993 makes explicit that the author of a work is determined by the law of the country of origin (*lex loci originis*), and not by the country where protection is sought (*lex loci protectionis*).[5] In this way, the Russian legislator has followed the example of French jurisprudence and set a good example for US courts.[6]

§ 2. Neighboring Rights

816. With regard to the performing artists, the Copyright Law is applicable to

— the performances of Russian performing artists;
— the performances which took place for the first time in Russia;
— the performances which were fixed in a phonogram protected by the CL 1993; and
— the performances which were broadcast in a program protected by the CL 1993 without having previously been recorded on a phonogram (*i.e.*, "live").[7]

The rights of phonogram producers are protected if the producer of the phonogram holds Russian nationality or is a legal person with official residence in Russia or if the phonogram is first published in Russia.[8]

The rights of the broadcasting or cable organizations are acknowledged by the Copyright Law, if these organizations are officially resident in Russia and make broadcasts with transmitters situated on the territory of the Russian Federation.[9]

5. The International Intellectual Property Alliance (IIPA) thus succeeded in its aims. It had insisted that the Government of the US ensure in its policy with respect to the (then) USSR "that authorship of U.S. works made for hire is viewed as determined by U.S. law", see IIPA Report on 'Copyright laws in Eastern Europe and the U.S.S.R.', published on 20 November 1990, *World intellectual property report*, 1991, No.1, 6 and 20-22.
6. US 2nd Circuit Court of Appeals, *Itar-Tass Russian* v. *Russian Kurier, Inc.*, 27 August 1998 (also published in German translation in *Grur Int*., 1999, 639 with consenting comment by H. Schack), in which it is recognized that the law of the country with the closest relationship to the work will apply to settle the ownership question. Generally, the laws of the country where the work originated will control in deciding who initially owns the copyright. See, also, P.L.C. Torremans, "The law applicable to copyright: which rights are created and who owns them?", 188 *R.I.D.A.* April 2001, 77 ff.
7. Art.35 (1) CL 1993.The nationality of the performing artist does not appear in the Convention of Rome as a relevant criterion to determine the applicable national law (art.4); see, also, Prins 1994a, 28.
8. Art.35 (2) CL 1993.
9. Art.35 (3) CL 1993. On satellite broadcasts, see Parker 450.

Section 2. International Agreements

§ 1. General

817. The following subject matters are protected by copyright or neighboring rights in Russia to the extent provided by international agreements to which Russia is a party:[10]

— works of non-Russian authors either published abroad, or unpublished, but located abroad;
— performances abroad by non-Russian performers;
— phonograms and performances fixed in phonograms which are published abroad and of which the producer does not hold Russian nationality or have an official residence in Russia;
— broadcasts and the performances which are broadcast by broadcasting and cable organizations not officially resident in Russia or by those resident in Russia which make their broadcasts with transmitters situated abroad.

818. At the time of the disintegration of the USSR, this country was a Treaty party to the UCC (1952 version), the Satellite convention of Brussels, and a series of bilateral treaties. The disappearance of the Soviet Union, however, gave rise to great unclearness about the protection of foreign works in the new independent states including the Russian Federation. It was, thus, one of the first tasks of the Russian government to take initiatives to clarify the situation or to make new commitments.

819. As has already been said, the USSR in 1989 for the first time announced its coming accession to the Berne Convention.[11] Goldman was, however, over-optimistic when in 1990 he posited that "it is fair to assume that the USSR's expressed intention to join the Berne Union is genuine and the Soviet Union will accede to the Berne Convention in the months ahead".[12] The Russian government wished first to bring its internal legislation into line with the aforesaid agreements before signing new international commitments.

After Parliament had finally passed the Copyright Law on 9 July 1993, President El'tsin on 7 October 1993 ordered the Ministry of Foreign Affairs RF—together with important ministries and departments and with the Russian Authors' Association *RAO*, recognized by the same Edict—to formulate propositions on the RF's accession to the following international treaties: the Berne Convention (Paris, 1971), the UCC (Paris version, 1971), the International Convention for the Protection of Performers, Producers of Phonograms

10. For copyright: art.5 (1) CL 1993. See, also, Boguslavskii 1994a, 261. For the neighboring rights: art.35 (4) CL 1993, as amended by the Federal Law of 19 July 1995 (*SZ RF*, 1995, No.30, item 2866, *Rossiiskaia gazeta*, 26 July 1995). See, also, Savel'eva 1993b, 38.
11. *Supra*, No.596.
12. Goldman 413. Aoki 234; however, in the same year wrote that "the probability of Soviet accession to the Berne Convention would seem to be very low".

and Broadcasting Organizations of 26 October 1961 (the Rome Convention), the Geneva Convention for the Protection of Producers of Phonograms against Unauthorized Duplication of Their Phonograms of 29 October 1971, and the Multilateral agreement on the prevention of double taxation on the payment of author's fees (1979).[13] On 25 March 1994, President El'tsin issued a Resolution that decreed the completion of the preparations for accession to the BC, the UCC (1971), and the Convention of Geneva, ordered the continuation of the preparations for accession to the RC, and ventured forth the opinion that entry into the Multilateral Tax treaty was not opportune at that time.[14] Finally, on 3 November 1994, the Russian Government took the final decision to accede to the Berne Convention (1971), the UCC (version 1971), including Protocols I and II, and the Convention of Geneva (1971).[15]

§ 2. The UCC

820. As is already known, the USSR entered in 1973 into the original version of the Universal Copyright Convention (1952).[16] The Russian Federation, without formalities, adopted the USSR's international rights and duties proceeding from the UCC.[17] This meant that works published outside the USSR since 27 May 1973 by nationals of a UCC member state (with the exception of the USSR), as well as works published after 27 May 1973 in a UCC member state (with the exception of the USSR) and which were brought about by nationals of a state which had not acceded to the UCC, were protected in the Russian Federation on the basis of the principle of national treatment. Works which were published before the aforesaid date, are not protected in Russia.[18]

On the basis of the aforesaid Government Decree of 3 November 1994,[19] the Russian Federation on 9 March 1995 acceded to the Paris version of the UCC (1971) and to the two additional Protocols. New in the Paris Act in comparison with the original version of the UCC is the granting of special advantages for developing countries (art. Vbis, Vter, Vquater) and the acknowl-

13. Point 4 Ukaz Prezidenta RF, "O gosudarstvennoi politike v oblasti okhrany avtorskogo prava i smezhnykh prav", 7 October 1993, *SAPP RF*, 1993, No.41, item 3920.
14. Rasporiazhenie Prezidenta RF, "Voprosy prisoedineniia Rossiiskoi Federatsii k riadu mezhdunarodnykh konventsii v oblasti okhrany avtorskikh prav", 25 March 1994, *SAPP RF*, 1994, No.13, item 1020. The Convention on the prevention of double taxation has for lack of sufficient ratifications not come into force and does not have direct applicability as it refers to bilateral agreements. The entry of the RF would consequently have no practical significance: Dozortsev 1994, 61.
15. Point 1 PP RF, "O prisoedinenii Rossiiskoi Federatsii k Bernskoi konventsii ob okhrane literaturnykh i khudozhestvennykh proizvedenii v redaktsii 1971 goda, Vsemirnoi konventsii ob avtorskom prave v redaktsii 1971 goda i dopolnitel'nym Protokolam 1 i 2, Konventsii 1971 ob okhrane interesov proizvoditelei fonogramm ot nezakonnogo vosproizvodstva ikh fonogramm", 3 November 1994, *SZ RF*, 1994, No.29, item 3046, *Rossiiskaia Gazeta*, 30 November 1994.
16. *Supra*, Nos.116 ff. and 123 ff.

edgement of the most important exploitation rights, namely the exclusive right to authorize reproduction, public performance, and broadcasting (art.IVbis), rights which are now also acknowledged unambiguously in Russia's internal legislation. In its relations with other states which have signed the UCC, 1952 version, the RF is still bound by this original Geneva version; in its relations with the states which acceded to the version of Paris of 1971, Russia is bound by this second, revised version.[20]

§ 3. The Moscow Agreement

821. Because of the strictly territorial nature of copyright,[21] the disintegration of the USSR resulted in great unclearness in the mutual relations of the different independent states which appeared amid the ruins of the Soviet Union,[22] a situation of which piratical publishing enterprises and producers from other parts of the former Soviet Union took advantage.[23] The relations between the various CIS states and third states was also unclear.

17. After the disintegration of the USSR, Russia adopted the entire system of treaty obligations of the USSR (Lukashuk 1993, 241). In a special note of the Russian Ministry of Foreign Affairs of 13 January 1992 to all diplomatic representatives in Moscow, the Russian Federation communicated that it would maintain all rights and fulfill all obligations proceeding from treaties signed by the USSR, and that is why it asks the other States "to consider the Russian Federation as a party to all international treaties in force in the place of the USSR" (*Diplomaticheskii Vestnik*, 1992, No.10, 34). With regard to the Russian Federation's membership of the UN and its specialized organizations (including WIPO) President El'tsin—in a letter of 24 December 1991—informed the Secretary-General of the UN that "the membership of the Soviet Union in the Security Council and all other United Nations organs was being continued by the Russian Federation with the support of the countries of the Commonwealth of Independent States". He repeated in this letter furthermore that Russia remained responsible for all rights and duties of the former USSR under the UNO charter (United Nations: Press Release ORG/28 of 8 January 1992, 1). The heads of state of the other former Union Republics had indeed, in a decision of 21 December 1991, allowed Russia to continue the USSR's membership of the UN: "Reshenie Soveta glav gosudarstv Sodruzhestva nezavisimykh gosudarstv", *Izvestiia* and *Pravda*, 23 December 1991. See, also, Beemelmans 358-359; Klimenko 10; Schweisfurth 1994a, 115-119; M. Weyer, "Die Mitgliedschaftsrechte der ehemaligen Sowjetunion in den Vereinten Nationen", *ROW*, 1992, 171.
18. On the possible protection of works created before 27 May 1973, but which were afterwards published in a Union Country, see *supra*, No.117, note 153.
19. Point 1 PP RF, "O prisoedinenii Rossiiskoi Federatsii k Bernskoi konventsii ob okhrane literaturnykh i khudozhestvennykh proizvedenii v redaktsii 1971 goda, Vsemirnoi konventsii ob avtorskom prave v redaktsii 1971 goda i dopolnitel'nym Protokolam 1 i 2, Konventsii 1971 ob okhrane interesov proizvoditelei fonogramm ot nezakonnogo vosproizvodstva ikh fonogramm", 3 November 1994, *SZ RF*, 1994, No.29, item 3046, *Rossiiskaia Gazeta*, 30 November 1994.
20. Art.IX (4) UCC (Paris, 1971).
21. A.G. Svetlanov, in Boguslavskii 1994b, 439.
22. Elst 1994, 145.

To bring clarity, on 24 September 1993 the CIS states signed in Moscow an Agreement on cooperation in the field of the protection of copyright and neighboring rights (hereinafter: "the Moscow Agreement").[24] This was the execution of article 19 of the Charter of the CIS, which mentions the judicial protection of intellectual property as one of the domains of cooperation within the CIS.[25] This Agreement comes into operation when three CIS states have submitted their decree of ratification to the Government of Belarus. However, at the end of 1993 the Russian government informed a number of federal state organs (among which also was listed the collecting society *RAO*!), that Russia would fulfill its obligations resulting from the Moscow Agreement.[26] It regulates both the copyright relationships between the new independent states and third countries as well as the mutual relationships among the CIS-States themselves.

822.By virtue of article 1 of the Moscow Agreement, the Treaty States ensure within their territory

> the execution of the international obligations which proceed from the accession of the former USSR to the UCC (in the version of 1952), assuming that the date of coming into force of this Convention for the former USSR (27 May 1973) is also the date from which the Treaty States consider themselves committed by its provisions. Each Treaty State is to send the necessary communication of this to the Director-General of UNESCO.

By virtue of this provision, the CIS states undertake the duty of successor to the USSR in its relations with third parties, maintaining the date on which the UCC came into force in the USSR.[27] At present Azerbaidzhan, Belarus, Kazakhstan, the Republic of Moldova, the Russian Federation, Tadzhikistan,

23. For example, a Ukrainian publisher declared himself innocent in connection with the republication of a work which had been published for the first time after 1973 "as the Ukraine has never signed the UCC, and what happened before the independence of the Ukraine is irrelevant for us": V. Gubarev, "Copyright: return to the fold of civilization?", *Moscow News*, 1992, No.23, 15.
24. "Soglashenie o sotrudnichestve v oblasti okhrany avtorskogo prava i smezhnykh prav", 24 September 1993, *Vestnik Vysshego Arbitrazhnogo Suda RF*, 1994, No.2, 113-115; and in Dozortsev 1994, 318-320. See, also, the communication in *Diplomaticheskii vestnik*, 1993, Nos.19-20, 33-34. For a discussion, see Gavrilov 1994b, 394. Georgia only sought membership of the CIS in October 1993, a request which was granted in December 1993. It is not known whether Georgia afterwards signed the Moscow Agreement.
25. "Ustav Sodruzhestva Nezavisimykh Gosudarstv", signed on 22 January 1993 in Minsk, *Rossiiskaia gazeta*, 12 February 1993. *Supra*, No.178.
26. Appendix 1 PSMP RF, "Ob organizatsii vypolneniia obiazatel'stv Rossiiskoi Federatsii, vytekaiushchikh iz reshenii i soglashenii, priniatykh i podpisannykh na zasedaniiakh Soveta glav gosudarstv i Soveta glav pravitel'stv gosudarstv—uchastnikov Sodruzhestva Nezavisimykh Gosudarstv 24 sentiabria 1993 g.", 10 December 1993, *Diplomaticheskii vestnik*, 1994, No.5, 10-11.
27. Boguslavskii 1994a, 274.

and the Ukraine have formally confirmed their membership of the UCC (1952).[28]

823. The mutual copyright relationships among the CIS States are regulated by article 2 of the Moscow Agreement. This article determines that "in their mutual relations the Treaty States [..] [apply] the UCC (in the version of 1952) to works created after 27 May 1973 as well as to works protected according to the legislation of the Treaty States before this date on the same conditions which are fixed by the national legislature with regard to its own authors".[29] And a second paragraph adds to this the rule of the comparison of terms, as an exception to the principle of national treatment.

The fact that in their mutual relations the CIS states also protect works created before 27 May 1973 obviously has to do with the fact that the independent states involved originate from a unitary state with a single national copyright (which was differentiated by the various Union Republics according to slightly different modalities). At the end of 1991, this single copyright—like the USSR itself—fell apart into fifteen different national copyrights, for Soviet works created before as well as after 27 May 1973. The regulation contained in the Moscow Agreement is to prevent works of Soviet authors or works first published in the Soviet Union, which were protected by the single Soviet copyright, from being protected only in one of the new Republics after the disintegration of the USSR (on the basis of the new nationality of the author or the place of publication), and falling into the public domain in the other former republics of the Soviet Union, irrespective of whether the work had been created before or after 27 May 1973.[30]

824. The Treaty States also undertake to take the necessary measures for the development and ratification of draft laws guaranteeing protection for copyright and neighboring rights at the level of the Berne Convention, the Convention of Geneva, and the Convention of Rome (art.3). This commitment, however, does not go so far as to bind the Treaty parties to accede to these three Conventions.

Furthermore, the Treaty States commit themselves to joining the struggle against the illegal use of subject matter of copyright and neighboring rights (art.4), to contributing to the founding and functioning of national collecting societies and the signing of cooperation agreements between these collecting societies (art.5),[31] and to signing agreements on the prevention of double taxation of author's fees (art.6).

28. *Industrial Property and Copyright*, 1996, 37. See, also, S. Wagner, "Copyright Law and Enforcement in Russia and Eastern Europe", *International Publishers Association Bulletin*, 1994, No.1, 13-14.
29. See, also, Boguslavskii 1994a, 274.
30. Dozortsev 1994, 62.

825. As we have already mentioned, cooperation concerning intellectual property is anchored in the Charter of the CIS.[32] It is not impossible that, in future, even more agreements will be signed within the framework of the CIS on the mutual protection of copyright and neighboring rights or that the technique of model laws[33] may lead to a further harmonization of the copyright legislation within the CIS. In fact, it is undeniable that—in comparing the different legal systems of the newly independent States—much more integration and harmonization appears than politics are ready to admit.

§ 4. The Berne Convention

826. On 9 December 1994, the Russian Government deposited the act of entry into the Berne Convention (Paris, 1971) with the World Intellectual Property Organization. With regard to the Russian Federation, the BC came into force on 13 March 1995.[34]

31. On 11 August 1998, an expert group met at the Federal Service of Russia on Television and Radio Broadcasting, consisting of representatives of broadcasting organizations, collecting societies, the administration of the President, the Interstate Economic Council and the Federal Service itself. The expert group recommended that a Coordinating Council on Copyright of the CIS Members States would be founded on the basis of the 1993 Agreement. Its main function would be the coordination of the activities of the collecting societies, the exchange of information and experience, mutual consultations on the improvement of IP legislation, etc.
32. *Supra*, No.821.
33. Immediately after the disintegration of the USSR, Sukhanov 1992 (29) suggested that model laws should be adopted at an All-Union level, and sent for discussion to the parliaments of the different Republics. As examples he explicitly named a model law on copyright, on patents and on industrial models. See also Pigolkin 7. On 16 September 1992 the Interparliamentary Assembly of the CIS approved a Decree on the basic orientations for the harmonization of the legislation of the member states ("Osnovnye napravleniia sblizheniia natsional'nykh zakonodatel'stv gosudarstv—uchastnikov sodruzhestva", *Zakon*, 1993, No.1, 8), in which a number of domains were listed for which harmonization was considered purposeful. In this non-exhaustive list the rights on inventions, discoveries, industrial models and trademarks were mentioned (Tikhomirov 1993a, 83). Then, on 9 October 1992, the Council of Heads of State approved an Agreement on the principles of harmonization of the economic legislation of the member states of the CIS ("Soglashenie o printsipakh sblizheniia khoziaistvennogo zakonodatel'stva gosudarstv—uchastnikov sodruzhestva", *Zakon*, 1993, No.1, 4-5. This agreement was signed by Russia, Belarus, Armenia, Kazakhstan, Kyrgyzstan, Uzbekistan, and Tadzhikistan. See N. Kartsev, "Ekonomicheskaia integratsiia—neobkhodima", *Zakon*, 1993, No.1, 6). In this agreement, the Contracting States undertook to cooperate in order to harmonize, among other things, civil law (including copyright?) and, again, the legislation on inventions, industrial models and trademarks (Tikhomirov 1993a, 83; Tikhomirov 1993b, 47-50). The practice of the harmonization by non-binding model laws finally found its affirmation in art.26 para.2. Treaty on the Economic Union (*supra*, No.178). In fact, a model Copyright Law was indeed adopted by the Interparliametary Assembly of the CIS, but it did not really influence Russian law; on the contrary, it more or less served as a way to "export" Russia's 1993 Copyright Law.
34. *Industrial Property and Copyright*, 1995, 43.

827. When it became clear that Russia would accede to the BC, a lively discussion began within the country on the issue of whether older foreign works protected in other members of the Berne Union would have to be protected in Russia as of the date of entry into force of the Berne Convention in Russia.[35] Gavrilov warned of the serious consequences, which accession to the BC "with retroactive force" would have for the Russian economy.[36] He quite rightfully pointed out that the US, which were notably pressuring Russia to grant retroactive protection to US works, were very badly placed to demand that Russia accede to the BC with retroactive force as it were precisely the US which had created a precedent by rejecting the application of the retroactivity rule in article 18 (1) BC at their entry into the BC.[37]

35. Pozhitkov 1994, 80-81.
36. With this, he warned against American "biznesmeny" who approached Russian civil servants with the request to join the BC retroactively: "they represent the interests of American private business and the American state. But we have to think of our own interests!" (E.P. Gavrilov, "Prisoedinenie Rossii k Bernskoi konventsii ob avtorskikh pravakh i knizhnyi biznes", *Knizhnyi biznes*, 1 December 1993). This was a clear reference to the actions of various American interest groups who insisted both to their own government and directly to Russian functionaries that American works, which were published before 1973, should be protected by the Russian authorities: see, *e.g.*, International Intellectual Property Alliance (IIPA) Report on "Copyright laws in Eastern Europe and the U.S.S.R.", published on 20 November 1990, *World Intellectual Property Report*, 1991, No.1, 6 and 20-22; B.A. McDonald, "Russia. Copyright bill gets through the first round", *Copyright World*, March 1993, 11-12; the IIPA Status Report on Copyright Revision and Anti-Piracy Activities in Selected Target Countries, February 1993, unpublished; S. Wagner, "Copyright law and enforcement in Russia and Eastern Europe", *International Publishers Association Bulletin*, 1994, No.1, 13. See, also, the joint declarations of 13 November 1992 of the Russian/U.S. intellectual property task force: "Russian/U.S. Task Force Pledges Support for New Copyright Law", *World Intellectual Property Report*, 1992, No.6, 334; Boffey 110-111; and the view of the American Copyright Office: J.F. Baker, "Crisis in Russian Publishing", *Publishers Weekly*, 22 March 1993. In Russia, there was a fear that joining the BC would replace the iron curtain with a financial curtain: I. Surzhenko, "Piracy to pay no more", *Financial & Business News*, 1993, No.18, 13.
37. E.P. Gavrilov, "Prisoedinenie Rossii k Bernskoi konventsii ob avtorskikh pravakh i knizhnyi biznes", *Knizhnyi biznes*, 1 December 1993. The "Berne Convention Implementation Act" of 1988 (*Public Law*, 100-568, 31 October 1988 (H.R. 4262)) indeed stipulates that "Title 17, United States Code, as amended by this Act, does not provide copyright protection for any work that is in the public domain in the United States" (art.12). The US hereby rejected, clearly in contravention of art.18 BC, the retroactive application of the Convention of Bern: see, *e.g.*, J.A. Baumgarten and C.A. Meyer, "Effects of U.S. adherence to the Berne Convention", *Bijblad Industriële Eigendom*, 1989, 116; Deters 985-997; D. Nimmer, "Conventional Copyright: A Morality Play", *Entertainment Law Review*, 1992, 94-95; A. Nordemann and A. Scheuermann, "Der Beitritt der US zur Revidierten Berner Übereinkunft—Bericht über ein Berliner Urheberrechts-Symposium", *Grur Int.*, 1990, 951-954; O. Regnier, "Who Framed Article 18? The Protection of Pre-1989 Works in the US under the Berne Convention", *EIPR*, 1993, 400-405.

828.Let us have a closer look at this article 18 BC. Article 18 (1) BC prescribes that the BC "shall apply to all works which at the moment of its coming into force have not yet fallen into the public domain in the country of origin through the expiry of the term of protection". This, and also the following paragraphs of article 18, shall apply equally in the case of new accessions to the Union.[38] An acceding State should, consequently, from the moment of entry grant protection to all works which in their (Union) country of origin have not fallen into the public domain due to the expiry of the period of protection irrespective of whether they are unpublished or published.[39] Conversely, works originating in the acceding State, and which were in the public domain within the Berne Union for reasons other than the expiry of the term of protection, are granted full protection in the Berne Union from the coming into force of the BC in the acceding State onwards.[40]

Article 18 (2) BC adds to this that "if through the expiry of the term of protection which was previously granted, a work has fallen into the public domain of the country where protection is claimed, that work should not be protected anew". This determination prevents the renewal of protection under the Berne Convention of a work which, at the time of accession, had come into the public domain in the State in which protection had ceased due to the expiry of the formerly granted period of protection. This formerly granted period of protection cannot obviously mean that of the BC itself. It is, however, possible that the intended works in the country, in which the protection is claimed, used to be protected there on the basis of the national legislation on the basis of a bilateral agreement or on the basis of the UCC. If that protection has ceased through the expiry of the then period of protection, copyright protection will not revive by entry into the BC.[41]

829.The revival of expired copyright, naturally, gives rise to many questions with regard to the rights of the users who thought they could rely on the continued free use of works in the public domain. To come some way towards meeting the just expectations of the holders of "acquired rights," the BC allowed that

> the application of this principle [of retroactivity] shall be in accordance with the provisions contained in special Conventions to that effect existing or to be concluded between countries of the Union. In the absence of such provisions, the respective countries shall determine, each insofar as it is concerned, the manner in which the said principle is to be applied.[42]

In practice, use is made only of the second possibility, namely the national legislator can adopt a regulation with regard to the manner in which the principle of retroactivity will be applied.

38. Art.18 (4) BC.
39. Deters 985; Ricketson 671.
40. Deters 985.
41. Ricketson 675.
42. Art.18 (3) BC.

The BC here leaves a great deal of play to the states to safeguard certain rights which users obtained at a time prior to legal protection.[43] The States cannot, however, go so far as to exclude all retroactivity; they can only regulate the modalities of the application of the principle.[44] And yet, this is exactly what the US did: foreign works which had entered the public domain in the US, *e.g.*, because of the non-fulfillment of the formalities, remained unprotected even after the US's accession to the BC.[45]

Such an attitude was very provoking for a nation which, on the one hand, at an international level considered itself the equal of the US, but for which, on the other hand, entry into the BC would almost certainly have a deleterious effect on its foreign trade balance, especially if accession to the BC were to make the use of older foreign works subject to the exclusive authorization from the foreign holder of copyrights and the payment of royalties to them.[46]

830. When the Russian Government took the definitive decision on accession to the BC, a declaration was entered in the instrument of accession stating that "it is understood that the effects of the above-mentioned Convention [BC] shall not extend to the works which, at the date of entry into force of the said Convention in respect of the Russian Federation, are already in the public domain in its territory".[47] In almost the same phrases as the American legislator in the "Berne Convention Implementation Act", the Russian government thus simply rejects the retroactivity rule of article 18 BC. The US now

43. Ricketson 674.

44. "There is no basis on which the principle of retroactivity can be completely denied. The conditions and reservations can only be imposed on the 'application of the principle', that is, its carrying into effect: they cannot be imposed on the principle itself. Thus, it would not be permitted to deny retroactivity altogether in relation to a particular class or classes of works."

(Ricketson 675. Cf. Deters 995-996; Nordemann *et al.* 163; O. Regnier, "Who Framed Article 18? The Protection of Pre-1989 Works in the US under the Berne Convention", *EIPR*, 1993, 403)

45. See, *e.g.*, the remark of Cohen Jehoram in A. Nordemann and A. Scheuermann, "Der Beitritt der US zur Revidierten Berner Übereinkunft—Bericht über ein Berliner Urheberrechts-Symposium", *Grur Int.*, 1990, 953; O. Regnier, *l.c.*, 402-403. On this point Deters (996) writes:

"By denying retroactive protection altogether, the United States, in effect, is enjoying the best of both worlds. United States nationals may continue to exploit the works of foreign Berne authors while their own works are being pulled out of the public domain and protected in all Berne states utilizing a traditional interpretation of article 18."

46. Deters (996-997) had, nevertheless, warned:

"Although the existing members of the Berne Convention likely would not abandon their historical interpretations of article 18 in retaliation for the United States denial of protection, absolutely no reason exists why new adherents to the Convention could not rely upon the United States denial of retroactivity as precedent for a similar denial of protection in their own implementing legislation."

reaped what it had sown some years before.[48] What is more, the Republic of Moldova[49] and the Ukraine[50] have followed the Russian example and have also excluded every form of retroactivity at their respective accessions to the BC. However, Ukraine amended its Copyright Law in the summer of 2001, hereby recognizing the application of the retroactivity rule of article 18 BC.

831. The irony now is that the US, with the incorporation of the TRIPS-Agreement,[51] have revised their former point of view and have restored copyright on works of a national or of a person domiciled in a Member State of the WTO or a state which has joined the BC, which are still protected in their "source country" but which had entered the public domain in the US as a consequence of the non-fulfillment of formalities.[52] The purpose is not only to bring US legislation into conformity with article 18 BC, but, also, to strengthen the US's position in negotiations the aim of which is to acquire retroactive copyright protection abroad for American works. And it was precisely Russia—a potentially large market for American works—which cited the US's non-application of article 18 BC as justification for itself not extending protection in Russia to older American works, which were in the public domain in Russia.[53] When Russia joins the WTO, it will, like the US, be forced to review its attitude. Moreover, on 29 September 1999, the European Commission and the Russian Federation adopted a list of priority actions on intellectual property

47. *Industrial Property and Copyright*, 1995, 43; Para.2 PP RF, "O prisoedinenii Rossiiskoi Federatsii k Bernskoi konventsii ob okhrane literaturnykh i khudozhestvennykh proizvedenii v redaktsii 1971 goda, Vsemirnoi konventsii ob avtorskom prave v redaktsii 1971 goda i dopolnitel'nym Protokolam 1 i 2, Konventsii 1971 ob okhrane interesov proizvoditelei fonogramm ot nezakonnogo vosproizvodstva ikh fonogramm", 3 November 1994, *Rossiiskaia Gazeta*, 30 November 1994. According to W. Nordemann, "Der Urheberrechtsschutz von Angehörigen der Russischen Föderation in Deutschland", *ZUM*, 1997, 523, the reservation made by the Russian government has no legal force, as a state cannot unilaterally reject one of the provisions of an international convention to which it accedes (unless this convention so permits); moreover the Russian government is bound by the priority given to international copyright treaties in art.3 CL 1993. All this may be true, but it is still up to Russian judges to come to the same conclusion...
48. Note, moreover, that under Hollywood pressure the Trade Agreement between the US and Russia explicitly stipulates that, from whatever moment both states may have acceded to the BC, the protection of works existing at that date will be determined in accordance with art.18 of the Berne Convention (*supra*, No.560, note 104). The US could not have suspected that Russia would adopt the American interpretation of art.18, contrary to the interests of the American film and publishing industries.
49. *Industrial Property and Copyright*, 1995, 297.
50. *Industrial Property and Copyright*, 1995, 297.
51. See esp. art.70 (2), (3) and (4) TRIPS.
52. *Public Law* 103-465 (the GATT implementation legislation), § 514, reformulating § 17 U.S.C. § 104A. See Maggs 307 ff.
53. P.J. Sleven, and E.J. Weisberg, "Gatt Implementation Bill Restores Copyright in Foreign Works", *J. Copyright Soc'y U.S.A.*, 1995, 272-273.

rights to be implemented by the Russian Federation before the 1 of July 2000. One of the priorities is the retroactive protection of foreign works (and sound recordings) by Russia.[54]

832. Every work which has as country of origin a member state of the Berne Convention, and thus fell into the public domain in the Russian Federation before Russia's accession to the BC,[55] should—on the basis of article 18 BC—enjoy protection in Russia from 13 March 1995 (the date on which the RF's accession to the BC came into effect) onwards, on condition that it has not fallen into the public domain in its country of origin due to the expiry of the period of protection.

The reservation which Russia formulated at its entry into the BC, however, prevents the application of this rule. Consequently, Russia refuses to protect not only the works with a Union country as country of origin, which due to the expiry of the protection term had already fallen into the public domain of that country by 13 March 1995 (as allowed by art.18 (2) BC), but, also, those works which at the same date have not fallen into the public domain in the country of origin for the same reason.

Put differently, Russia only protects those works, which have a Union country as origin and which were created after 13 March 1995.

833. The importance of Russia's rejection of the retroactive application of the BC is less extreme in its relations with those countries, which have entered the UCC as well as the BC, as is the case for most Western European countries and the US. The effect of the Russian Federation's attitude limits itself in this case to works created and published before 27 May 1973[56] in a signatory state of the UCC (with the exception of the USSR). These works remain in the public domain in Russia due to the non-application of the retroactivity rule[57] even if, on 13 March 1995, they are not in the public domain in the country of origin because of the expiry of the period of protection. Works published after 27 May 1973, enjoy further protection under the UCC and, now obviously, also under the BC.

834. The economic advantage for Russia is clear: Russia only very gradually steps into the international system of protection of the Berne Convention. Author's fees only have to be paid for "new" works (*i.e.*, those published on or after 27 May 1973) from Union Countries. It is not unimportant to notice

54. The Parliamentary Cooperation Committee EU/Russia had already at its meeting of 23 June 1998 formulated a recommendation to the Russian authorities to recognize retroactive protection for foreign works and sound recordings (*Europe*, 27 June 1998).
55. Art.28 (1) para.2 CL 1993.
56. Or, a later date, for those countries having joined the UCC after the USSR.
57. Unless they were granted retroactive protection under one of the bilateral treaties which the USSR concluded with a number of States. On the further application of these treaties by the RF, see *infra*, No.838.

that the main "beneficiaries" of Russia's refusal to recognize international retroactivity are the Russian state enterprises and institutions in the cultural sector.

Moreover, the chance is great that the Russian market for the "new" works will remain small for a long while, since that the exploitation of "old" works that have become accessible to the Russian public for only a decade and a half, is completely free.[58]

§ 5. The Conventions of Rome, Geneva, and Brussels

835. On 9 December 1994, Russia deposited its act of entry into the Convention of Geneva with WIPO. This Convention came into force for the Russian Federation on 13 March 1995[59] and has no retroactive effect.[60] Only phonograms recorded after 13 March 1995 and produced by nationals of another Contracting State are to be protected in Russia from duplication without the producer's consent, and from the importation of such duplicates, provided that any such duplication or importation is for the purpose of distribution to the public, and from the distribution of such duplicates to the public.[61]

836. Accession to the Convention of Rome has been postponed because no organization for the collective administration of the rights of performing artists had yet been founded in Russia; consequently, Russia cannot guarantee the effective protection of the rights of foreign performers.[62]

837. In 1989 the USSR joined the Brussels Convention of 21 May 1974 relating to the distribution of program-carrying signals transmitted by satellite. Russia continues to adhere to this Convention—the Russian text of which is authentic.[63]

§ 6. Bilateral Agreements

838. With regard to the bilateral copyright treaties Russia also seems to adhere to the principle of continuity. Russia at no time indicated a desire to discontinue the agreements with Hungary, Bulgaria, Czechoslovakia, Poland, Austria, and Sweden—which were signed either for an indefinite period or for a tacitly renewable period of three years.[64] Austria and Sweden have each individually

58. Along the same lines: Boffey 111.
59. *Industrial Property and Copyright*, 1995, 43.
60. Art.7 (3) GC. For future reference it is, however, not unimportant to be aware that under art.14 (6) TRIPS the provisions of art.18 BC (providing for retroactivity) *mutatis mutandis* will also have to be applied to the rights in phonographic recordings of performing artists and phonogram producers. The present situation is therefore an obstacle if the Russian government decides to move towards accession to WTO.
61. Art.2 GC. See, also, Gavrilov 1996, 161-162, No.21.
62. Dozortsev 1994, 60-61. Moreover the RC, like the GC, has no retroactive force (art.20 (2) RC).
63. Art.12 (1) Brussels Convention (1974). For the Russian text, see Dozortsev 1994, 312-317.

with the Russian Government drawn up a list of those bilateral treaties of which the continued force is confirmed; in both cases, the bilateral agreement on the mutual acknowledgement of copyrights is one of them.[65] With regard to the Czech and Slovak Republics, the Agreement between the former USSR and the former Czechoslovakia will also continue in force.[66] Hungarian legal theory, however, reports negatively on the applicability of the bilateral treaty between Hungary and the former USSR.[67] With regard to the other countries, the situation is at this moment "not entirely clear".[68] In an informative Letter of 2 September 1997, the Russian Ministry of Foreign Affairs confirmed the continuing validity of the bilateral agreements with Austria, Hungary, Poland, The Czech Republic, and Slovakia, and Sweden, but indicated that the agreement with Bulgaria (and the GDR) were no longer in force.[69]

839. The importance of these bilateral agreements was mainly to be found in the retroactive force, which was granted in the relation between both Treaty Parties to the UCC. Given Russia's refusal to acknowledge the BC's retroactivity, these agreements—insofar as they are still in force—retain their significance. By virtue of these Agreements (including the Protocol to the Agreement with Austria) published works by nationals of, respectively, Hungary, Bulgaria, the Czech Republic, Slovakia, Poland, Austria, and Sweden, irrespective of the place

64. Boguslavskii 1994a, 261 and 273 confirms that these bilateral agreements continue to apply.
65. For Sweden, see *Sveriges internationella överenskommelser*, 1993, No.32, 2. For Austria: private communication of Dr. W. Dillenz, 3 May 1995. With regard to bilateral agreements with Eastern European states which subsequently broke up, Austria in general began "vom Tabula-rasa-Grundsatz, ist aber während einer Übergangszeit zu pragmatisch weiterer Anwendung der Verträge bereit, bis einvernehmlich eine ausdrückliche Regelung getroffen ist. Diese Lösung soll den Unterschied zwischen dem Tabula-rasa-Grundsatz und dem Prinzip der Fortgeltung minimieren" (Beemelmans 372).
66. Private communication Dr. J. Svidron, Bratislava, 27 April 1995. See, also the Czech copyright handbook, with *status iuris* 1 January 1993, in which the bilateral agreement is presented as binding in law: K. Knap, *Autorsky zakon a predpisy souvisici*, Prague, 1993, 261-267.
67. G. Boytha, "Republic of Hungary", in S.M. Stewart, (ed.), *International Copyright and Neighboring Rights*, II, London, Butterworths, 1993, 96 ("The dissolution of the Soviet Union and recent developments in the Russian Federation as well as in other states of former Union have rendered its provisions void"). Russia is engaged in negotiations with Hungary for the drawing up of an inventory of those bilateral treaties which have retained their force: PP RF, "O podpisanii Protokola mezhdu Pravitel'stvom Rossiiskoi Federatsii i Pravitel'stva Vengerskoi Respubliki ob inventarizatsii dvustoronnikh dogovorov", 4 March 1995, *SZ RF*, 1995, No.11, item 998.
68. Dozortsev 1994, 68.
69. As quoted by Silonov (48-50), who also refers to a bilateral treaty with Madagascar of 19 April 1988 (the continued applicability of which is confirmed by the Ministry of Foreign Affairs), and with Cuba of 30 May 1985 (status unclear). These conventions apparently were never published.

of publication, as well as the works which were published for the first time on the territory of Poland, Hungary or Austria by non-nationals,[70] are protected in Russia, even when publication took place before 27 May 1973.[71]

840.More recently this list of bilateral agreements has been extended with an Agreement of 25 June 1993 between the Government of the Russian Federation and the Government of the Republic of Armenia on the mutual protection of copyrights.[72] This mutual protection is granted both to works of nationals of the Contracting Parties, irrespective of the place of publication, and to works of non-nationals published in Russia or Armenia (art.2) As an exception to the national treatment principle, the rule of the comparison of terms applies (art.3). The word "publication" is defined according to the example of articleVI UCC, but extended to include the distribution to the public of copies of a work from which it can be *auditively* and, thus not only *visually*, perceived (art.4). This Treaty applies to the exploitation of all works of which the term of protection is still running in accordance with article 3 (art.6). Moreover, the Treaty also contains provisions concerning the encouragement of the distribution of works from the other treaty state (art.1), on the prevention of double taxation (art.5), on the encouragement of the signing of mutual agreements between the national collecting societies (art.8), and on the mutual duty of information with regard to the copyright legislation (art.9). Rights and duties from other international agreements remain unaffected (art.10).The agreement came into force from the moment of signing.

With this bilateral agreement, Russia continues the tradition of bilateralism in the area of copyright. In the past as well as now, not so much the material-legal provisions and the clauses on conflict of laws are noticeable but, rather, the integration of cultural-political provisions in a copyright agreement.[73]

841.On 25 April 1996 President El'tsin signed in Peking an agreement with China on the protection of intellectual property rights.[74] In doing so, both

70. Art.2 of the respective agreements with Poland and Hungary. The bilateral agreement with Austria refers in its art.2 to the UCC for the definition of its area of application. This indirectly confirms that works of nationals of third states which were first published in Austria or the USSR, enjoy protection in the other treaty state under the provisions of the bilateral agreement. The other bilateral agreements contain no such provision.

71. Or, a later date, in the relationship with those countries which joined the UCC after the USSR: Bulgaria: 7 June 1975; Poland: 9 March 1977.

72. "Soglashenie mezhdu Pravitel'stvom Rossiiskoi Federatsii i Pravitel'stvom Respubliki Armeniia o vzaimnoi okhrane avtorskikh prav", 25 June 1993, *BMD*, 1994, No.5, 46-47. For a discussion, see Gavrilov 1994b, 394. See, also, art.8 "Soglashenie mezhdu Pravitel'stvom Rossiiskoi Federatsii i Pravitel'stvom Respubliki Armeniia o sotrudnichestve v oblasti kul'tury, nauki i obrazovaniia", 13 November 1995, *Diplomaticheskii vestnik*, 1995, No.12, 28-32 ("The parties will contribute to the development of the cooperation between the appropriate organizations of the two countries with regard to ensuring the mutual protection of copyright and neighboring rights").

73. See Majoros 121.

States not only confirmed their existing international commitments concerning copyright, they also declared the principle of national treatment mutually applicable to citizens, legal persons, and organizations without legal personality of both states in the area of intellectual property in the broadest sense, also outside all international obligations. Moreover, they grant mutual retroactive protection to the works of literature, science, and art of Russian and Chinese citizens.[75]

The latter, in particular, causes problems for Russia in its relation to the European Union. Indeed, Russia is bound to grant both European companies and nationals most-favored-nation treatment,[76] and this, by virtue of a unilateral Russian declaration, from the day of coming into force of the Interim agreement,[77] *i.e.*, 1 February 1996.[78] By virtue of the bilateral agreement with China, Russia grants an advantage (retroactive protection) to Chinese authors, which it has refused to grant to works with (*inter alia*) an EU Member State as country of origin at the moment of its accession to the Berne Convention. At first sight, this would seem to be an advantage granted by Russia and China on the basis of effective reciprocity,[79] but this is an appearance only. China already granted retroactive copyright protection to Russian works from the moment of its entry into the BC by virtue of article 18 of this Convention. By the bilateral agreement with China, Russia now grants, in fact *unilaterally*, the same advantage to Chinese works. China does not undertake new commitments on this point; Russia does.[80]

74. "Soglashenie mezhdu Pravitel'stvom Rossiiskoi Federatsii i Pravitel'stvom Kitaiskoi Narodnoi Respubliki v oblasti okhrany prav intellektual'noi sobstvennosti", *Problemy intellektual'noi sobstvennosti*, 1996, No.10, 46. See, also, *Frankfurter Allgemeine Zeitung*, 26 April 1996, and PP RF "O zakliuchenii Soglasheniia mezhdu Pravitel'stvom Rossiiskoi Federatsii i Pravitel'stvom Kitaiskoi Narodnoi Respubliki o sotrudnichestve v oblasti okhrany intellektual'noi sobstvennosti", 2 November 1995, *SZ RF*, 1995, No.45, item 4359. See, also, art.16 of the Agreement on good neighborship, friendship and cooperation concluded between both states in Moscow on 16 July 2001, the text of which was published in *Rossiiskaia gazeta*, 17 July 2001. ("The Contracting States guarantee the protection of intellectual property, including author's and neighboring rights, in accordance with their national legislation and the international agreements to which they adhere.")
75. Art.2 (2):
    "Literary, scientific and artistic works of Russian and Chinese citizens, that at the moment of coming into force for both states of the Berne Convention for the Protection of Literary and Artistic Works have not fallen into the public domain in the territory of the other Party through the expiry of their terms of protection, shall be granted protection for the term established by the legislation of the State of that Party, where the work is used, from the moment of coming into force of this Agreement."
76. Art.54 (1) PA *juncto* para.4 Annex 10.
77. *OJ*, L 247/27, 13 October 1995.
78. *OJ*, L 316/44, 30 December 1995.
79. Whereby the advantage granted would fall under the provision of exceptions in para.5 of Appendix 10 of the PA.
80. Elst 1998, 125-127.

However, all this requires the entry into force of the bilateral agreement with China, which—according to an informational letter of 28 June 2000 of Russia's Ministry of Foreign Affairs—is not yet the case.[81]

842.For the sake of completeness, we should finally mention that many bilateral treaties on cooperation in the area of culture, science, and education also contain provisions in which both Contracting States commit themselves to encouraging cooperation in the area of the protection of copyrights and neighboring rights.[82]

81. As quoted by Silonov 50.

82. See, *e.g.*, art.15 "Soglashenie o sotrudnichestve mezhdu Pravitel'stvom Rossiiskoi Federatsii i Pravitel'stvom Korolevstva Daniia v oblasti kul'tury, nauki i obrazovaniia", 4 November 1993, *Diplomaticheskii vestnik*, 1993, Nos.23-24, 30 (Denmark).

Chapter VI. Infringements and Remedies

Introduction

843. The Copyright Law devotes an entire Title (V) to the enforcement of copyright and neighboring rights. The sanctions for infringements of copyright and neighboring rights can be under civil, criminal, or administrative law,[1] but as part of the civil law the Copyright Law regulates only civil liability.[2] The criminal sanctions are in the Criminal Code, while the administrative-law sanctions are set out in the Code for infringements of administrative law and in a number of Government decrees.

Section 1. Civil Liability

844. Counterfeiting is deemed to have taken place when the manufacture and distribution of copies of a work and phonogram occurs in violation of copyright and neighboring rights.[3] Copies of works or phonograms protected in the Russian Federation in agreement with the Copyright Law, which are imported into the Russian Federation without the permission of the holder of copyright and neighboring rights from a state in which these works and phonograms were never protected (or are no longer protected), are also deemed to be counterfeit.[4] As already stated above, despite the acknowledgement of a right to prevent so-called parallel import, the Russian legislator in defining the remedies apparently does not regard the importation of copies of works and phonograms which were brought onto the market abroad by, or with, the permission of the author or the phonogram producer, to be a violation of copyright.[5]

845. The civil-law procedure for the courts of law, the courts of arbitration (*i.e.*, the commercial courts resolving disputes among merchants/entrepreneurs),[6] and the arbitration panels (*treteiskii sud*)[7] enable the owners of exclusive author's rights to act against infringers to request:

1. Art.48 (1) CL 1993.
2. Kostiuk 111. All clauses on civil liability apply on copyright infringements, especially Art.12 and 1064 ff. CC RF, see Dietz 1997, 47-48.
3. Art.48 (3) CL 1993. See, also, art.17 (2) Computer Law.
4. Art.48 (4) CL 1993. Compare art.17 (1) and (3) Computer Law. The customs office has as one of its basic functions the halting of illegal traffic across Russia's customs boundaries of subject matter of intellectual property (art.10 point 9 Customs Code RF (signed into law by President El'tsin on 18 June 1993)), but the Customs Code RF only provides a very summary mechanism through which the prohibition of the importation of goods on the grounds of intellectual property rights can be realized. The prohibited imported goods have to be exported again immediately by the importer or the transporter at their own expense, unless the confiscation of these goods is provided for (by legislation? by court decision?). If such re-export is impossible, the goods can be stored for up to 3 days in a customs depot (art.20 Customs Code RF). See N. Zolotykh, "Formirovanie sistemy pravovoi okhrany i transfera intellektual'noi sobstvennosti v Rossii", *Ross. Iust.*, 1997, No.3, 39-40.
5. *Supra*, No.703.

(1) the pronouncement of a declaratory judgment;
(2) the restoration of the *status quo ante* and a negative injunction (*i.e.*, orders to cease and desist from the violating actions or the threatened violation);
(3) at the option of the plaintiff:[8]
— either the indemnification for losses including lost profits,[9]
— or the recovery of the income the infringer received as a result of the infringement,[10]
— or statutory damages of an amount from 10[11] to 50,000 times the minimum wage as established by the legislation of the Russian Federation; and
(4) the taking of other measures provided for by the legislative acts with regard to the protection of their rights.[12]

846.Over and above the compensation granted by virtue of point 3, a court of law or arbitration court (but not an arbitration panel) can impose a fine amounting to 10 per cent of the sum awarded to the plaintiff by the court.[13] Moreover, the old procedural rule continues to apply, which provides that a court of law can declare its judgment, awarding compensation to the author for the use of his work, immediately applicable in whole or in part regardless of appeal.[14]

847.In addition to this, the court[15] must order the confiscation of all counterfeit copies of a work or phonogram and their subsequent destruction unless the owners of the exclusive rights request that these counterfeit copies

6. For an analysis of some copyright disputes before arbitration courts, see E.P. Gavrilov, "Avtorskie spory v arbitrazhnykh sudakh", *Knizhnyi biznes*, 1994, No.17-18, 6-7. In an informative letter of 19 October 1993, the Supreme Arbitration Court offered some comment on the new Copyright Law, but limited itself here to summarizing the contents of the CL 1993: Informatsionnoe pis'mo Vysshego Arbitrazhnogo Suda RF, *Vestnik Vysshego Arbitrazhnogo Suda RF*, 1994, No.1, 51, *Khoziaistvo i Pravo*, 1994, No.2, 157-160.
7. Art.49 (3) CL 1993. On the arbitration panels, see Annex No.3 to the Civil Procedure Code RSFSR. There are no specialized courts for hearing intellectual property issues in Russia.
8. Art.49 (1) para.2 CL 1993.
9. Compare art.15 (2) CC RF.
10. This possibility is missing in the Computer Law: Yakovlev 296.
11. Newcity 1993a, 367 here mistakenly gives 10,000. Art.18 (1) Computer Act RF names 5,000 as the minimum multiplicator.
12. Art.49 (1) para.1 CL 1993. This, also, refers to general civil remedies, as included in the former art.6 Fundamentals 1991 and now in art.12 CC RF. See, also, L.B. Gal'perin, and L.A. Mikhailova, "Intellektual'naia sobstvennost': sushchnost' i pravovaia priroda", in Gal'perin 32-33.
13. Art.49 (2) CL 1993.
14. Art.211 Grazhdanskoe Protsessual'nyi Kodeks RSFSR. For other relevant provisions concerning procedural law, see arts.80, 133-140, 419 and 432 Grazhdanskoe Protsessual'nyi Kodeks RSFSR, and *infra*, No.852. See also Stoyanovitch 193.
15. Arbitration panels do not have this power.

be rendered to them.[16] In the latter case, their value will be deducted from the total amount of the compensation awarded.[17] Furthermore, the court may (but is under no obligation to) order the confiscation of the materials and facilities used for the manufacture and reproduction of such counterfeit copies.[18]

848. It is clear that this arsenal of sanctions is likely to achieve much more than the regulation in the Soviet legislation in which the author, in case of violation of his copyright, had to satisfy himself with a remuneration equal to what he would have received according to administrative rules if the use of his work would have been legal.[19] Consequently, the user was in no way encouraged to request the author's permission for the use of the work. Neither losses, which originated in the unlawful nature of the exploitation of the protected work (*e.g.*, loss of market share, investments which became useless) nor moral damages could be recompensed.

849. The most important innovation for the authors and the holders of neighboring rights is now the option, as an alternative to damages, to demand either the income (not the profit![20]) which the counterfeiter makes from the infringement upon copyright and neighboring rights,[21] or for the payment by the counterfeiter of a compensation of 10 to 50,000 legal monthly minimum wages (per month).[22] The author or holder of neighboring rights is, consequently, no longer obliged to prove the damage (or its extent) caused by the counterfeit.[23] The compensation is determined by the court according to the nature and the gravity of the infringement.[24] Thus, in an unpublished deci-

16. Art.49 (4) CL 1993, as amended by Federal Law of 19 July 1995 (*SZ RF*, 1995, No.30, item 2866, *Rossiiskaia gazeta*, 26 July 1995). Confiscation and destruction must be ordered, even if the plaintiff did not demand this (point 15 of the informational letter No.47 of the Presidium of the RF Supreme Arbitration Court of 28 September 1999 ("Obzor praktiki rassmotreniia sporov, sviazannykh s primeneniem zakona Rossiiskoi Federatsii 'Ob avtorskom prave i smezhnykh pravakh'"), see <www.rao.ru/law/lawarbitrage.htm>). In the original version of the Act, there was not yet mention of a judge sitting alone, and confiscation was an option, not an obligation (Pozhitkov 1996, 24). Art.18 (3) Computer Law still speaks of an option.
17. Gavrilov 1993a, XLIV, 1994c, 45 and 1995a, 696. Doubtfully: Yakovlev 296. See, explicitly, art.18 (3) Computer Act.
18. Art.49 (4) CL 1993, as amended by a Federal Law of 19 July 1995 (*SZ RF*, 1995, No.30, item 2866, *Rossiiskaia gazeta*, 26 July 1995). In the original version of this article, mention was only made of installations for reproduction, not for the manufacture of counterfeit copies. The earlier possibility of the courts to order the destruction of the materials and the technical equipment lapsed, however, after the amendment (see also Pozhitkov 1996, 24).
19. Pozhitkov 1994, 53-54; Savel'eva 1993a, 809; V. Smirnov, "Avtor tozhe chelovek", *Novoe vremia*, 1992, No.34, 50.
20. Gavrilov 1994c, 45 and 1995a, 695-696.
21. According to Gavrilov 1996, 224 since the coming into force of Part I of the Civil Code this is no longer even an alternative, but an additional compensation above the (to be proven) real damage.

sion of the local people's court of Ostankino in Moscow of March 1995, the broadcasting organization Ostankino was ordered to pay 300 minimum wages to the author of a musical fairy-tale, which had been broadcast without authorization. The court considered this to be a grave infringement of copyright. It took into account that the fairy-tale was part of the repertoire of a number of theaters, which would suffer a decline in demand from the public because of the unauthorized broadcasting of the work.

The legal right holder can—if s/he chooses the first alternative—consequently profit from the success of the infringing actions, but this does presuppose that he disposes over the turn-over figures and documents of the defending party to calculate this income. This is why the other alternative, the awarding of a damage-independent financial compensation ("statutory damages"), is usually simplest.[25]

The civil-law sanctions are made even more frightful by the imposition of a kind of civil-law fine (the profit from which goes not to the plaintiff, but to the state)[26] and confiscation of the counterfeited copies and the installation used for the counterfeiting.

850. Apart from this, we should also recall that in recent years the Russian law allows the awarding of monetary compensation for moral damages.[27] This is also the case in the Copyright Law. Indeed, in the remedies provided, this Law does not differentiate between the violation of property and non-property rights, so that the aforesaid sanctions also apply in case of the violation of one of the moral rights of the authors or the performing artists.[28] The Supreme

22. Considering the galloping inflation this (also to Russian standards very low) minimum wage is adjusted by the legislator a few times each year, but converted into Western currency it retains a roughly stable exchange value of US $10 to 12. The maximum compensation which can be awarded to the author or the holder of neighboring rights, therefore, amounts to approximately US $600,000.
23. Gavrilov 1993a, XLIII and 1993b, 14; Sergeev 296.
24. Savel'eva 1993b, 57; Gavrilov 1994c, 44-45.
25. One of the intentions of the "statutory damages" is to come to an amicable settlement, as the violator will always have to pay the minimum. This intended effect can, however, only be reached if the minimum is sufficiently high. It will hence also be important to see whether the Russian courts will interpret the legal provision in such a way that the minimum has to be applied to every work (title) or phonogram individually. *E.g.*, if a pirate is found to possess 200 different counterfeit works, are 1 x 10, or 200 x 10 minimum wages to be considered the lower threshold of "statutory damages"? (R.J. Rose, "Civil litigation for copyright Infringement. The California Video Piracy Program", unpublished manuscript of a lecture held on the WIPO-Symposium ("On the Enforcement of Copyright") of 21-23 June 1994 in Moscow).
26. In practice, this additional fine is, however, seldom enforced: Gavrilov 1996, 227.
27. *Infra*, No.955.
28. Gavrilov 1994c, 43-44. See, however, some recent court decisions, quoted by Gavrilov 2000, 1000-1001.

Court of the RF has unambiguously qualified "the moral or physical suffering which is caused by actions (or a lack of actions) [...] which damage the citizen's personal non-property rights (the right to be named, the right of authorship and other non-property rights, in agreement with the laws on the protection of the rights in the results of intellectual activity)" as moral damages, for which monetary compensation is due.[29]

851.On a procedural level, we have to point out the conservatory measures which can be ordered by the courts on the one hand, an injunction on the infringing actions and, on the other hand, the sequestration of counterfeit products to prevent the disappearance of evidence.

As security in actions for violations of author's and neighboring rights, a court, a judge alone, or an arbitration court may render an interim injunction, *i.e.*, a decision prohibiting the accused or a person who is reasonably suspected of being an infringer of copyright and neighboring rights, from performing specific acts (manufacture, reproduction, sale, rental, import, or other use provided for by the CL 1993, as well as transportation, storage, or possession for the purpose of release into circulation of the copies of works or phonograms suspected to be counterfeit).[30]

They may also render an interim decision to seize and confiscate all copies of the works and phonograms suspected to be counterfeit, as well as the materials and devices intended for their manufacture and reproduction.[31]

In case there are sufficient data concerning the infringement of author's and neighboring rights, the bodies of inquiry (*i.e.*, local police), the bodies of preliminary investigation (*i.e.*, civil servants-experts attached to the Procuracy, the Ministry of Interior or the State Security[32]), a court or a judge alone are obliged to take measures to search for and to seize copies of the works and phonograms, suspected to be counterfeit, as well as materials and devices intended for their manufacture and reproduction, and if necessary, to confiscate and deposit them.[33] These measures are not widely applied, partly because of unresolved technicalities, such as the lack of special warehouses for storage of

29. Point 2 PPVS RF, "Nekotorye voprosy primeneniia zakonodatel'stva o kompensatsii moral'nogo vreda", 20 December 1994, *Rossiiskaia gazeta*, 8 February 1995.
30. Art.50 (1) CL 1993, amend. 19 July 1995, *SZ RF*, 1995, No.30, item 2866. Pozhitkov 1996, 25, however, remarks that the Russian courts take a very reluctant position with regard to the issuing of such interim injunctions in disputes over intellectual property.
31. Art.50 (2) para.1 CL 1993, amended on 19 July 1995, *SZ RF*, 1995, No.30, item 2866.
32. Art.34 point 7 Ugolovno-protsessual'nyi kodeks RSFSR.
33. Art.50 (2) para.2 CL 1993, amend. 19 July 1995, *SZ RF*, 1995, No.30, item 2866, *Rossiiskaia gazeta*, 26 July 1995. In practice not much use has yet been made of this possibility: Pozhitkov 1996, 25. In the original version of this article, these measures were reserved for those cases in which the violation of the author's or neighboring rights gave rise to criminal liability. The purpose of such measures was to offer a guarantee for a civil action which had already been introduced or which was possible in the future.

such counterfeit goods, where the responsibility for payment of such storage lays, uncertainty as to the position on payments by the plaintiff by way of security for judgments, etc.[34]

In the draft of the Copyright Law which was approved by the Supreme Soviet in its second reading, moreover, the police were granted far-reaching powers to carry out house searches at the simple request of the holder of author's and neighboring rights in the context of the tracing of counterfeit copies, without any judicial control. However, this provision was struck out after the presidential veto because of the violation of the constitutional right of the immunity of the house.[35] It can be regretted that in exchange for the (quite correct) removal of this measure, no other possibility was provided for access to places, suspected to be locations for activities of piracy, to check whether the suspicion is true and to safeguard the evidence.[36]

852. The aforesaid conservatory measures, in principle, existed earlier as they are, in general terms, provided by the Code of Civil Procedure Law of the RSFSR.[37] According to this Code, the court issues a decision on the same day on which the request for the taking of conservatory measures is instituted without informing the defendant beforehand.[38] Moreover, the court can demand security from the plaintiff for possible damages caused to the defendant. The defendant can bring action for damages caused by the conservatory measures of the plaintiff if the main suit is rejected.[39]

853. The limitation of actions in the case of the violation of property rights is three years.[40] Actions for the violation of personal, non-property rights are not subject to any statute of limitations.[41] All actions brought before courts of law in copyright matters are exempt from judicial costs (duties or *poshliny*).[42]

34. Pozhitkov 1996, 25.
35. Art.25 Const.1993. See, also, Newcity 1993b, 1-2.
36. Pozhitkov 1994, 78 and Pozhitkov 1996, 25.
37. Arts.133-140 Grazhdanskii Protsessual'nyi Kodeks RSFSR (GPK). Compare also arts.75-80 Arbitrazhnyi Protsessual'nyi Kodeks Rossiiskoi Federatsii (APK) (*SZ RF*, 1995, No.19, item 1709).
38. Art.136 GPK. The court of arbitration has until the day following the submission of the request to give its decision: art.75 (2) APK.
39. Art.140 GPK. Compare arts.76 (2) and 80 APK. According to Yakovlev (296-297), neither of both conditions are applicable when the plaintiff directly bases his action on art.50 (2) CL 1993.
40. Art.196 CC RF. Compare art.42 (1) Fundamentals 1991 and art.78 CC RSFSR.
41. Art.208 CC RF; Point 7 PPVS RF, "Nekotorye voprosy primeneniia zakonodatel'stva o kompensatsii moral'nogo vreda", 20 December 1994, *Rossiiskaia gazeta*, 8 February 1995. Compare, also, art.43 (2) Fundamentals 1991 and art.90 CC RSFSR.
42. Art.5 (2) point 2 Zakon RF, "O gosudarstvennoi poshline", 9 December 1991, *VSND i VS RSFSR*, 1992, No.11, item 521, as last amended 31 December 1995 and republished in its entirety in *Rossiiskaia gazeta*, 13 January 1996. See, also, art.80 Grazhdanskii Protsessual'nyi Kodeks RSFSR.

Section 2. Criminal Liability

854. The Copyright Law itself does not contain any criminal sanctions,[43] but the Criminal Code 1960 contained an article 141 which penalized plagiarism, illegal reproduction or distribution of an author's work or forced co-authorship (objective component), if carried out with direct intent (*priamoi umysl'*) (subjective component)[44] with a fine of up to 300 rubles and up to two years of reformatory labor (*i.e.*, without loss of freedom[45]). To keep up with the consequences of galloping inflation, the determination of the fine was reformulated in 1992 as being an amount equal to up to three legal minimum monthly wages.[46] This could not, however, prevent that, as previously[47] the criminal remedies for the violation of copyright were rarely applied:[48] firstly, because the penalty was ridiculously low compared to the statutory damages (up to 3 minimum wages as against up to 50,000 minimum wages); secondly, because the Criminal Code did not take account of the recent evolution in the area of copyright (*e.g.*, the acknowledgement of neighboring rights); and finally, because prosecution of copyright violations always required the existence of a complaint.[49]

855. This last defect was cleared away by a Federal Law of 19 July 1995, which amended the Code of Criminal Procedure RSFSR on this point: crimi-

43. Art.20 Computer Law does describe the punishable actions, but refers to the penal legislation for determining the level of punishment.
44. According to Sergeev (300) this means that the person is not only conscious of the fact that s/he *e.g.*, plagiarizes or forces someone into co-authorship, but, also, desire to do so.
45. Art.27 CrC 1960.
46. Ugolovnyi Kodeks Rossiiskoi Federatsii, *VVS RSFSR*, 1960, No.40, item 591, *VVS RSFSR*, 1982, No.49, item 1821, *Rossiiskaia gazeta*, 20 November 1992.
47. V.A. Rassudovskii, "Zaimstvovanie v tvorchestve i problema plagiata", *SGiP*, 1982, No.11, 83; E. Vakman, "Rabota advokata po zashchite prav avtorov", *Sov. Iust.*, 1963, No.10, 13. As early as 1978, the Supreme Court had called on the USSR to hold liable those guilty of this kind of crime: Point 10 PPVS SSSR, No.1, "Novaia Konstitutsiia SSSR i zadachi dal'neishego sovershenstvovaniia sudebnoi deiatel'nosti", 3 February 1978, *BVS SSSR*, 1978, No.2, 12. Conflicts concerning forced co-authorship were, nevertheless, a matter of course in the scientific Soviet world: Ioffe 1985, 162-163; V. Rassudovskii, "Otvetstvennost' za narusheniia lichnykh neimushchestvennykh avtorskikh prav", *Sov. Iust.*, 1983, No.3, 4. An overview of theory and practice on forced co-authorship in Levitsky 1987, 145-159. See with regard to forced co-authorship in the making of films, Babitsky/Rimberg 98-99. Loeber 1980 (22) calls forced co-authorship "eine Ersatzform der 'Ausbeutung' des Urhebers [...], die sich unter den Bedingungen einer sozialistischen Gesellschaftsordnung herausgebildet hat".
48. Sergeev 301. In the first half of 1993, only 5 people received criminal convictions for violation of copyright (Section 8 Doklad "O sobliudenii prav cheloveka i grazhdanina v Rossiiskoi Federatsii za 1993 god", *Rossiiskaia gazeta*, 25 August 1994, 6). See, *e.g.*, also Pozhitkov 1994, 54; V. Savel'ev, "RAIS ob"iavliaet voinu piratstvu", *Vecherniaia Moskva*, 23 July 1992.
49. Art.27 paras.2 and 3 Ugolovnyi Protsessual'nyi Kodeks RSFSR. See, also, Sergeev 301.

nal infringers of copyright could be prosecuted by the police bodies acting *ex officio* without a complaint.[50]

Perhaps as a consequence of the new extensive competence of the Ministry of Justice on IPR, an amendment to the Criminal Procedure Code has, however, returned copyright infringements to the jurisdiction of prosecutors who have limited resources to prosecute copyright violations in comparison with the Police. In addition, right holders have again to lodge a formal complaint to start the prosecutions under article 146 para. 1 of the Criminal Code.[51] No complaint is required, however, if the copyright infringement has "a special meaning for society" or if it is impossible for the suffering person, for reasons depending on the suspected person or for other reasons, to defend his own rights and legitimate interests.

At a time of massive piracy, it would certainly be preferable to enhance the possibility for *ex officio* prosecutions. If a complaint is always required, then it is almost certain that—in regions where the legal right holders have no representatives—pirates will not risk being held criminally liable.

856. With the approval of the new Criminal Code in 1996,[52] there were also changes at the level of substantive law. In Chapter 19 ("Criminal offenses against the constitutional rights and freedoms of human beings and citizens"), we find an article 146 which penalizes "the unlawful use of subject matter of copyright and neighboring rights" and "the appropriation of authorship" (*i.e.*, plagiarism[53]), "provided that this act results in substantial damage" (*krupnyi ushcherb*). Forced co-authorship is no longer explicitly penalized.[54]

Compared to the provisions of the 1960 Criminal Code, the following changes appear:

50. Art. 1 (1) Federal'nyi Zakon RF, "O vnesenii izmenenii i dopolnenii v ugolovno-protsessual'nyi kodeks RSFSR, kodeks RSFSR ob administrativnykh pravonarusheniiakh i Zakon Rossiiskoi Federatsii 'Ob avtorskom prave i smezhnykh pravakh'", 19 July 1995, *SZ RF*, 1995, No. 30, item 2866, *Rossiiskaia gazeta*, 26 July 1995. See S.I. Rozina, "The rebirth of copyright in Central and Eastern Europe", in C. Keane, (ed.), *Legislation for the book world*, Council of Europe Publishing, 1997, 94. The criminal breaches of patent rights are still prosecuted on complaint: see also Point 11 PPVS RF, No. 1, "O sudebnom prigovore", 29 April 1996, *Rossiiskaia gazeta*, 22 May 1996.
51. Art. 27 Ugolovnyi Protsessual'nyi Kodeks RSFSR. See Memorandum of the European Commission on the protection of intellectual property in Russia, 12 May 1997.
52. Ugolovnyi kodeks Rossiiskoi Federatsii, *Rossiiskaia gazeta*, 18, 19, 20 and 25 June 1996.
53. In a previous draft of the Criminal Code, plagiarism was no longer considered a crime: "Proekt. Ugolovnyi kodeks Rossiiskoi Federatsii", *Rossiiskaia gazeta*, 25 January 1995 and 1 February 1995.
54. Apart from this, the Criminal Code 1996 also dedicates a separate chapter (28) to computer crime, describing criminal liability for illicit access to computer information, the creation and spreading of computer viruses and the violation of the conditions of use of computer programs, systems or networks (arts. 272-274 CrC 1996). For comments on these articles, see Iu. Liapunov and K. Maksimov, "Otvetstvennost' za kompiuternye prestupleniia", *Zak.*, 1997, No. 1, 8-15.

— the infringement of neighboring rights is criminally penalized;
— not only the infringement on the property rights (reproduction or distribution) in a work or a subject matter of neighboring rights, but every illegal use of an author's work, a performance, a phonogram or a broadcast is penalized;
— the illegal use, but, also, plagiarism, must result in "substantial damage" (*krupnyi ushcherb*), a concept not further defined, thus leaving it up to the judges to draw the line between criminal liability—if considerable harm can be proven—and administrative liability for minor violations;
— the subjective component of the crime is the perpetrator's direct or indirect intent.[55]

856. The penalty fixed in the new Criminal Code is substantially increased. Firstly, the multiple of legal minimum wages was greatly increased from 200 to 400 minimum wages although this remains far less than what is possible on the basis of a civil action. Considering the often very high income of counterfeiters, the alternative—a fine equal to the wage or other income earned by the convicted in a two to four month period—will clearly have a much greater deterrent effect. Evidence of such income can, however, be difficult to trace. A third possible punishment is between 180 and 240 hours of community service.[56] The fourth and heaviest penalty is a possible prison sentence of up to two years. These four punishments are alternatives and cannot, thus, be accumulated.

In the case of recidivism, or when the illegal use is carried out by a group of persons according to previously made agreements (a plot), or by an organized group, the fines are increased from 400 to 800 minimum monthly wages, or the wage or income of four to eight months. Community service is no longer an option, but the culprit can be kept in strict isolation from society (the so-called *arest*[57]) for four to six months, *i.e.*, not necessarily in a prison, but *e.g.*, under house arrest, or may be denied his freedom for up to five years by incarceration in a prison or an isolated settlement.[58]

The main deficiency in these new provisions is the absence of any possibility to confiscate the illegal copies produced or the equipment used in its

55. Arts.24 (1) and 25 CrC 1996. Russian criminal law uses the term direct intent (*priamoi umysel*) when the culprit was conscious of the social danger of the actions (or lack of them), foresaw and also desired the possibile or unavoidable introduction of socially dangerous consequences (art.25 (2) CrC 1996). The term indirect intent (*kosvennyi umysel*) was used when the culprit did not desire the consequences but consciously allowed them or was indifferent towards them (art.25 (3) CrC 1996). In the draft Criminal Code already referred to (*supra*, note 53), direct intent was in any case an aggravating circumstance in cases of counterfeiting or plagiarism.
56. See art.49 CrC 1996.
57. Art.54 CrC 1996.
58. See art.56 (1) CrC 1996.

production. Therefore, the regulation of Russian criminal law is not compatible with article 61 TRIPS. The CL 1993 does provide for such possibility but only in civil, not in criminal, proceedings.[59]

Moreover, the fact that "substantial damage" is one of the constitutive elements is highly problematic: what is the meaning of "substantial" damage, who is the victim of the damage (society, the state, the legal right holder?), why should the damage suffered by the legal right holder be taken into account to decide a criminal case, apart from the civil liability of the infringers? Amendments to the Criminal Code are said to be under preparation.

Section 3. Administrative Law Liability

857. On 1 January 1997, simultaneously with the new Criminal Code, a number of amendments to the Code of the RSFSR on administrative infringements also came into force, pursuant of the Federal Law of 19 July 1995.[60] According to the new article 150-4 of this Code, the sale, rental, or other illicit use for commercial purposes of copies of works or phonograms shall be punishable with a fine and the confiscation of said copies (with subsequent destruction unless the right holder wishes to take possession of them) in the following cases: (1) when these copies are counterfeit in accordance with the copyright legislation of the Russian Federation; (2) when the copies of the works or phonograms contain false information concerning their producers and the place of production or other information which may mislead the consumer; or (3) when the protection sign for copyright or for neighboring rights placed on the copies by the legal right holder was destroyed or altered. This provision should enable the local police to act quickly and efficiently against street vendors of counterfeit products.[61]

The fine amounts to five to ten times the minimum wage, or ten to twenty times the minimum wage if the infringer was a civil servant. In case of recidivism within one year, these fines are respectively increased to between ten and twenty, or thirty and fifty times the minimum wage. These amounts are too small to have a deterrent effect. It is of more importance that the counterfeit copies (thus, only in case (1)) are confiscated and destroyed unless the holder of copyright or neighboring rights requests that these copies be delivered to him. The people's courts of the area or town have jurisdiction in these matters.[62]

59. S.I. Rozina, "The rebirth of copyright in Central and Eastern Europe", in C. Keane, (ed.), *Legislation for the book world* , Council of Europe Publishing, 1997, 96.
60. Arts.2 and 4 Federal'nyi Zakon RF, "O vnesenii izmenenii i dopolnenii v ugolovno-protsessual'nyi kodeks RSFSR, kodeks RSFSR ob administrativnykh pravonarusheniiakh i Zakon Rossiiskoi Federatsii 'Ob avtorskom prave i smezhnykh pravakh'", 19 July 1995, *SZ RF*, 1995, No.30, item 2866, *Rossiiskaia gazeta*, 26 July 1995.
61. Pozhitkov 1996, 24.
62. Art.202 Kodeks RSFSR ob administrativnykh pravonarusheniiakh, as amended by art.2 (2) Federal Law 19 July 1995, *SZ RF*, 1995, No.30, item 2866.

858.Apart from this, there are several Governmental Decrees, which enforce very strict administrative sanctions in the case of (repeated) violation of copyright by certain user organizations. Here it is important to recall that the major part of the enterprises in the cultural industry, irrespective of their form of ownership and apart from their registration as enterprises according to economic law, are still subjected to an additional duty of registration and/or licensing which is organized by the major cultural administrations.[63] It is exactly this duty of registration and/or licensing which is a powerful weapon in the hands of the registering governmental bodies, also in the struggle against violations of copyright.

859.In the Temporary Decree on publishing activity in the RSFSR, for example, ratified by the Council of Ministers of the RSFSR on 17 April 1991, the governmental body which delivers a license to the publishing houses (at that time the Ministry of the Press and Mass Information RSFSR, now the Committee for the Press RF[64] and its regional sections), was given the authority to cancel this license in cases where the publishing house has repeatedly (*i.e.*, at least twice in the course of one year) violated the legislation on copyright.[65]

The license for printing companies can also be cancelled, by the same administrative authority which issued the license, if the printing company has violated the license conditions, which would include accepting or executing a commission from a publisher in violation of the legislation of the Russian Federation on publishing activity and on copyright and the neighboring rights.[66]

The broadcast licenses for broadcasting corporations can be cancelled by the Russian Federal Service for television and radio broadcasting (which is authorized to issue such licenses) in the case of a systematic distribution of television and/or radio programs in violation of the legislation in force on copyright and the neighboring rights.[67] This sanction was for the first time

63. *Supra*, Nos.347 ff. and 419.
64. PP RF,"O vnesenii izmenenii i dopolnenii v Polozhenie o Komitete Rossiiskoi Federatsii po pechati", 1 November 1994, *SZ RF*, 1994, No.29, item 3031.
65. PSM RSFSR, "O regulirovanii izdatel'skoi deiatel'nosti v RSFSR", 17 April 1991, esp. point 14 "Vremennoe Polozhenie ob izdatel'skoi deiatel'nosti v RSFSR", in *Pechat' i drugie sredstva massovoi informatsii. Sbornik normativnykh i spravochnykh materialov*, I, M., 1991, 15-21, amended by PSMP RF, 8 June 1993, *SAPP RF*, 1993, No.24, item 2240, *Zakon*, 1994, No.6, 19-21.
66. PP RF,"O regulirovanii poligraficheskoi deiatel'nosti v Rossiiskoi Federatsii", 22 September 1993, esp. point 10 "Polozhenie o poriadke otkrytiia poligraficheskikh predpriiatii", *SAPP RF*, 1993, No.40, item 3754, *Zakon*, 1994, No.6, 22.
67. PP RF,"O litsenzirovanii televizionnogo veshchaniia, radioveshchaniia i deiatel'nosti po sviazi v oblasti televizionnogo i radioveshchaniia v Rossiiskoi Federatsii", 7 December 1994, esp. point 17 "Polozhenie o litsenzirovanii televizionnogo veshchaniia i radioveshchaniia v Rossiiskoi Federatsii", *SZ RF*, 1994, No.34, item 3604.

applied on 31 July 1998 against the broadcasting organization Alpha in the city of Izhevsk, after the repeated broadcasting of American movies.[68]

The holder of a license for the public screening of cinema or video films in cinemas, video salons, and suchlike has to observe, when exercising this activity, the legislation on copyright and the neighboring rights and has to be able to produce a contract on the acquisition of the rights to use of the films screened together with the rental certificate obtained at the official registration of each film.[69] If the license conditions are violated, the regulating state body can suspend the license or, in the case of repeated violation, cancel it.[70]

The Russian government introduced an obligation to register all films intended for public showing, whether or not for commercial purposes, for the making of copies with the intention of sale, rental, distribution through video libraries and rental stores, and broadcasting on cable television.[71] For films imported from outside the CIS, a hefty registration fee is levied.[72] This duty of registration for a rental certificate is intended as a weapon in the fight against piracy, but the high levy for imported films clearly shows protectionist ulterior motives.[73]

Additional measures have also been taken at the local level. Thus, on 23 March 1998, the Moscow authorities adopted Decree No.265-PM "On the new procedure for the sale of video and sound recordings, computer information carriers, laser and compact discs in the city of Moscow". According to this decree, the retail sale of such products is subject to prior authorization by the Moscow Committee on telecommunications and mass media. Moreover,

68. Undated Press release of the Russian Federal Service for television and radio broadcasting. Since 1998, the Interregional Copyright Agency *MAAP* established 51 cases of illegal showing of pictures on regional television channels, which led the Federal Service to issue a number of warnings to infringers.
69. PSMP RF, "O registratsii kino- i videofil'mov i regulirovanii ikh publichnoi demonstratsii", 28 April 1993, *SAPP RF*, 1993, No.18, item 1607.
70. PP RF, "Ob utverzhdenii Pravil po kinovideoobsluzhivaniiu naseleniia", 17 November 1994, *SZ RF*, 1994, No.31, item 3282 (esp. point 3 and 5); PP RF "Ob utverzhdenii Polozheniia o litsenzirovanii deiatel'nosti, sviazannoi s publichnym pokazom kino- i videofil'mov", 19 September 1995, *SZ RF*, 1995, No.39, item 3776, *Rossiiskaia gazeta*, 7 October 1995.
71. PSMP RF, "O registratsii kino- i videofil'mov i regulirovanii ikh publichnoi demonstratsii", 28 April 1993, *SAPP RF*, 1993, No.18, item 1607. See, also, G. Belostotskii, "Kinoliubiteli s bol'shoi dorogi", *Rossiiskaia gazeta*, 12 January 1993; P. Kuz'menko, "Prostranstvo kino na fone infliatsii", *Rossiiskaia gazeta*, 28 January 1993; M. Murzina, "Fil'mov v Rossii snimaetsia vse men'she, zato vozmozhnostei uvidet' ikh—vse bol'she", *Izvestiia*, 31 March 1993.
72. PP RF, "O pervoocherednykh merakh po realizatsii protektsionistskoi politike Rossiiskoi Federatsii v oblasti otechestvennoi kinematografii", 30 July 1994, *SZ RF*, 1994, No.15, item 1794, *Rossiiskaia gazeta*, 17 August 1994 (*supra*, No.510).
73. According to Iu. Vasiuchkov, it is the intention of *Roskino* that the income of the registration levy is again invested in the needy Russian film studios: "Russia. Distribution tax on foreign films", *Copyright World*, November 1994, 9-10. See, also, "Ishchut upravu na piratov", *Rossiiskaia gazeta*, 15 September 1994.

another decree of the government of Moscow of 19 January 1999 No.33, as changed by Decree No.369 of 27 April 1999 introduces the obligation for retail sellers to have documents containing information on the way the products were obtained. Moreover the sale of video and audio recordings and computer information carriers is forbidden if such products do not have a protective identification sign.[74] Such measure is said to make the struggle against pirate products easier although one may doubt this: how long will it take for organized crime to either falsify such signs or to conspire with some corrupt functionaries in order to obtain such signs for products, the origin of which does not have to be proven?

860. Still, it is clear that especially the licensing obligation, and the administrative sanctions linked to this obligation, may have far-reaching consequences. They do not, in the first instance, apply to those enterprises which, in complete illegality, apply themselves to the production and marketing of pirated publications or pirated films, as these usually entirely avoid licensing obligations and operate in the black market. The aforesaid administrative sanctions do, however, apply to the legally operating cultural enterprises, which "occasionally" indulge in violations of copyright. Thus, it is common knowledge that enterprises obtaining a license to produce a certain number of copies of a cinematographic film on videocassettes, gain a lot of money by not respecting the agreed upon maximum print run.[75]

The courts of law will, nevertheless, have to judge whether these administrative sanctions for breaches of author's and neighboring rights, which are contained in *Governmental Decrees*, are reconcilable with article 44 (1) Constitution 1993 which entrusts the protection of intellectual property (including copyright) to the *law in a formal sense* (*i.e.*, *an Act of Parliament*).[76]

861. The existence of these possibilities for administrative sanctions in such a typically civil-law matter as copyright is characteristic for the system transformation in Russia, organized from above, in which important powers of decision and control—certainly in the cultural sector—have remained in the hands of government administrations. As an element of discontinuity, we should mention that the decisions of these administrations are now subject to judicial control. As an additional positive point we should here emphasize that the provision of the possibility of enforcement by heavy administrative law sanctions demonstrates the government's serious commitment to the maintenance of copyright and neighboring rights in general and to the struggle against piracy in particular.

862. In this context we may finally refer to the establishment in 1995 of an Interdepartmental Commission in matters of the guarantee of the protection of

74. "Sarancha. Videopiraty idut na abordazh", *Tverskaia, 13*, 29 July-4 August 1999, 2.
75. A. Shcherbakov, "'Titanik' zatonul dosrochno", *Rossiiskaia gazeta*, 27 March 1998.
76. *Supra*, No.371.

the objects of intellectual property.[77] This Commission has the following task: to coordinate the policy of the various organs which, in some way, play a role in the protection of intellectual property in the broadest sense,[78] also with regard to meeting the obligations arising from the international agreements binding Russia; to prevent unfair competition; and to establish a civilized market for objects of intellectual property.[79]

Section 4. Customs Law

863. There appears to be a general problem of enforcement at the administrative level, in particular in the area of border enforcement by customs officials. Given the international nature of piracy, border control is very important. In this context it is significant that within the framework of the CIS, an Agreement on cooperation on the termination of legal infringements in the field of intellectual property was negotiated in 1998.[80]

864. In fact, the Customs Code[81] provides no separate procedures for goods infringing intellectual property rights. In article 10 (9) of this Code, it is stated that one of the functions of the customs authorities is to prevent the illegal cross border movement of objects of intellectual property. Apart from this general reference to intellectual property, there is only article 20, which states that the import of certain goods may be forbidden for reasons of, among

77. PP RF, "O sozdanii Mezhvedomstvennoi komissii po voprosam obespecheniia okhrany ob"ektov intellektual'noi sobstvennosti", 7 March 1995, *SZ RF*, 1995, No.11, item 992, *Rossiiskaia gazeta*, 22 March 1995; PP RF "O Mezhvedomstvennoi komissii po voprosam obespecheniia okhrany ob"ektov intellektual'noi sobstvennosti", 9 September 1995, *SZ RF*, 1995, No.38, item 3689, *Rossiiskaia gazeta*, 27 September 1995. See, also, "Piratov—na abordazh", *Rossiiskaia Gazeta*, 24 March 1995; "Russia. Inter-Agency Commission established to increase protection of IP", *Copyright World*, August 1995, 13. Kostiuk (105) called the foundation of the Interdepartemental Commission a "cardinal improvement of the state of affairs in the area of protection of copyright and neighboring rights". Rassudovskii 1994b, 11 opposed a reorganization which would take the form of a newly to be founded State committee for Intellectual Property, but was of the opinion that a perfection and coordination of the activities of the different competent bodies was due.

78. The following state bodies and organizations are represented: the Ministry of Culture, the Committee for Cinematography (now incorporated in the Ministry of Culture), the Committee for the press, the Federal Service for Television and Radio, the State Committee for the anti-monopoly policy, the Russian Author's Society *RAO*, the Patent Office *Rospatent*, the Association of Russian patent attorneys, the custom's services etc.

79. On the precise tasks of this Interdepartemental Commission, see PP RF, "O Mezhvedomstvennoi komissii po voprosam obespecheniia okhrany ob"ektov intellektual'noi sobstvennosti", 9 September 1995, *SZ RF*, 1995, No.38, item 3689, *Rossiiskaia gazeta*, 27 September 1995. See, also, "Russia. Approval for Interministerial Commission", *Copyright World*, December 1995-January 1996, 14.

80. See PP RF, "O podpisanii Soglasheniia o sotrudnichestve po presecheniiu pravonarushenii v oblasti intellektual'noi sobstvennosti", 31 March 1998, *Rossiiskaia Gazeta*, 5 May 1998.

81. Tamozhennyi kodeks Rossiiskoi Federatsii, 18 June 1993.

others, the protection of intellectual property rights. Such goods must be immediately exported by the importer at his own cost "unless their confiscation is provided for". If the exportation is not possible or simply not done, the goods are deposited with the customs authorities for a term of maximum three days.

There are no separate border enforcement measures for goods infringing intellectual property rights in the Customs Code including notification to the right holder of infringing shipments and remedies such as disposal or destruction of infringing goods. Seizure and destruction or disposal of pirated or counterfeit goods is apparently not possible on the grounds of violation of copyright, but might be possible on the grounds of false declaration, for example, with regard to the value of imported goods.[82]

865.Given the very vague and often outdated legal provisions, customs authorities claim that they are not entitled to withhold or seize *ex officio* importation of counterfeit or pirated goods for reasons of infringements of intellectual property rights. Moreover, there is in general a lack of awareness among the officials, lack of databases on protected rights, and corruption within the Custom authorities, all of which makes the lack of initiative of custom officers "comprehensible". The main problem, however, is here the legislation itself. In our view, the Customs Code should be amended in order

— to provide for the legal basis for control by the Customs authorities of the movement through the Customs territory of goods incorporating objects of intellectual property;
— to provide to the Customs authorities the right to detain (including *ex officio*) pirated and counterfeit goods and to suspend the release into free circulation of such goods; and
— to give to the right holder the right of information and inspection of the detained goods.[83]

Section 5. Piracy in Reality: Enforcing the Law in Practice

5.1. Piracy

865. The liberal economic and political climate, the greater freedom of communication and travel, the broader availability of reproduction apparatus, and the opportunism of a number of cultural functionaries who saw the opportunity to get rich quickly through the illegal reproduction of the works of—mostly foreign—authors, have in the past decade given rise to an enormous problem of piracy.[84] Piracy levels are said to be up to about 90% in the sector of motion

82. Memorandum of the European Commission on the protection of intellectual property in Russia, 12 May 1997.
83. See, *e.g.*, the Agreement EU-Russia of 1999 on Priority Actions on Intellectual Property Rights to be taken by the European Community and the Russian Federation.
84. For a brief overview, see Malkov 697-698.

pictures and (entertainment) software and about 70% in the sector of sound recordings in 2000.[85] This phenomenon had been unknown under communism when all exploiters and all of the distribution network for cultural products was state-owned. Since *perestroika* and the appearance of private entrepreneurship, the police and the Procuracy is confronted with formerly unknown problems. Moreover, there is no longer a social network of informers helping the authorities to maintain social control. Ironically, one could say that the apparatus of the totalitarian Soviet state was not enough prepared for its repressive tasks in the new political and economic context.

866. Piracy first appeared in the video sector, which took off after the approval of the Law on the Cooperatives of 26 May 1988.[86] On the basis of this law, countless video salons were set up, where visitors could watch videos against payment. These were almost always illegally copied foreign films, which in Russia—long deprived of Western cultural products—found a keen audience. This was one of the reasons why video salons were soon prohibited again,[87] but the circuit remained almost intact, now with the active participation of the Communist Youth Association Komsomol, the cultural centers of the creative unions, *and* finally of the network of cinemas of the competent state administration (*Goskino*) itself. *Goskino*, *Gosteleradio*, the Ministry of Trade, and suchlike were vested with exclusive powers for the manufacture, sale, and rental of video tapes, but these state organs signed contracts with cooperatives "on aid with the exploitation of the technical equipment [...]", so that the prohibition was circumvented.[88] This practice was afterwards explicitly permitted by the Government.[89] Because of this, not only was the door opened wide to illegal screenings but, also, to illegal mass reproduction (on machinery which was, at least in the initial phase, state property) and sale of foreign films without the permission of the copyright holders.[90] In reaction to this, in June 1991 the Motion Picture Association of America decreed a boycott of the Soviet Union,[91] but this was abandoned at the end of 1992 without having

85. International Intellectual Property Alliance 2001 Special 301 Report: Russia, available at <www.iipa.com>.
86. Zakon SSSR, "O kooperatsii v SSSR", 26 May 1988, *VVS SSSR*, 1988, No.22, item 355. For a discussion, see *supra*, Nos.392 ff.
87. PSM SSSR, "O regulirovanii otdel'nykh vidov deiatel'nosti kooperativov v sootvetstvii s Zakonom o kooperatsii v SSSR", 29 December 1988, *SP SSSR*, 1989, No.4, item 12. *Supra*, No.393.
88. V. Reshetnikov, "Konets videopiratstvu v SSSR?", *Izvestiia*, 4 April 1991.
89. Point 4 PSM SSSR, "O perestroike tvorcheskoi, organizatsionnoi i ekonomicheskoi deiatel'nosti v sovetskoi kinematografii", 18 November 1989, *SP SSSR*, 1990, No.1, item 5. On this Decree, see *supra*, No.384.
90. S. Mostovshchikov, "Piratskoe video—ne tol'ko kollektivnyi propagandist, no takzhe i organizator", *Izvestiia*, 14 February 1992.
91. J.-M. Frodon, "Autocritique du cinéma soviétique", *Le Monde*, 28 July 1991; M. Murzina, "Enough is enough", *Moscow News*, 23-30 June 1991; Fleishman 217-222; Waters 950.

had much effect,[92] officially with the intention of encouraging the Russian authorities to reform their copyright legislation, unofficially not to restrict the then depressed American film industry's access to a potentially large market.[93] In the meantime, the production and distribution of pirate videos was well organized: on the biggest market of video tapes in Moscow, illegal copies of 30 new Western films were available each week, with increasingly better technical quality.[94] Not only foreign, but, also, home, copyright holders fell victim to this piracy as until a few years ago approximately 30% of the production costs for a Russian film could be covered by the income from the video market, a proportion now reduced to almost nothing.[95]

867. The situation in the music sector is at least equally bad due to the ease with which illegal copies can be made. The sale of such illegally reproduced recordings, like that of video tapes, takes place openly in the street. Customers

92. In August 1991, a complaint was made for the first time with the prokuratura on the sale of illegal copies of 594 foreign and Soviet films on a fair for film and television (V. Arsen'ev, " 'Videofil'm' sozdaet kinokanal i boretsia s piratstvom", *Izvestiia*, 27 January 1992; G. P'ianykh, "Videopiraty ukrali 594 fil'ma. Ochen' svoevremenno", *Kommersant"*, 29 July-5 August 1991). As a reaction to this scandal, the Commission for culture in the Supreme Soviet of the USSR decided on 9 August 1991 to discuss the entry into the Convention of Berne in October 1991 in plenary meeting of Parliament, but this debate did not take place because of the institutional crisis in the Soviet Union. The plaintiff in this case, *VPTO Videofil'm*, an enterprise specialized in the buying and selling of rights to the screening of films on television and video, was itself accused half a year later for piracy: "Videobiznes protiv piratstva", *Argumenty i Fakty*, 1992, No.6.
93. Fleishman 222-223.
94. The extent of video piracy becomes clear if one looks at the estimated number of video tapes imported into Russia: in 1993, 60 million blank tapes were imported into Russia against 7,500 prerecorded tapes ("Russia. Distribution tax on foreign films", *Copyright World*, November 1994, 9-10).

    Originally pirated copies ("triapochnyi" or euphemistically "ekrannaia kopiia") were made by a "resident" (mostly a Russian emigrant in the West) in a cinema hall in Western Europe or the USA at the first screening, and were sent the same day to Moscow. Witness of the poor quality of such bootlegs was the broadcasting of *Jurassic Park* on a local television station in the Ural, even before Universal Pictures had released the video tape in the US. The counterfeit copy was made with a video camera in a cinema hall somewhere in Western Europe. The sound of the public was audible, and the tape also showed how somebody left the hall during the film (Waters 946). The quality of pirate videos has recently improved, now that the "residents" make use of the practice in the West where the distributors first send a copy of a new film labelled "not for sale" to video retail centers on the basis of which the latter decide whether or not to buy copies of this video tape. A copy of such a tape "not for sale" is sent by the "resident" to Moscow and the rest of the story remains the same. Each of the estimated ten pirate studios in Moscow (which each has its own specialization according to the abilities and interests of the "residents") can make up to 1000 copies a day (O. Goriachev, "Videopiran'i", *Argumenty i Fakty*, 1995, No.10).
95. A. Podymov, "Iz vsekh piratstv dlia nas vazhneishim iavliaetsia kino?", *Rossiiskaia gazeta*, 5 October 1995.

can take blank tapes to street kiosks (sometimes with an advertising board for *zvukovaia zapis'*, *i.e.*, audio recording) and for a fee (for the service, thus not as an author's fee) select pieces of music from a long list, usually consisting mostly of Western pop music, to be recorded.[96] It is remarkable that here, just as in the video sector, piracy takes place openly and that (former) state enterprises are among the offenders.[97] It is presumed that both the legal and the illegal market for sound recordings are controlled by one and the same persons.[98]

868. Also remarkable is the fact that book piracy, virtually non-existent in the West, thrives in Russia mainly at the expense of Western authors.[99] According to Pubwatch, an American non-profit organization with the purpose of coordinating and increasing aid from the West to book publishers and dealers of the Eastern bloc and the former Soviet Union, 70% of the 28,000 new titles published in Russia in 1992 were translations of works by foreign authors, and 90% of these were published without the permission of the author or of the copyright holder.[100] According to the International Intellectual Property Alliance, book piracy is now increasingly controlled by the Russian mafia. Printers of legitimate editions deliver "hidden" additional unauthorized copies to mafia distributors before delivering books to legitimate publishers. Book piracy first focused on bestsellers, but is nowadays concentrated on the large market of textbooks and reference works.[101]

5.2. Reasons for Piracy

869. Up until the moment of the approval of the Copyright Law of 1993, the explanation for the mass violations of copyright seemed to be the absence of

96. Boffey 83.
97. In St. Petersburg, the pirating company "Antron" is officially registered, a company which in the Soviet period was part of the only record enterprise which then existed in the Soviet Union "Melodiia": O. Pshenichnyi, "Populiarnaia muzyka i filosofiia shou-biznesa", *Shou-biznes*, 1995, 77-78. In general, on music piracy, see T. Bulkina and D. Nulin, "Muzykal'nye piraty", *Rossiiskaia gazeta*, 28 June 1995.
98. "Piratov pobedili lish' na ekrane", *Rossiiskaia gazeta*, 7 August 1998.
99. For flagrant examples, see V. Gromov, "Vosem' protsentov plagiata?", *Rossiiskaia gazeta*, 13 October 1995; P.B. Kaufman and G. Uspensky, "Moves to Control Rampant Book Piracy in Russia", *Rights*, 1993, No.4, 1; N. Khoroshavina, "Zashchita avtorskikh prav: svoeiu sobstvennoi rukoi", *Kommersant"*, 9 May 1993, 29; M. Plotnikova, "Izdatel'skii biznes ne prodaetsia vdokhnoven'e, no mozhno rukopis' ukrast'", *Kommersant"*, 1992, No.25; R. Wester, "Buigen of barsten. De lotgevallen van het uitgeverswezen in Rusland en Polen", *Oost-Europa-Verkenningen*, 1994, No.136, 33-35. Remarkable is also the reader's letter published in *Literaturnaia gazeta* written by V. Borisov, vice-president of the prose section of the publishing enterprise *Novyi Mir*, warning other publishers that they cannot publish works by A. Solzhenitsyn without his permission as copyright holder: V. Borisov, "O publikatsii proizvedenii A. Solzhenitsyna", *Literaturnaia Gazeta*, 21 June 1989.
100. S. Wagner, "Copyright law and enforcement in Russia and Eastern Europe", *International Publishers Association Bulletin*, 1994, No.1, 13.
101. International Intellectual Property Alliance 2001 Special 301 Report: Russia, available at <www.iipa.com>.

market-adjusted legislation with effective measures and procedures to fight piracy. In the judicial vacuum, which originated through the introduction of a market economy with, at the same time, the maintenance of judicial norms drafted for a different economic system, illegal counterfeiting could flourish.[102] The wide range of remedies, available under current copyright legislation, are a necessary but apparently insufficient condition for upholding copyright.[103] In any case, as long as the Customs Code and Criminal Code are not amended, the fight against piracy remains also a worry for Russia's legislator.

870. It should also be a worry for the police and the Procuracy, but they tend to give priority to the struggle against organized crime so that only a few members of the judiciary and the police forces can be committed to pursuing and prosecuting violations of copyright (or other exclusive rights), especially in remote areas.[104] In some cases, there could also be genuine unwillingness on the part of the authorities, given that state enterprises themselves have often participated in the origins of piracy, and some of these also now acquire considerable income from the production of and trade in, counterfeit products.[105] Lack of knowledge about existing procedures with enforcement authorities[106] and a lack of coordination among the several competent authorities makes the fight against piracy hopeless. The Interdepartmental Committee for the protection of the objects of intellectual property has as yet not been able to meet the hopes placed on it.[107] A restructuring seems to be in the offing.

102. For example H. Heker, Member of the Management Board of the German Börsenverein, says:

> "The laws on copyright which used to exist in Eastern Europe and the Soviet Union were all tailored to the communist system. Piracy was limited because there were no independent publishers and the award of licenses for the printing, distribution and sale of foreign material was under state control. These laws have now gone by the board and there are no effective laws against piracy which would allow us to bring successful prosecutions. Piracy is now flourishing in this legal vacuum—it's an open invitation to pirates."

("Piracy in the CIS—the Wild West?", *Financial & Business News*, 11-24 May 1992, 15-16).

103. Dietz 1994b, 199:

> "Compte tenu du passé socialiste avec l'absence presque totale de procès et de procédures dans le domaine du droit d'auteur, une tâche énorme attend les pays d'Europe centrale et orientale pour qu'ils établissent l'infrastructure nécessaire pour combattre les infractions aux droits d'auteur et aux droits voisins. Le texte d'une loi, si bon et nécessaire qu'il soit, n'est pas suffisant."

104. Prins 1994a, 29; Yakovlev 297.

105. Vermeer (170) in connection with the piracy of computer programs: "Ironically, the main culprits are not individuals or black market dealers, but rather government enterprises and state-run agencies."

106. Some admit that there is some improvement at this point in the last years: T.A. Bogoliubova, (ed.), *Rassledovanie prestuplenii o narushenii avtorskikh i smezhnikh prav*, M., Izd. Prior, 2001, 62p; Iu.V. Truntsevskii, *Videopiratstvo*, M., Iurinfor, 2000, 171.

871.Some take the view that the causes of mass violations of copyright are much more fundamental and, therefore, much harder to remedy. The first point of reference is the weak judicial tradition in Russia, particularly the weakness of the judicial power.[108] Judges were not seen as fulfilling a function of finding law; they are now confronted, completely unprepared, with legal concepts, which need to be given content by their judicial application and interpretation.[109]

Moreover, some even wonder whether the concept of intellectual property is not an imported product, which is not adapted to the current conceptual baggage of Russian society. According to this reasoning, it should be no surprise that persons—who were always denied private property rights in material goods—are suspicious of private claims to intangible goods.[110] The achievements of Russian individuals in the fields of science and culture are part of the spirit of the Russian people and the heritage of the country, they are *res nullius*, and thus not subject to private monopolization, certainly not when this leads to the possibility of the sale of the "national heritage" to foreigners.[111] In other words, the phenomenon of piracy which blatantly manifests itself on the streets of the Russian conurbations, is not a passing and easily combated phenomenon; it is rooted in the Russian people's imperfect consciousness of rights, which does not seem to accept that products of the mind can be appropriated by individuals. The Western concept of intellectual property lacks the moral and philosophical justifications in Soviet (Russian) society which have been accepted in the West for centuries.[112] In this view, only long-term education can lead to an improvement in the respecting of copyrights.[113]

107. PP RF, "O sozdanii Mezhvedomstvennoi komissii po voprosam obespecheniia okhrany ob"ektov intellektual'noi sobstvennosti", 7 March 1995, *SZ RF*, 1995, No.11, item 992, *Rossiiskaia gazeta*, 22 March 1995. See, also, "Piratov—na abordazh", *Rossiiskaia gazeta*, 24 March 1995; "Russia. Inter-Agency Commission established to increase protection of IP", *Copyright World*, August 1995, 13. Kostiuk 105 called the foundation of the Interdepartemental Commission a "cardinal improvement of the state of affairs in the area of protection of copyright and neighboring rights". Rassudovskii 1994b, 11 opposed a reorganization which would take the form of a newly to be founded State committee for Intellectual Property, but was of the opinion that a perfection and coordination of the activities of the different competent bodies was due.
108. Malfliet 1994, 43.
109. See, *e.g.*, Prins 1994a, 29.
110. "Intellectual property owners cannot expect nationals of formerly Socialist countries instantly to comprehend and embrace the concept of intangible property rights when many of these people were denied tangible property rights for much of their lifetimes" (Waters 973).
111. Malfliet 1994, 43-46.
112. G.V. Litman, "Reinventing a Law on Inventions: International Aspects of the New Russian Patent Law", *Geo. Wash. J. Int'l L. & Econ.*, 1991, vol.25, no.1, 221; Malfliet 1994, 45.

872. We can agree with this last view to some extent: the problem goes beyond the disinterest of the judiciary and the police forces. We do have doubts, however, about whether a theoretical approach concerning legal transplants really gets to the heart of the problem.

Obviously, some of the norms which are included in the current Russian copyright legislation can only be understood if we check their foreign or international origin—in particular, the first two European Directives relating to copyright,[114] the Berne Convention and the Convention of Rome, and different national legislation. The implementation of these imported norms can, indeed, cause problems to the extent that they try to give a judicial solution to problems of which Russian jurists were not even aware.

In Russian legal theory, for example, there was no call for the introduction of neighboring rights for phonogram producers and broadcasters, which shows a lack of consciousness of the problem. Only with regard to the status of performing artists was there discussion of whether they could be acknowledged as authors or whether they had to enjoy protection through their own subjective neighboring right,[115] but it remained unclear what the contents of this right should be. In practice, the neighboring rights are not (yet) applied,[116] in our opinion not only because there is still no operative society which takes on the collective management of these rights, but, also, because the holders of these rights, and especially the Russian performing artists, do not know that they have certain rights or what they can do with these rights.

The resale right for visual artists is another construction which was completely unknown in Russian legal theory. In this case, the fact that this *droit de suite* is not applied in practice not only has to do with the unfamiliarity of the term, or the absence of a workable collective management of this right, but, also, with the failed attempt of the Russian legislator to give this resale right its own identity, so that the regulation lacks a sense of reality.[117] The resale right as described by the CL 1993 is a pitiful blot on the Russian copyright legislator's otherwise not unattractive escutcheon.

113. "Rather than concentrating vast resources on lobbying their own governments to create strong border controls and international trade laws, Western companies should begin re-educating Central Europeans on a local level" (Waters 973). Compare Fleishman 236: "The government must also stop condoning the pirating of intellectual works, and instead, must educate the public as to the goals and benefits of copyright protection in a free market system."
114. European Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs, *O.J.*, L 122/42 of 17 May 1991; European Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property, *O.J.*, L 346/61 of 27 November 1992.
115. *Supra*, No.151.
116. See, also, Sergeev 264.
117. *Supra*, No.714.

The judicial world, and ultimately society as a whole, will effectively have to go through a learning process in order to apply effectively the norms granting new rights (such as neighboring rights or the resale right), recognizing new subject matter of copyright (such as computer programs), and providing for new forms of remedies.

873. On the other hand, there are also innovations in the classical copyright, such as the increase of the term of protection or the reformulation of a number of exceptions to the author's property rights, which can also be explained by external pressure; yet present judges should have no problems in their application because of their relatively system-neutral and largely technical nature.

Moreover, a good proportion of the alterations in copyright legislation was made at the request of the Russian legal theorists themselves. When new concepts were introduced (*e.g.*, the concept of the "disclosure" of a work), this was often an attempt by the Russian legislator to get rid of interpretative problems and polemics from the past in a creative fashion. In spite of all alterations, the continuity with the past seems—with regard to contents as well as terminologically—to be very great.

In our opinion, it is, therefore, incorrect to present Russian copyright law as no more than a copy of some Western model. However, renovation could be seen as one answer to a confluence of internal and external demands for reform. It should not surprise us that the effect was harmonizing: already since the signing of the first version of the Convention of Berne in 1886, the rule has been the mutual influence of national copyright legislations; this tendency has, as we know, moved into a higher gear in the course of the last few years, concerning the depth of the convergence as well as with regard to territorial extent, because of the European harmonization movement, the increasing success of BC and RC, the integration of copyright into the foreign commercial policy of the great powers, and the TRIPS-agreement. This fact, certainly in some parts of copyright law, causes an increase of the transitional problems in various countries (thus not only in Russia) because of the lack of familiarity with the new terms and concepts. But this can, on the whole and with careful optimism, be considered a relatively temporary phenomenon certainly in the Northern hemisphere. Through adaptation of the textbooks, scientific exchanges with foreign experts, retraining programs, etc., it can be largely solved.

874. If the existing problems in connection with the reception of a number of *technical regulations* are set aside, is it then possible to speak on a more theoretical level of the transplantation of a foreign *concept* of copyright? As we will see in Part IV, this is clearly not the case. Conceptually speaking, Russian copyright is very close to Soviet copyright. It was (and is) constructed as a subjective claim of the author, limited in time, to immaterial goods, a claim, which gives stature to the protection of the author's economic and moral interests in the creation and the exploitation of his work. Even though the arguments have definitely changed, the idea that copyright is a property right is almost

unanimously rejected as it was in the Soviet period. The persisting personal tie of the author with his work is emphasized. If at a conceptual level there have been shifts, these were not negations of earlier positions but, rather, radicalizations of options which had already been selected in the Soviet period.

875. In our opinion, the causes for the inadequate enforcement of rights is mainly to be sought in the relationship between copyright law on the one hand and the political and economic transformation as a whole on the other hand.

Copyright in Western Europe, understood as in Russia as a set of economic and moral rights, functions in a society under the rule of law and with a market economy. The rule of law and the market economy are the results of a long historical process; they are, thus, deeply embedded in the culture of the old continent and in the conceptual baggage of the populace. That the state is also tied to certain legal rules, namely to the respect for inviolable rights and liberties of the individual, and that the general welfare is served by an economic system driven by individual self-interest based on private property, are no longer issues in Western Europe.

This is not the case in Russia. There, the rule of law and the market economy were, so to speak, introduced by decree, *i.e.*, from above, by the same state from which the individual was expected to emancipate himself spiritually and economically. In Russia both closely linked systems to a certain degree lack the cultural historical base which they have in the West. This is, of course, also reflected in the legal consciousness of the Russian citizen. He finds it difficult to see himself as an independent legal actor, who—autonomously and within a self-organizing civil society—pursues the fulfillment of his own desires *without interference by the state*. He also finds it difficult to cut himself completely loose from the collective and to make a clear distinction between mine and thine, or between private and public. Of course, Russian culture has its own dynamic, and the characteristics of the past will not characterize Russian society eternally. Russia too went through an industrial revolution, albeit late, under violent pressure from its rulers, and completely within the state sector, *i.e.*, without acknowledgement of any meaningful private initiative and so with only a limited impact on the citizen's legal ideas. At the beginning of the 2000s, the Russian citizen in any case feels uncomfortable in his legally anchored, strongly individualist position towards state and fellow citizens. The idea that he has rights and freedoms which he can invoke against the state, instead of receiving them from the state (the autocrat), feels strange. Also the idea that private property—a legal concept which never became familiar in the course of the czarist period, and was even despised during the Soviet period—forms the basis for his economic freedom, gives the Russian an uneasy feeling.

The acknowledgement of inalienable human rights and of private property, including ownership of the means of production, is the quintessence of the system transformation, which—let it be repeated—was instigated from above.

The rule of law and the market economy came first, the changing legal consciousness, which is the condition for the success of this transformation, has to be created afterwards. The new legal system, the new rules of the game cannot thus be applied immediately: they have an educational function. Although the contents of the legal system have changed drastically, the continuity with regard to (one of) the functions of the law is remarkable: Soviet law strove for the creation of the *homo sovieticus*, the current Russian law strives for the creation of "the individual" in the liberal sense of the word. Truly work for the long term. The future will show whether the new educational project will produce better results than the old one.

876. Against this background, it should not surprise us that the modern provisions of the Copyright Law of 1993 are so extensively trodden underfoot. Like the right to property or any human right, copyright presupposes a clear distinction between the private and the public domain; so far, this distinction does not belong to the generally accepted worldview of Russian society. If there is a problem of reception, it is mainly one concerning the absence of a social foundation for the fundamentals, originating from Humanism and the Enlightenment, of a market economy and the rule of law, of which copyright is an integrating, not unimportant, but, also, not isolated part. The realization that a person cannot make use of the material goods of other persons seems in Russia to be weakly developed because of historic factors. *A fortiori* the same is true of the lack of respect for other people's *immaterial* goods.

This is also why the Copyright Law 1993 has an educational function. This is expressed, *inter alia*, in the long list of definitions of terms,[118] in the extended (although superfluous) listing of possible subject matter of copyright,[119] in the explicit mention of those principles which are axiomatic to a Western lawyer, such as the rule that copyright does not apply to ideas,[120] that the transfer of the right of ownership of a material object does not imply the transfer of copyrights to the work which is incorporated in that material object[121] or that collective management of the property rights is desirable for those manners of exploitation in which the exclusive rights are hard to exercise on an individual basis.[122] By fixing detailed regulation in the law and by clearly formulating a number of fundamentals, the Russian legislator hopes to offer citizens and users,[123] but, also, the traditionally weak link in the apparatus of power, namely

118. Art.4 CL 1993.
119. Art.7 CL 1993.
120. Art.6 (4) CL 1993.
121. Art.6 (5) CL 1993.
122. Art.44 (1) para.1 CL 1993.
123. "Gesetzesmethodisch einmalig ist die Tatsache, dass das Urheberrechtsgesetz Russlands die allgemein anerkannten Rechtspositionen im Urheberrecht expressis verbis regelt. [...] Hinter dieser Art Regelungstechnik im Gesetz steht die Absicht, das Urheberrechtsbewusstsein der Urheber und Nutzer in der Praxis zu erhöhen und aufzuklären" (Wandtke 568).

the judiciary, stronger support in the application of the (partly new) frame of reference, and to give them guidelines by which copyright-law problems can be solved according to the new rules of the game.

877. In our opinion, the problem of the enforcement of copyright also has to do with the different speeds at which the various subordinate processes of the system transformation are taking place. We have seen how the state sees itself as a guardian of the protection of human rights, how the state maintains its grip on the distribution of cultural products, how the state is still active as an entrepreneur participating in the market of cultural goods.

In the area of copyright, the state has almost completely withdrawn itself. In our opinion, the state here has taken a laissez-faire attitude which is not in agreement with its attitude in the area of, for instance, human rights, where the state stands "warrant" for their observation. At this stage of the transformation process, should the state not also have to "stand warrant" for the observation of copyright?

878. Against this background, the abolition of the administrative model contracts and the privatization of the collecting society are worrying and, in our view, premature.

Administrative model authors' contracts could offer an effective protection for the weakest contracting party, the author. Obviously, the quasi-obligatory model contracts of bygone times would have to be completely revised, they would have to leave greater freedom to the contracting parties and be given an unambiguously author-friendly nature. That such model contracts are "Fremdkörper" in a market economy is certainly true, but as long as there is still an economic system in Russia which combines the worse characteristics of the crumbling and of the developing systems (the formation of monopolies and the lack of social protection), such a measure, which would be entirely in tune with the legal culture of the country, to us certainly seems defensible. Indeed, for persons involved, it is much simpler to adjust a model contract to one's own needs than to have to translate abstract legal principles into "contractual language" oneself. The freedom of contract obviously has to remain the point of departure, but beyond that non-binding model contracts, drawn up by the authorized administrations in consultation with the creative unions, in accordance with and in addition to the author's contract law, could form an important aid for many authors and—why not?—exploiters.[124] Were the government to throw its moral authority into the balance, and the cultural organizations, first among them the creative unions, to give the necessary pub-

124. It is, incidently, very likely that—certainly in the first period—the former model agreements remain models for many contracts (Gavrilov 1993b, 12; Sergeev 198). According to Verina, the model agreements maintained their "methodic meaning" (D. Verina, "GK RF o poniatii i usloviiakh dogovora po litsenzionnym soglasheniiam na ob"ekty IS", *I.S.*, 1996, Nos. 1-2, 34). Why, then, not adapt these to the new legal framework?

licity to the existence of such model agreements, they would in many cases prove serviceable to the authors.

The hasty privatization of the authors' agency *RAIS*, which has become *RAO*, to us seems even more problematic, given that the new authors' association, without a period of transition and with exactly the same personnel members, has to face completely new problems, without any support from the government (with the exception of the transferred property of the buildings and the financial means). Not only is *RAO* confronted with an internal reorganization as a consequence of the loss of its status as legal representative and the ensuing necessity of signing agreements with authors and users without having built up any expertise in the matter (at any rate in relation to authors), it also for the first time has to take care of its own financing. And all of this at a moment when the cultural industry and patterns of leisure are going through an explosive development in Russia. Obviously, none of this increases the likelihood of the law being upheld effectively.

One could rightly argue that the collective management of private rights should ideally be done by private organizations, but this is to misjudge the specificity of the current transitional period *and* the necessity of acting against infringers with the necessary authority. We are of the view that in Russia at the beginning of the 2000s, a public body, or a semi-public body with the involvement of the creative unions (important for the absolutely necessary increase of membership!), would better satisfy the needs of the moment even though this means that, in organizational form, such an organization would show many similarities with the unpopular *VAAP* of earlier times. As long as the difference between "private" and "public" is not more sharply outlined in economic life, we are of the opinion that only organizations which hover in the twilight between the two guarantee an effective exercise of the author's property rights on a collective basis. The strict application of a separation between "private" and "public" at the level of the organizational structure of the collecting societies, as the CL 1993 did, could be "educational", but in any case longer delays the effective management of property rights so that the credibility of copyright itself is threatened.

879. In the same spirit, we must see the continuation and even strengthening of the administrative liability, besides civil and (seldom applied) criminal liability, as a good thing. While it is true that it maintains the involvement of administrative authorities in a private-law matter such as copyright, the earlier bureaucratic capriciousness now seems to have been more or less excluded by the built-in judicial checks on arbitrary government action. Furthermore, the involvement of the administrative authorities has to be considered essential if the fight against massive breaches of copyright is to have any tangible result, particularly if one takes into account the fact that the authorities continue to exercise a considerable role as an active participant in cultural mediation through the state enterprises.

Chapter VII. Transitional Law

Section 1. Situating the Problem

880. As was and is usual in Russia, the transitional provisions were not included in the Copyright Law itself but, rather, in an accompanying Decree of the Supreme Soviet RF on the manner of coming into force of the RF Law on copyright and neighboring rights (hereinafter: the Executive Decree).[1] Strangely enough, these transitional measures are precisely the part of the new copyright law, which has led to a real controversy among Russian lawyers.

881. For a proper understanding of the discussions surrounding this issue, we have to recall that the extension of the legal term of copyright from 25 to 50 years *p.m.a.* was already introduced by the Fundamentals 1991, *i.e.*, on 3 August 1992, an increase in period which was immediately applicable to all unexpired terms of protection.[2] In concrete terms this meant that as far as copyright was concerned, works of which the period of protection of 25 years *p.m.a.* had not yet expired on 3 August 1992 (*i.e.*, if its author is still alive, or died after 31 December 1966) would in future be protected for 50 year *p.m.a.*, whereas works which had fallen into the public domain through the expiry of the period of protection, remained there even after the coming into force of the Fundamentals 1991. With regard to the neighboring rights (which were acknowledged for the first time by the Fundamentals 1991), this regulation meant that the Fundamentals 1991 only protected performances, phonograms, and broadcasts made (or published) after 3 August 1992.

Furthermore, we have to point out that in Russian civil law, the immediate application of the law is the rule but that specific laws can explicitly provide retroactivity.[3]

882. The recent controversy does not concern the date of the coming into force of the new Copyright Law, to wit 3 August 1993[4], nor the provision that the Copyright Law is applicable to the relations concerning the creation and the use of objects of copyright and the neighboring rights, which originate after the coming into force of the Law.[5]

What the controversy does concern is the question of whether terminated rights, such as copyright on works which ended because of the expiry of the period of protection, can fall under the application of this new Copyright Law. That is the issue of the possible retroactivity of the Copyright Law.

1. PVS RF, "O poriadke vvedeniia v deistvie Zakona RF ob avtorskom prave i smezhnykh pravakh", 9 July 1993, *VSND i VS RF*, 1993, No.32, item 1244.
2. The executive decree with the Fundamentals 1991, which contained this rule, had itself probably never come into force (*supra*, No.600), but in fact it only made explicit a generally applied legal principle.
3. Art.4 CC RF. See, also, M. Braginskii, "Obshchie polozheniia novogo Grazhdanskogo kodeksa", *Khoziaistvo i Pravo*, 1995, No.1, 16.
4. Point 1 Executive Decree (day of the (first) official publication of the Law).
5. Point 2 Executive Decree.

883.Everything depends on the correct interpretation of the third point of the Executive Decree, which runs as follows: "The terms of protection of the rights provided by art.27 [copyright] and 43 of this Law [the neighboring rights], are applied in all cases in which the 50-year term of copyright or of the neighboring rights has not ended by 1 January 1993."

The crucial question here is to know whether the fifty-year period to which this point refers, concerns the period of protection provided in the Fundamentals 1991, or the one from the Copyright Law. In the first case the new Copyright Law comes into force immediately; in the second case, the law has retroactive force.

Section 2. Scholarly Opinion on the Retroactivity of the Copyright Law

884. Savel'eva,[6] Voronkova,[7] and Sergeev all defend the opinion that the CL has retroactive force. Savel'eva writes: "Thus, works, phonograms, performances, and transmissions of broadcasting or cable organizations are protected under the new Law if their author died or if they were performed, created, fixed, or transmitted after 1 January, 1943, for the remaining period". She does add that "the new Law covers legal relations in respect of use of such works after the effective date of the new Law, *i.e.*, 3 August 1993. The old legislation is applicable only in cases where a violation of copyright work took place prior to 3 August 1993".[8] In other words, only future actions of exploiters with regard to works of which the copyright—which had already expired—is restored, are subject to the application of the CL 1993; actions of exploitation from before 3 August 1993, carried out in accordance with the legislation then in force, remain licit. Sergeev fully agrees with this interpretation and wonders whether this construction was the legislator's conscious aim or, rather, the result of an overhasty and un-thought-through decision.[9]

885.Gavrilov, on the other hand, does acknowledge that it had apparently been the purpose to grant the CL 1993 retroactive force,[10] but that the legislator's choice of phraseology in point 3 Executive Decree does not do justice to this purpose and, consequently, that the CL 1993 has no retroactive force.After he has first recalled that the Fundamentals 1991 were not introduced

6. "In Zukunft [werden] also vor dem Datum des Inkrafttretens des Gesetzes veröffentlichte Werke und Gegenstände verwandter Schutzrechte geschützt sein, wenn die 50-jährige Schutzfrist vom Augenblick des Todes des Urhebers (im Falle des Urheberrechts) bzw. von der Herausgabe des Phonogramms (im Falle der verwandten Schutzfrist) usw. noch nicht abgelaufen ist. Eben dadurch hat das Gesetz früher geschaffenen Werken und Gegenständen verwandter Schutzrechte rückwirkend Schutz gewährt."
   (Savel'eva 1993a, 810-811)
7. Voronkova 1995, 26.
8. Savel'eva 1993b, 25.
9. Sergeev 192-193.
10. Gavrilov 1993a, XLV.

with retroactive force, he points out that *point 2* of the Executive Decree for the Copyright Law has to be explained in such a way that certain categories of subject matter which, in the past, were not protected by copyright or the neighboring rights, do not fall under the new legislation. According to him, this is an expression of the general principle that a law does not have retroactive force, namely that the new legislation does not grant judicial meaning to facts which took place in the past if, under previous legislation, these did not give rise to, alter, or terminate civil rights and duties.[11]

Point 3 Executive Decree does—still according to Gavrilov—nothing other than lengthen the 50-year periods of protection of copyright and neighboring rights still running on 1 January 1993 according to the provisions of art.27 and 43 CL 1993. He takes as a premise that the period of 50 years to which point 3 Executive Decree for the Copyright Law refers, is the term of protection fixed by the Fundamentals 1991 and not the one established by the Copyright Law 1993 itself.[12] All this, Gavrilov claims, is analogous to the transitional provisions contained in the Executive Decree for the amendment to the Fundamentals 1961 which was passed in 1973,[13] as well as in the original executive decree for the Fundamentals 1991.[14] These increased the period of protection of copyright respectively from 10 to 25 years *p.m.a.*, and from 25 to 50 years *p.m.a.* for those works of which the period of protection valid under the earlier legislation had not expired on, respectively, 1 January 1973 and 1 January 1992. In neither case were works which had fallen into the public domain through the expiry of the term of protection, withdrawn from the public domain.

Things are then, according to Gavrilov, no different with the coming into force of the new Copyright Law: the periods of protection provided in art.27 and 43 CL 1993 are applied to all works and subject matter of neighboring rights of which the terms as determined under the previous copyright legislation, *i.e.*, the Fundamentals 1991, has not yet expired on 1 January 1993. Works and subject matter of neighboring rights which, according to the old legislation, were at that time no longer (or had never been) protected, remain outside the field of protection of the new Copyright Law.[15]

11. Gavrilov 1994a, 74-76.
12. Gavrilov 1994a, 76 and 1995a, 697.
13. Point II UPVS SSSR, "O vnesenii izmenenii i dopolnenii v Osnovy grazhdanskogo zakonodatel'stva Soiuza SSR i soiuznykh respublik", 21 February 1973, *VVS SSSR*, 1973, No.9, item 138.
14. Point 12 PVS SSSR, "O vvedenii v deistvie Osnov grahzdanskogo zakonodatel'stva Soiuza SSR i Respublik", 31 May 1991, *VSND i VS SSSR*, 1991, No.26, item 734.
15. Gavrilov 1994a, 76-77. Compare, also, Pozhitkov 1994, 80.

Section 3. A Systematic and Legal-Teleological Interpretation

886. It is clear that a grammatical interpretative method cannot help us much further. There is, indeed, no single grammatical argument which could give a definitive answer to the question of whether the 50-year period mentioned in point 3 Executive Decree refers to the period fixed in the Fundamentals 1991 or to those provided in CL 1993. By making use of a systematic method (*i.e.*, placing the legal regulation within the entirety of regulations concerning copyright) and legal teleological method (the description of the purpose of the concrete norm), we can nevertheless conclude that the Russian legislator, indeed, intended to vest the Copyright Law 1993 with retroactive force.[16]

887. As a first argument, we would like to refer to the necessary link between the Executive Decree and the Law of which it is the execution. We here assume that it cannot have been the legislator's intent to approve legal provisions which have no meaning at all. In our opinion, the Russian legislator—in the transitional provisions—desired to give content to certain provisions of the Copyright Law itself.

This is most clear when we look at article 43 (6) CL 1993 with regard to the period of protection of performers who were posthumously rehabilitated or were active during the Second World War. The coming into force in 1992 of the Fundamentals 1991 was the first time at which the rights of the performing artists were protected in the Russian legislation, with application to performances taking place on or after 3 August 1992. Previously, the achievements of performing artists had not been protected. Why then should the duration of the rights of the performing artists be increased because of their activities during the Second World War if—at that time and in the course of almost five decades following the war—the performing artists had had no rights at all? The same applies to the performing artists who were victims of Stalin's repression and who were only rehabilitated posthumously: why should the heirs of these persons be compensated for the impossibility of exploiting certain rights during the repression if these rights did not exist at all at the time of the repression, not even for the performing artists who escaped Stalin's wrath? If, in other words, one were to accept that the Copyright Law does not have retroactive force, the provisions of article 43 (6) CL 1993 would be absolutely meaningless.

It is true that with regard to the virtually identical provision concerning the duration of copyright,[17] the same reasoning cannot be maintained since during the Second World War and the Stalin repression the copyrights *were* always acknowledged so that compensation for the impossibility of exercising

16. Compare, also, "Russland—Erneute parlamentarische Prüfung und endgültige Verabschiedung des neuen Urheberrechtsgesetzes", *Grur Int.*, 1993, 793.
17. Arts. 27 (5) paras. 2 and 3 CL 1993.

these rights in these periods does make sense. However, because both rules were introduced so many years afterwards, the number of applicable cases would remain rather limited if the CL were not to have retroactive force. For the extension of the period of protection by four years, only the works of authors who died in 1967 or later would come into consideration, whereas for the heirs of the authors who became the victim of the repression, the special rule only would apply if the posthumous rehabilitation took place on (or after) 3 August 1993. This would mean that this measure would largely miss its goal since the bulk of rehabilitations took place in the second half of the fifties and in the late eighties/early nineties, and thus—with a non-retroactive application of the recent Copyright Law—would have no consequences at all in the field of copyright.

888. Point 3 Executive Decree was not only intended to give meaning to all provisions from the CL 1993; it also has to be interpreted in such a way that the other executive provisions do not lose their meaning. The issue here is, thus, the mutual coherence of the executive provisions. Point 4 Executive Decree, for example, provides that the copyright of legal persons originating prior to the coming into force of the Copyright Law ceases at the end of a period of 50 years after the publication of the work or, if the work was not published, its creation.[18] This refers to the original copyright of legal persons (*e.g.*, film studios) which existed under the CC RSFSR and was not subject to a limitation in time.[19] Such an eternal, original copyright of legal persons was no longer acknowledged in the Fundamentals 1991.[20] Point 4 Executive Decree, however, ignores this fact completely and provides a transitional regu-

18. Consequently, the rights of legal persons temporarily continue to exist. Their extent is determined by the new legislation, but the holder of the rights is determined by the formerly applicable legislation: Gavrilov 1996, No.13, 238. In practice, there are great difficulties in determining the ownership in pre-1992 television films made in Soviet film studios on order by Gosteleradio USSR: E. Gavrilov, "O vladel'tsakh avtorskikh prav na sovetskie televizionnye fil'my", *Zakonodatel'stvo i praktika sredstv massovoi informatsii*, May 1999. Moreover, one may wonder whether after the expiry of the 50-years-after-publication-term for old films, the authors of the film, as they are now defined by art.13 (1) CL, and indirectly the film producer on the basis of the legal presumption provided in art.13 (2) CL, may not invoke the general term of 50 years *p.m.a.* to protect their rights. If not, then the term of protection for old films would be significantly shorter than for new films: see Dietz 1997, 51.
19. *Supra*, Nos.114 and 144.
20. *Supra*, Nos.604 ff.
21. Without making the link with these problems explicit, Dozortsev 1993a, 516 writes: "Although the Fundamentals as mentioned above contain provisions governing copyright, the 1993 Law on Copyright and Neighboring Rights was drafted and promulgated as if the Fundamentals seemingly did not exist."

lation for the original copyright of legal persons, which in fact had for a year no longer existed![21]

A similar reasoning fits point 5 Executive Decree which provides that radio and television broadcasts—of which the 50-year period of protection runs from the time of licit disclosure or from their creation if they were not disclosed (and thus by virtue of point 3 Executive Decree fall under the application of the Copyright Law)—are protected from the coming into force of the Copyright Law for the remaining part as subject matter of neighboring rights and, thus, no longer as subject matter of copyright, as was still the case under CC RSFSR. Also here the fact is ignored that the Fundamentals 1991 no longer considered broadcasts protected by copyright but, rather, by a specific neighboring right.[22]

Both provisions from the Executive Decree for the CL 1993 are an attempt to fill the gaps which originated through the overhasty application of the Fundamentals 1991 but, at the same time, ignore the very fact that the Fundamentals 1991 had been in force in Russia for one year.

The point is now that, if points 4 and 5 Executive Decree ignore the coming into force of the Fundamentals 1991 in the territory of the Russian Federation, it appears to us—because of the coherence of the Executive Decree—that also in point 3 there is no reference to the period of protection, as described in the Fundamentals 1991, but only a reference to the term contained in the CL 1993 itself.

889. A final argument in favor of the retroactive applicability of this Law can be derived from the history of the origin of the CL 1993. The regulation concerning the duration of protection of authors and performing artists—who were posthumously rehabilitated or who were active during the Second World War[23] on the one side, and the regulation of the application of the new CL in time on the other[24]—were introduced into the texts at the very last moment in the legislative process, *i.e.*, only after the presidential veto at the third reading of the Bill (and the Executive Decree). The immediate cause for this amendment was a request from the then Copyright Agency *RAIS*[25] and an open letter from leading cultural workers to the Supreme Soviet,[26] in which it was asked also to let works of victims of the repression enjoy the increase of the duration of copyright protection. This not only led to the present provisions of material law concerning the duration of protection but, also, to the present redaction of the Executive Decree. Until the very last moment, the draft of the

22. Art.141 (3) Fundamentals 1991.
23. Art.27 (5) paras.2 and 3 and art.43 (6) CL 1993.
24. Point 3 Executive Decree.
25. S. Taranov, "RAIS budet vyplachivat' dollary po dolgam VAAPa", *Izvestiia*, 31 March 1993.
26. Quoted by Voronkova 1995, 26.

Executive Decree contained a completely different rule, namely that the 50-year period would only be applied for the successors-in-law of those authors who had been dead for less than twenty years by 1 January 1993.[27] Because of this, however, "the pride of Russian culture" (*gordost' russkoi kul'tury*)—figures such as A. Platonov, A. Akhmatova, B. Pasternak and S. Prokof'ev—remained outside the sphere of the CL 1993, whereas these were precisely the sort of authors whose works were banned during their lifetimes and even many years after, or the publication or performance of which was limited. This is why they did not even fully enjoy the previously existing, short period (15 or 25 years *p.m.a.*) of protection for their rights, and it did not seem more than just that the Supreme Soviet should now work out a solution to eliminate this old discrimination. A number of people's representatives and lawyers who participated in the preparations of the drafts took this task to heart, and this has led to the present point 3 of the Executive Decree.[28]

890. All this shows that it was certainly the purpose of the Russian legislator to apply the term of protection provided by the CL 1993 in a retroactive way.[29] The motivation for this should be sought in the desire to compensate (the successors-in-law of) those authors and performing artists who were active during the Second World War or who fell victim to the political terror and were only rehabilitated posthumously. Their rights—if they had any to start with—were economically worthless for a shorter or a longer period. The special calculation of the period of protection, and the extension of the period, are in the first place intended to benefit the heirs of a lost generation of cultural workers. This goal could, however, only be reached by granting the Copyright Law 1993 retroactive force.

891. In order to complete the picture, one should mention here a Governmental Decree of 29 May, 1998,[30] which clarifies that for the exploitation of films created before 3 August 1992—*i.e.*, the date on which Russian law abolished the possibility for legal persons to be initial copyright holder—the producers are no longer regarded as authors thereof but, rather, as the "legal right holders of the cinematographic work". The Decree guarantees a minimum royalty to "the authors of cinematographic works" created before the said date (*i.e.*, the scriptwriter, the director, the composer of film music, the scenic artist, the cameraman, and the authors of other works which are used

27. Remark that in this proposed rule likewise the existence of the Fundamentals 1991—which had already introduced a 50-year period—was completely ignored.
28. Voronkova 1995, 26.
29. See, also, W. Nordemann, "Der Urheberrechtsschutz von Angehörigen der Russischen Föderation in Deutschland", *ZUM*, 1997, 523 (applied to Prokof'ev's example).
30. Gov. Decree No.524 of 29 May 1998 on minimum rates for the remuneration of authors of cinematographic works produced before August 3 1992, *Rossiiskaia gazeta*, June 16, 1998. See Elst 1998, 101.

in the film) for the broadcasting by wire or wireless, reproduction on any material support, distribution (including rental), and showing to the public, of such works.[31] Among the beneficiaries of this remuneration for the use of a Soviet cinematographic work in Russia are not only Russian but, also, Uzbek, Ukrainian, Georgian, etc. authors. As already indicated, the former perpetual copyright in such films was reduced to 50 years from the lawful disclosure of the work or of the creation of the undisclosed film.

Section 4. Concrete Cases of Application

892. The application of point 3 Executive Decree comes down to a true renaissance of rights in works, which had already fallen into the public domain. A few examples can illustrate this.[32]

— The composer Sergei Prokof'ev died in 1953, so that according to the then acknowledged period of protection of 15 years *p.m.a.* his works would fall into the (Russian) public domain on 1 January 1969. Neither the increase of the period of protection in 1973 from 15 to 25 years *p.m.a.*, nor the increase from 25 to 50 years *p.m.a.* in the Fundamentals 1991, benefited the legal right holders of the works of Prokof'ev. By 1 January 1993 the compositions of Prokof'ev had already been in the public domain for 24 years. And then point 3 Executive Decree suddenly stated that the periods provided by article 27 CL 1993 have to be applied in all cases in which the 50-year, copyright period of protection has not expired by 1 January 1993. In other words, if an author has by this date, been dead for less than 50 years, for the remaining part of the period the new Copyright Law will be applied. This is also the case with Prokof'ev, whose works are consequently protected again from 3 August 1993 until 2003, or even until 2007 as this composer also worked during the Second World War and can consequently count on an increase of four years. In other words, the exploitation of his works has since 3 August 1993 again required prior authorization from the legal right holder within the conditions and limitations fixed in the Copyright Law 1993.

— The writer Babel' was executed in 1940, and rehabilitated in 1954. His works fell into the public domain in 1955 (*i.e.*, 15 years after his death). To see whether Babel's heirs profit from the new Copyright Law, we have to examine whether a period of 50 years, the starting point of which is determined by article 27 CL 1993, *i.e.*, in this case the year of rehabilitation, has expired by 1 January 1993. This is not the case, as 1954 is the

31. Mosfil'm paid (already in 1996) a fee to the authors of the old Soviet films, although there was no legal obligation to do this: "Russkoe kino: skromno, no s razmakhom", *Rossiiskaia gazeta*, 2 April 1999.

32. See, also, Elst 1994, 155-157.

year of reference. His oeuvre will be protected until the year 2004. This example clearly shows how the measure taken also benefits the heirs of the victims of the Stalin repression who were (mostly posthumously) rehabilitated under Khrushchev.

— Finally, authors who were never officially rehabilitated because they were never "officially" suppressed, but whose works were for a long time "taboo", can in an indirect manner profit from the new Copyright Law, through the posthumous publication of a work. Let us take for example Bulgakov, who died in 1940. His *The Master and Margarita* was published for the first time in 1966. As article 27 (5) par.1 CL 1993 starts the period of 50 years from the moment of posthumous publication, this masterpiece is now protected until 2016.[33] This is a very extreme example if one finds that the work was already unprotected at the time of its (posthumous) publication, since the copyright legislation then in force set a term of 15 years *p.m.a.* and did not have a separate regulation for posthumously published works.

Other authors whose works are again protected include the writers Osip Mandel'shtam (who died in a concentration camp in 1938, was partially rehabilitated in 1956 and completely rehabilitated in 1987), Anna Akhmatova (†1966), Boris Pil'niak (executed in 1937, rehabilitated in 1957), Aleksei Tolstoi (†1945),[34] Mikhail Zoshchenko (†1958), Boris Pasternak (†1960), the painters Igor' Grabar' (†1960), Natal'ia Goncharova (†1962) and Petr Konchalovskii (†1956), the sculptor of the famous statue "Worker and Kolkhoz Woman", Vera Mukhina (†1953), the architect of Lenin's mausoleum Aleksei Shchushev (†1949), etc.

893. With reference to neighboring rights, point 3 Executive Decree does not have the effect of a renaissance (as these rights did not exist in the past) but, rather, of a late birth. It covers achievements which took place after 1943 and *post factum* give rise to rights. The secondary use in 1995, for example, of a commercial phonogram made in the sixties gives rise to a right to remuneration for the performing artists and the producer of the phonogram in agreement with article 39 CL 1993. In other words, the legal protection has by the recent legislation not only been granted to the subject matter of neighboring rights which were created or first disclosed after the coming into force of the new copyright legislation, but, also, objects which had been created previously, on the sole condition that on 1 January 1993 the period of 50 years, introduced by the law, has not yet expired. In other words, from 3 August 1993, onwards every use of subject matter of neighboring rights—including those subject

33. See, also, Voronkova 1995, 26.
34. Confirmed by the Civil Chamber of the Moscow City Court of 26 February 1998, as quoted by Gavrilov 2000, 1003-1004.

matters, which were created and published earlier—could only take place subject to the permission of the holders of these rights.[35]

894. As the regulation concerning neighboring rights shows, the retroactive force of the periods of protection in the CL 1993 affect not only those works which were no longer protected because of the expiry of the former periods of protection but, also, those achievements which, in the past, had not been protected at all, which were removed from the public domain and for the time being "privatized" by exclusive appropriation. For example, the performances of the famous ballet dancer Rudolf Nureyev are protected in Russia until the end of 2048, *i.e.*, 50 years following his reported posthumous rehabilitation on 21 September 1998.[36] Rudolf Nureyev died in 1992, *i.e.*, before the entry into force of this Copyright Law.

895. For the sake of clarity it must be emphasized that this renaissance of copyrights (or the late birth of neighboring rights) only has consequences for exploitation actions taking place from 3 August 1993 onwards (point 2 Executive Decree). No claims on the past utilization of now reborn works or late born subject matter of neighboring rights are to be honored.

Section 5. Concluding Remarks

896. However innovatory these provisions on retroactivity may seem, the renaissance of rights in works and achievements which have fallen into the public domain is not unique in the copyright history of Russia nor is it inherently linked with the granting of retroactive force to a law.

Thus, the general period of protection of 15 years *p.m.a.*, introduced by the Fundamentals of copyright of 1928,[37] was introduced retroactively: "The copyright in those works concerning which the periods provided by art. 10-15 of the Fundamentals coming into force have not yet expired, is reinstituted [*vosstanovit'*] from the moment of the coming into force of the Fundamentals for the remaining part of the respective periods." The Russian legislator of 1993, in his striving for clarity, would have done better to take inspiration from the clear choice of words of the Soviet legislator of 1928.

Concerning the second element of our remark, we can refer to what we wrote above in connection with the posthumous publication of a work more than 50 years after the death of the author and the reinstitution of copyright, implicitly linked to this by the Copyright Law.[38]

35. Sergeev 268-269. Entine (556), in our opinion, assumes incorrectly that the subject matter of neighboring rights which were licitly disclosed in Russia before the coming into force of the CL 1993, are in the public domain.
36. *Radio Free Europe/Radio Liberty Newsline*, Vol. 2, No. 182, Part I, 21 September 1998.
37. Point 2 Postanovlenie TsIK i SNK SSSR, "O vvedenii v deistvie Osnov avtorskogo prava", 16 May 1928, *SZ SSSR*, 1928, No. 27, item 245. *Supra*, No. 108.
38. *Supra*, No. 741.

897. Finally, we also have to point out the macro-economic effect of the described transitional measures, which in essence (re)privatize a substantial part of the public domain. Measures inspired by these social motives have economically important consequences even at only an internal level since the exclusive rights on numerous famous and popular Russian works sometimes revive after many years (or rights in old performances or recordings originate for the first time).

It is, moreover, not unimportant that this renaissance of rights took place in certain older works in 1993, *i.e.*, before Russia joined the BC. At the time of the entry, these works were not in Russia's public domain, so that—by application of article18 (1) BC[39]—they are also removed from the public domain in the other countries of the Berne Union. As we already know, Russia has itself, in an opposite movement, rejected the retroactive protection of "old" foreign works. The combined effect of both measures (retroactive foreign protection of old Russian works and no retroactive Russian protection for old foreign works) is very favorable to Russia's balance of foreign trade: Russia does not pay for old foreign works but does receive royalties from abroad for "its" older works. At least on this point the Russian lawyers seem not to have suffered any problems from a defective legal culture.

Conclusion of Title II

898. Savel'eva, in our view correctly, writes that a legal regulation was instituted "die es Russland erneut erlaubt, sich der Weltgesellschaft zuzugesellen und den russischen Schriftstellern, Dichtern, Künstlern, Komponisten, Musikern und ausübenden Künstlern Gerechtigkeit widerfahren zu lassen".[40]

In the classical copyright, this appears from the clear description of the subject matter of the law, the consistent maintenance of the principle that solely physical persons may be initial copyright holders, the greater systematization in the description of rights, the modernization of these rights (the right to broadcast by satellite and transmit by cable, the rental right), the acknowledgement of the exclusivity of these rights, the acknowledgement of a right to remuneration

39. "This Convention shall apply to all works which, at the moment of its coming into force, have not yet fallen into the public domain in the country of origin through the expiry of the term of protection" (art.18 (1) BC). It is, of course, true that these works had previously already fallen into the public domain, but this fact is irrelevant for the countries of the Berne Union. All that counts is the legal situation at the time of accession to the BC, and then these Russian works were not (or no longer) in Russia's public domain.

40. Savel'eva 1993a, 799. Compare Sergeev (19-20), according to whom the legal basis has now finally been laid for the civilized (*tsivilizovannyi*) regulation in Russia of relations in connection with the creation and the use of works of science, literature and art, and also of neighboring rights, and Russian copyright for the first time in its almost 300-year history (*sic*) has converged with the level of copyright protection guaranteed in the majority of the developed countries of the world.

for home copying, the linking of the exceptions to concrete purposes, and their subjection to the general clause which safeguards the normal exploitation and the author's legitimate interests, and the long period of protection, with a special manner of calculation for works by authors who were victims of the communist repression.

Positive in the Russian copyright law at the beginning of the 2000s are also the provisions concerning contract law, which combine the principle of freedom of contract with some protective rules for the benefit of the weaker party; the acknowledgement of the neighboring rights, which moreover were in many respects conceived more broadly than is the case in the Convention of Rome (more beneficiaries, more rights, longer period of protection, no reservation where the RC nevertheless allowed this); the regulation concerning collecting societies with the imposition of the double obligation to represent and to license; the accession to the most important international conventions and the regional cooperation in the framework of the CIS; and finally the very well developed civil, administrative, and criminal liability system in which the possibility of a damage-independent remuneration is particularly remarkable. Also the retroactive application of the terms of protection should, in principle, be applauded insofar as in this way the unjust limitation of copyrights under the Soviet regime is, at long last, partially rectified.

899. Nevertheless, a number of provisions are still problematic because of legislative sloppiness, a lack of problem consciousness and/or a lack of a sense of reality. This is true particularly for the regulation of the initial ownership in so-called collective works, the all-too-weak legal position of the film director, the unnecessary and for the (author even disadvantageous) redefinition of the moral right to integrity, the unclear formulation of the exhaustion rule, the introduction of an unrealistic resale right and the absence of a lending right, the absence of a right of remuneration for reprography, the clumsy formulation of the extension of protection for participation in the war, the careless definition of the parties to author's contracts, the exclusion of every external control over the collecting societies, and the rejection of the retroactive application of the Berne Convention.

900. A number of these points of criticism can definitely be called serious, but the excessive skepticism which would follow from a comparison of the present Russian copyright to an ideal-typical copyright law, is in our view unjustified, as this would relegate the enormous progress which the Copyright Law 1993 means for the protection and improvement of the legal position of the author on the background. It is, however, true that the Copyright Law 1993 is still very young and a number of its innovations are still to be put into practice, particularly the remuneration for home copying, or the rights of the performing artists, which will largely remain a dead letter until an effective collecting society is set up.

PART IV

NATURE AND FUNCTION OF COMMUNIST AND POSTCOMMUNIST COPYRIGHT

Introduction

901. In this Part, we will examine what influence the system transformation has had on the legal nature of the subjective claims of the author (Chapter I). The first question is whether copyright, indeed, *is* a subjective right (in the meaning of the word in European continental traditions). If so, to which category of subjective rights copyright should be assigned according to Soviet and Russian law and legal doctrine: property rights or personal, non-property rights?

Secondly, one may ask how the political, economic, and cultural alterations have had their effect on the way in which the interests, fundamental to copyright, are brought into mutual equilibrium, and on the place of copyright within the whole range of standards which regulate creation and enterprise in the cultural sector (Chapter II)?

Chapter I. The Legal Nature of Communist and Postcommunist Copyright

Section 1. Is Copyright a Subjective Right?

§1. Privilege or Subjective Right?

902. Soviet and present-day Russian legal thought knows the traditional distinction between copyright in the objective sense and copyright in the subjective sense. The former refers to the set of legal norms which regulate property and personal, non-property, relationships, arising in connection with the creation and the use of works of science, literature, and the arts, whereas the latter refers to all the various individual rights vested in an author as a consequence of the works created by him, the legal claims which the author draws from this set of norms.[1]

It is, thus, acknowledged that an author has a subjective right to his work, in other words, that by virtue of the objective copyright legislation a subjective claim is granted, the object of which is not of a material but of an immaterial nature.[2] This claim originates automatically, *i.e.*, purely as a consequence of the creation of a work of science, literature, or the arts.[3] Holding author's rights was and is considered being part of the citizen's legal capacity.[4]

903. All this was, in Soviet times, less obvious than it seems. As was explained above, in the USSR the artist was required to subordinate his subjective striving to the objective, collective interest of constructing communist society.

1. S.A. Chernysheva, in Sukhanov 1993, I, 318; L.B. Gal'perin and L.A. Mikhailova, "Intellektual'naia sobstvennost': sushchnost' i pravovaia priroda", in Gal'perin 21;. Gavrilov 1984a, 3; Grishaev 1991, 6; Krasavchikov, II, 444.
2. Gavrilov 1984a, 3; Savel'eva 1986, 6.
3. Art.4 para.2 CC RSFSR; Art.9 (1) CL 1993 and art.4 (1) Computer Law; Art.3 para.2 Fundamentals 1991; Art.8 (1) para.2 CC RF.
4. Art.9 Fundamentals 1961; Art.10 CC RSFSR; art.9 (2) para.1 Fundamentals 1991; art.8 CC RF.

His social position was entirely dependent on his public loyalty to the regime and to the then-current interpretation of Marxism-Leninism.

One can, therefore, only be surprised that state and Party accepted the author's subjective claim, based on the objective law, in a cultural (or scientific) matter, a claim which originated without any government interference and, thus, without any possibility of monitoring the contents of the created work.

Things could have been very different in such a totalitarian system, for example through a system of privileges, in which the state would grant well-defined rights only to the authors of ideologically approved works. The authors' loyalty would be absolute because the arbitrariness in such a system is absolute: the copyright privilege could, at any moment, be revoked on the grounds of (alleged) dissidence on the author's part. The copyright privilege would be a perfect stimulant for the creation of ideologically reliable works, comparable to the granting of a Lenin award, good accommodation and holiday homes at the Black Sea, study and travel grants, access to sanatoria and polyclinics, etc.

While these last advantages did indeed take the form of privileges, reserved to members of monolithic creative unions,[5] copyright was—like an island in a sea of privileges—still construed as a subjective right.

904. In present-day Russia, copyright continues to be seen as a subjective right and not a public-law privilege. The reverse would indeed have been amazing.

By construing copyright as a subjective, civil right, the Russian legislator recognizes that the author can dispose freely over his work, *i.e.*, he can exercise his rights to the work according to his own understanding and will and in his own interest,[6] he is free to make contracts or not, and to determine the contents of author's contracts,[7] saving the provisions of imperative law and taking into account the dispositive provisions,[8] contained in the Copyright Law 1993 with relation to the law of contracts. The realization of one's subjective rights in accordance with one's own will is seen as an important part of the establishment of the rule of law.[9]

§2. Only a Subjective Right to Ideologically Sound Works?

905. It would not have been startling if, in the totalitarian USSR, the subject matter of the author's claim were limited to ideologically approved works. Soviet copyright law, however, explicitly ruled out the possibility of excluding ideologically undesirable works from the copyright protection system since such protection was granted to works "irrespective of their purpose [*naznachenie*] or value [*dostoinstvo*]".[10]

5. Exclusion from the creative unions meant the immediate loss of these privileges: *supra*, No.86.
6. Art.1 (2) paras.1 and 9 CC R.F.
7. Arts.1 (1) and 421 (1) CC R.F.
8. Art.421 (4) CC R.F.
9. Zenin 78.

906. In Soviet legal doctrine, a few lawyers did argue for the introduction of an axiological criterion for copyright protection. [11] The majority of legal theorists, however, rejected the importation or acknowledgement of axiological criteria for copyright protection on the basis of the text of the legislation itself.[12] Koretskii, for example, found his opponents in Serebrovskii, who did not consider usefulness to the community as a feature but as the purpose of a work,[13] and in Antimonov and Fleishits who were of the opinion that even works containing ideological mistakes were protected under the copyright law. The latter authors did, however, add in the same breath that when deciding whether or not to exploit a work the user organizations had the right to weigh the ideological content of the work and, if it was found wanting, to refuse to publish.[14] In a reaction to Popov, Gavrilov wrote[15]—backed in this by Savel'eva[16]—that social usefulness could play a role in the exploitation of a work but definitely could not be a condition for protection. Because the appreciation of a work can change with time, a temporary need for the work could arise or the author could still revise his work.

The argumentation of the opponents of an axiological criterion is remarkable. They rejected such a criterion, in fact, because it was in any case

10. Art. 96 para. 1 Fundamentals 1961; art. 475 para. 1 CC RSFSR. This explicit exclusion of the value and the purpose of the work as requirements for protection was already present in the Fundamentals 1925.
11. Koretskiis for example wrote:
    > "Works which are hostile towards the ideology of Marxism-Leninism and the interests of the laboring masses, or which preach and extol predatory wars, racism, misogyny, lechery, pornography and similar degerneracies which are incompatible with the moral ideas of progressive humanity, cannot and must never enjoy the protection of our copyright law."

    According to him there was a need for works which contributed to communist construction. If one "finds that a work fails to conform to the requirements which society had the right to demand of it, no copyright should originate: excessive liberalism would harm authors as much as anyone" (Koretskii 250-251). Comp. Gordon 60-64; O.A. Krasavchikov, "Edinstvo i differentsiatsiia pravovykh form tvorcheskikh otnoshenii", in Boguslavskii et al. 55; V.A. Popov, "O poniatii i priznakakh ob"ekta avtorskogo prava", in Boguslavskii *et al.* 59-62; Sverdlyk 18.
12. The proponents of the introduction of an axiological requirement nonetheless seemed to have won, when the draft Fundamentals of Civil Legislation became known in 1960 (*Sots. Zak.*, 1960, No. 8). In these, the formula "regardless of the value of the work" had been dropped. In the final version of the Fundamentals 1961, this formula was, however, again included, so that the defense of an axiological criterion of protection could only be maintained by an interpretation *contra legem*: Levitsky 1979b, 429-430.
13. Serebrovskii 42.
14. Antimonov/Fleishits 100-101. Compare Chernysheva 1979, 77.
15. Gavrilov 1984a, 92.
16. I.V. Savel'eva, "Effektivnost' pravovogo regulirovaniia otnoshenii v sfere khudozhestvennogo tvorchestva", in Gribanov 147.

superfluous: the economic order of the Soviet Union prevented undesired works from being exploited and distributed.

907. If under communist rule the originating of subjective copyright was not made dependent on any axiological criterion, such as the social utility or ideological correctness of a work, this is *a fortiori* true of Russia after the democratic reforms. After all, copyright extends to works of science, literature and art which are the result of creative activity *regardless of the purpose or value of the work*.[17]

§ 3. The Abuse of Author's Subjective Rights

908. If in Soviet times copyright was not a privilege, and not limited to works which were ideologically "correct", could not then the application of the theory of the abuse of rights (*zloupotreblenie pravami*) in the exercise of author's rights secure the ideological pureness of the author's works disseminated?

909. Article 39 para.2 Constitution 1977 stated that the exercising of their rights and freedoms by the citizens should not harm the interests of the community and the state, nor the rights of other citizens.[18] In one of the rare comments in the Soviet legal doctrine on the abuse of copyright, Dozortsev emphasized, nonetheless, that the principle contained in article 39 para.2 Constitution 1977 could only be applied under strict conditions.[19] He named four:

(1) it had to concern actions taking place within the framework of a subjective right;
(2) these actions ignored other people's interests which were also supported by a right but without a direct link with the (abusively) exercised right (in other words, the rights of the two people exist in the framework of different legal relationships);
(3) these actions exceeded the measures which were necessary for the realization of the private interests which lay at the basis of the subjective right (or they did not even have any link with these interests); and
(4) no special law existed which provided a regulation in such cases.[20]

As a possible application of this principle in copyright law, Dozortsev gives the example of an author's demand for the prohibition of the publication of a work by a contracting party—which is nonetheless authorized by the publication contract—on the basis of the violation of his personal, non-property rights at a moment when this contracting party had already made great ef-

17. Art.6 (1) CL 1993.
18. See also art.65 Const.1977: "The citizen of the USSR is bound to respect the rights and lawful interests of other persons, to be intolerant of anti-social behavior, and to promote in every way the protection of public order."
19. Dozortsev 1979, 197.
20. *Ibid.*

forts in preparing the publication and the violated right could just as easily be restored by making alterations to the work. Such a demand entails an abuse of copyright as the author, in his choice between the measures legally at his disposal as civil law sanctions for the violation of his personal, non-property rights,[21] chooses those which—with no greater advantage to himself—cause the greatest disadvantage for the other party.[22]

910. Another possible source of law for the theory of the abuse of rights, more specifically concerning the civil law, was article 5 para.1 Fundamentals 1961 and article 5 para.1 CC RSFSR: "Civil rights are protected by law, with the exception of cases in which they are exercised in contravention of the intention of these rights in a socialist society in the period of the construction of communism."

Consequently, this case is not one of the willful choice to exercise such rights as, without giving greater advantage to the holder of the right, impose the greatest disadvantage on the other party but, rather, the exercising of a right contrary to its social purpose,[23] namely the construction of a communist society. This rule is only important for rights the purpose of which was not included in their legal description, as is the case with copyright.

Bratus' pointed out that the law itself did not link the author's right to publish and distribute a work under a pseudonym[24] to a particular intention, but the exercise of such right could not be in contradiction with the general sense of the copyright law, *i.e.*, the encouragement of creativity and the protection of its results in conformity with the interests of the author and society. This right can, for instance, not be used systematically to disseminate mendacious information or information which violates the honor and dignity of another person in a series of press articles under a pseudonym. In such cases, the courts were entitled to reveal the identity of the author of such articles, and to forbid the further use of a pseudonym by the author, on the grounds that the right to a name had been exercised contrary to its purpose.[25]

21. Art.499 CC RSFSR lists the introduction of corrections, the publication in the press of a notification of the violation of non-property rights, prohibition of publication, and the stopping of dissemination as possible sanctions, in principle to be chosen freely by the author.
22. Dozortsev 1979, 197; V.A. Dozortsev, in Bratus'/Sadikov 593. See, also, N.L. Klyk, "Nekotorye voprosy otvetsvennosti organizatsii po avtorskomu dogovoru", *VLU*, 1982, No.5, 80; Savel'eva 1986, 133-134. Gringol'ts writes that the court can apply any measure which ensures the complete satisfaction of the violated legal interests of the author or his heirs *at the lowest cost to the liable socialist organization* (italics M.E.), I.A. Gringol'ts, in Fleishits/Ioffe 732-733. *Contra*: S.A. Chernysheva, "Grazhdansko-pravovaia zashchita avtorskikh prav", *SGiP*, 1984, No.2, 71.
23. I. Ia. Diuriagin, *Grazhdanin i zakon*, M., Iuridicheskaia Literatura, 1991, 112-113.
24. Art.479 para.1 CC RSFSR.

Gringol'ts had very different examples in mind, such as the case of an author who prevented the publication of a work of great social value, or cases in which the copyright vested in the author, or more especially in his heirs, threatened to become a source of income so great as to be contrary to the principle of distribution according to labor.[26] As an ultimate measure, the government could then compulsorily purchase individual rights from the author or his heirs.[27] In practice, the compulsory purchase of copyrights was exercised extremely rarely and only after the author's death.[28] Excessive income from copyright almost never occurred since Soviet copyright law itself established the maximum fees for the use of authors' works by the various means of publication so that, in this respect, the theory of the abuse of rights was in reality virtually superfluous.

From the examples quoted in Gringol'ts, it is apparent that the compulsory purchase of rights by the state was a legal construction not thought up with an eye to buying up the copyrights in ideologically unsound works in order to prevent their publication and distribution but, on the contrary, with the intention of distributing socially desirable works on an as broad a scale as possible.[29]

911.The rather marginal cases of the abuse of law outlined above aside, there is not a single indication that this theory was used to restrict effectively the legal exercise of copyrights—a theory which, moreover, could not in any case deprive the author of his copyrights *ab initio*.The application of the theory of the abuse of rights on the *exercise* of copyright law did not, in our view, play a major role in the legal practice of the Soviet Union and was, thus, no real compensation for the absence of an axiological criterion for monitoring the *origination* of copyright.[30] The theory of the abuse of law did not, in our view,

25. Bratus' in Fleishits/Ioffe 25.With regard to this concrete example, Bratus' was contradicted by the Plenum of the Supreme Court of the USSR which, in a decision of 17 December 1971, made the publishers liable for the breach of the honor and dignity of a person by an article published anonymously or pseudonymously in one of their media, and expressly stated that the publishers were not obliged to reveal the identity of the author: *BVS SSSR*, 1972, No.1, 13.
26. I.A. Gringol'ts, in Fleishits/Ioffe 734.
27. Art.501 CC RSFSR.
28. I.A. Gringol'ts, in Fleishits/Ioffe 734.
29. Art.501 CC RSFSR arose from the nationalization decrees of the first years of the Revolution, and these concerned precisely such works as the dissemination of which was considered highly desirable: *Supra*, Nos.101 ff.
30. *Contra*:T.I. Illarionova, "Metod grazhdansko-pravovogo regulirovaniia i avtorskoe pravo", in Boguslavskii/Krasavchikov 29:

    "Naturally one can object [...] that socialist law need not protect the interests of an author who creates a work which propagates bourgeois ideology. But in itself the origin of copyright does not mean its unhindered realization. The general sanction of art.5 Fundamentals [1961] (art.5 CC RSFSR), consisting in the rejection of the protection of a right exercised contrary to its purpose in socialist society, is sufficiently effective."

serve to further restrict the law of copyright than is the case under western systems of copyright.[31] It is certain that this technique was not used in order to restrict the rights of dissident authors. In fact, there was no need to call on the theory of the abuse of rights in the struggle against dissent because there were enough other extra legal methods available to prevent the dissemination of undesired works. Nor was it needed to make individual economic interests subordinate to the collective interest of community and state since this subordination already seemed assured by the many far-reaching limitations upon copyright.

912. The theory of the abuse of rights has presently no direct legal basis in the Constitution. The Russian Constitution of 1993 subordinates the exercising of the rights and liberties of the man and the citizen only to the respecting of the rights and liberties of other persons,[32] thus no longer to the "interests of society and the state", as did article 39 para.2 Constitution 1977.

The theory of the abuse of rights is now based entirely on article 10 CC R.F. In this article, only the exercising of rights purely for the purpose of causing damage to others is explicitly characterized as a form of inadmissible abuse of rights.[33] Otherwise, the interpretation of the concept of the abuse of rights is left to the judge. It is not as yet clear whether the use of a right contrary to the social purpose for which the right is recognized, is considered to be an abuse of rights.[34] It should be noted that in article 5 (2) para.3 Fundamentals 1991 it was still provided that civil rights could not be exercised contrary to their purpose. According to Zenin, however, this general principle could never be used as the basis for the denial of an actual civil right; this was only acceptable if the legislator had expressly specified the purpose of a subjective right.[35] The same article of the Fundamentals 1991 also considered the exercise of civil rights to be inadmissible if this was contrary to the rights and legally protected interests of others, the principles of common decency, and business ethics.[36]

913. Now that the rights of the author have been more widely defined, and the limitations upon copyright defined much more strictly, conditionally and purpose bound, the triumph of a free individual right of disposal—as one of the most important results of the transition—also seems to extend itself to the exercise of copyright. It is, however, not impossible that this very freedom will in future make an appeal to the theory of the abuse of rights necessary to

31. N.K. Klamaris, "Die Verbotsnorm des Rechtsmissbrauchs in den zivilrechtlichen Gesetzgebungen der sozialistischen Länder (Volksrepubliken)", in *Law in East and West. Recht in Ost und West*, Institute of Comparative Law, Waseda University (ed.), Tokyo, Waseda University Press, 1988, 636.
32. Art.17 (3) Const.1993.
33. Art.10 (1) para.1 CC R.F.
34. Makovskii/Khokhlov 91 consider this not to be the case.
35. Zenin 78-79.
36. Art.5 (2) para.2 Fundamentals 1991. See E.M., V.S. in Sukhanov 1993, I, 158-159; V.P. Gribanov, in Sukhanov 1993, I, 26-27.

round off the sharp edges of rights such as copyright always being considered to be discretionary. It is quite possible that the theory of the abuse of rights will be more often applied by the courts in free Russia, with regard to copyright as well as other matters, than it was in the totalitarian Soviet Union. One can, after all, only abuse rights once one has the opportunity to exercise them. Possibly then the prohibition on the abuse of a dominant market position or the limitation of competition can serve as an anchor since both are mentioned in the new Civil Code in the same breath as the general theory of the abuse of rights.[37]

Section 2. The Formal Position of Copyright within the Legal System: Civil or Administrative Law?

§ 1. Copyright and Civil Law

914. Once it is accepted that authors need the protection of a subjective right it is, so to speak, natural that the objective copyright on which the subjective claim is based should be part of the civil law.[38] The copyright relationships which originated as a result of the use and the protection of works took the form of monetary goods (*tovarno-denezhnaia*), and that is precisely the domain of civil law. The personal, non-property rights were considered so closely linked that they could be regulated together by the civil law.[39]

As is known, the Soviet law of copyright was adopted at a federal level as Section IV in the Fundamentals of Civil Legislation of 1961, while it was regulated at the level of the Union Republics as an integrated part (in the RSFSR also Section IV) of the fifteen Civil Codes of the individual republics.

When the first steps were taken to modernize Soviet copyright law in the late eighties, a parallelism soon became clear: work went on simultaneously to rewrite Section IV in the Fundamentals of Civil Legislation and to draft a separate copyright law. The former first resulted in Section IV Fundamentals 1991 which was devoted to copyright, the latter in the Copyright Law of 9 July 1993.

By passing this act, the Russian legislature returned to the situation of before 1961 when there had been a separate copyright law independent of the codification of civil law in the Civil Code.

915. That copyright *is* part of the civil law is apparent both from the Copyright Law of 1993 itself[40] and from Part I of the CC RF. Thus article 2 para.2 CC RF provides that the civil legislation determines the grounds for

37. Art.10 (1) para.2 CC RF. This is to be explained by the fact that there is no separate code of business law in Russia: the civil code applies to the mutual relations of traders and businesses (art.2 (1) para.3 CC RF).
38. See, *e.g.*, Antimonov/Fleishits 7; Gordon 14-18.
39. Savel'eva 1985, 45-46.
40. Art.2 CL 1993.

the origination and the method of exercising the exclusive rights to the results of intellectual activity (intellectual property); article 8 (1) para.2 provides that civil rights and obligations arise, *inter alia*, as a result of the creation of works of science, literature and art, of inventions and other results of intellectual activity;[41] article 18 considers the holding of copyrights to works of science, literature, and art, or of rights to inventions and other legally protected results of intellectual activity a part of the legal capacity of the citizen;[42] article 128 counts the results of intellectual activity, including exclusive rights thereto (intellectual property) as among the objects of civil rights;[43] and article 138 CC RF is entirely devoted to intellectual property.[44]

This last article refers for the regulation of intellectual property to "this Code and other laws", so that the combination of general basic principles in the future Part IV of the CC RF and detailed regulation in the various legislative acts on intellectual rights, seems the most likely route for the Russian legislator to take.

916. There remains the formal issue of whether the regulation of copyright belongs in the (Fourth Part of the) CC RF, in a separate act (as is currently the case), or in both.

According to Rassudovskii, the specificity of the various fields of intellectual property makes the placing of them in the CC RF impossible and unnecessary, certainly now that the Russian legislature has already passed a whole series of special laws on the matter; a fragmentary reproduction of them in the CC is undesirable.[45] In the same sense, Ioffe considers the incorporation in the CC of the regulations concerning intellectual property undesirable, given the heterogeneity of the diverse intellectual property rights.[46]

Zhukov, by contrast, noted sorrowfully that the legislator had chosen the route of separate laws, and called for the integration of these laws in a single block preceded by a general section based largely on the right of authorship. Unnecessary repetitions in the legislation would thus be avoided, and intellectual

41. Comp. art.3 para.2 Fundamentals 1991.
42. Comp. art.9 (2) para.1 Fundamentals 1991.
43. Comp. art.4 (1) Fundamentals 1991. See, also, G.P. Savichev and Sukhanov, *et al.*, in Sukhanov 1993, I, 122; Zenin 64-65.
44. "In the cases and in the way determined by this Code and other laws the exclusive right (intellectual property) of the citizen or the legal person to the results of intellectual activity and the equated means of individualizing products, works or services (company name, brand, service mark etc.) is recognized. The use of the results of intellectual activity and of the means of individualization, which are the object of exclusive rights, can be exercised by third parties only with the permission of the right holder."
45. Rassudovskii 1994a, 68 and 1994b, 11-12.
46. O.S. Ioffe, "The System of Civil Law in the New Commonwealth", in *The Revival of Private Law in Central and Eastern Europe*, G. Ginsburgs, D.D. Barry, and W.B. Simons, (eds.), in *Law in Eastern Europe*, No.46, The Hague, Martinus Nijhoff Publishers, 1996, 90.

property as a whole and (as part of civil law) would clearly be distinguished from vertical legal relations.[47] What this author is actually defending is a separate Code on Intellectual Property and not—so it seems—the incorporation of an integrated regulation of all IP rights in the CC RF.

Nikulin argues for the inclusion of only basic provisions on the protection of all sorts of intellectual property into a Law on Intellectual Property. Besides this, a number of special laws "per intellectual product" should be passed, containing the necessary guarantee of the socio-economic rights of the creator and right holders and the maintenance of equilibrium in the interests of citizen and state.[48]

917. The greatest proponent of the inclusion of substantial provisions on intellectual property in the CC RF is Dozortsev.[49] Given the growing importance of the results of creative activity in economic traffic, this scholar believes that the general principles of civil law have to be applied to the exclusive rights in an unambiguous fashion. Only by including the basic rules in the codification of the civil law can the precise place of these legal institutions in the civil law as a whole be defined. If there were no rules concerning copyright in the Pandectist system, on which Russian civil law has always been based, or in the German Bürgerliches Gezetsbuch, this was to be explained by the fact that at that time copyright did not yet exist or was only in its infancy. Now, however, the institution of exclusive rights has become an organic part of civil law and, by consequence, belongs in the codification of this branch of law. The CC RF should, therefore, set out the basic content of the various exclusive rights in separate chapters.[50] Separate legislation concerning copyright, patent, and trademark law would still be necessary, Dozortsev holds, but would have to agree with the (future) provisions of the CC RF.[51] In this way, stability in the legislation (through the definitions of principles in the CC) could be combined with the dynamism of the separate laws, a dynamism which constant technological developments make inescapable.[52]

47. Zhukov 11-12 and 14.
48. P. Nikulin, "Ne terpit otlagatel'stva", *Khoziaistvo i Pravo*, 1990, No.9, 112.
49. Dozortsev 1993a, 529-530; V.A. Dozortsev, "Novaia era v okhrane iskliuchitel'nykh prav", *Pravo i Ekonomika*, 1995, No.15-16, 28-37; V.A. Dozortsev, "Informatsiia kak ob"ekt iskliuchitel'nogo prava", *Delo i Pravo*, 1996, No.4, 27-43 and No.5, 23-28; V.A. Dozortsev, "From detached legal acts to a system of exclusive legal rights", in *Science and Technology Legislation in Russia*, OECD, Paris, 1996, 63-75; Dozortsev 1996. He is the main author of a draft of Section V of Part III of the Civil Code regulating intellectual property rights, see *supra*, Nos.632 ff.
50. See the detailed chart for the system of exclusive rights presented in Dozortsev 1996, 1188-1193.
51. Dozortsev 1996, 1188-1190.
52. Dozortsev 1996, 1190.

Gavrilov also comes down in favor of the inclusion of the extensive (*i.e.*, at least 42 articles as in the CC RSFSR), operative regulation of copyright in the CC RF,[53] while Sergeev expresses the hope that only definitions of principle concerning the protection of rights and the use of authors' works will be included in the CC RF. The CC RF cannot possibly, according to this author, replace all civil laws but, rather, must play a "cementing" role between the various existing laws.[54]

§ 2. Copyright Law and Administrative Law[55]

918. To see Soviet copyright law purely as part of the civil law which regulated the legal relationships between the natural and the legal persons[56] is too simplistic since an author, wanting to exercise his rights, had to rely on the state enterprises and state institutions which themselves were dependent on the administrative bodies of government under whose competence they lay.[57] And the whole of the management of the state economy was subject to administrative law.

919. All sorts of administrative decrees, issued by any of the four cultural administrations and aimed at the enterprises or institutions subordinate to them, could indirectly influence the legal relationships between these enterprises and institutions, and the authors.

For example, a publishing house giving an opinion on a manuscript and suggesting changes to the author was not to be guided by its own interests (*e.g.*, motives of profit) or management policy but, rather, by an Order of the President of the State Committee for the publishing industry.[58] The cultural administrations could also, at every stage of the production process, introduce changes to the thematic planning of the user organization. If this meant that a work for the creation of which an author's contract had already been drawn up now fell outside the provisions of the plan, the user organization could unilaterally abrogate the contract.[59] If, on the other hand, the work was created on time, was delivered to the user organization, and was approved, the latter still had to remunerate the author even if intervention by the supervising

53. Gavrilov 1995b, 62-63.
54. Sergeev 23-24. He is the main author of a draft of Section V in Part III of the Civil Code containing general provisions on intellectual property, concurring with Dozortsev's draft, see *supra*, Nos.637 ff.
55. See Levitsky 1989, 209-257; Loeber 1985, 308-312.
56. Art.2 para.1 CC RSFSR.
57. Loeber 1980, 6.
58. Prikaz Predsedatelia Goskomizdata SSSR, No.479, "Tipovoe polozhenie o podgotovke tekstovykh originalov neperiodicheskikh izdanii k vypusku", 9 November 1982, in Voronkova *et al.* 205-228.
59. Koretskii 109.

administration meant that the user organization was obliged to refrain from publishing the work.[60]

920.Administrative law also had a more direct impact on copyright relationships between authors and publishers through quasi-normative model contracts, which could only be altered to the author's advantage,[61] and promulgation of binding lower and upper thresholds for the remuneration of authors[62] by the Council of Ministers or, exceptionally, by one of the cultural administrations.[63] Only within these two constraints could the contracting parties negotiate freely.

921.In the Russian Federation, the influence of administrative law on copyright relationships has naturally been greatly reduced by the abolition of the planned economy: in the field of authors' contracts, administrative law has lost all influence; in the field of the authors' fees, its role has been limited and its function clearly changed; only in the field of the remedies for infringements of copyright has administrative law maintained its position.

922.Since the coming into effect of the Fundamentals 1991, there has no longer been any question of model contracts deviation from which could only be in the author's interest. The principle of freedom of contract is recognized in the relations between author and exploiter as much as anywhere. From a concern to protect the weakest party to the contract, the Copyright Law 1993 does itself contain a number of provisions concerning the law of contracts (interpretative rules, directory provisions, things which have to be stated in the contract, the requirement of a written record). The reduced role of the cultural administrations in the taking of day-to-day decisions in the cultural industries also means that the exploiters of state property are no longer bothered with unexpected administrative instructions when carrying out their obligations under authors' contracts. To the extent that the private sector takes up a greater share of the cultural industries, the importance of administrative instructions in the economic traffic in cultural products will naturally decline.

923.In the issue of authors' fees, the Government retains the power of setting minimum rates for different methods of exploitation,[64] at the suggestion of one of the cultural administrations jointly with (one of) the creative

60. See, *e.g.*, in relation to an agreement for the creation of a film script: Chernysheva 1984, 101-102.
61. Art.506 CC RSFSR: model contracts could only be deviated from to the advantage of the author, which due to economic realities in practice never occurred. These model contracts were not applicable to copyright relations with foreign authors or publishers. Nevertheless, administrative law played a considerable role in the import or export of copyrights via *VAAP*, see Loeber 1979, 423 and 429.
62. Arts.479 para.2 and 507 CC RSFSR.
63. Levitsky 1989, 223.
64. Art.31 (3) para.2 CL 1993.

unions and possibly the Russian Author's Society.[65] There are no longer fixed maximum rates, and the minimum rates fixed are substantially higher than the earlier Soviet rates.[66] This measure now has an unambiguously social, rather than a planned-economic, function.

924. In future, the most important role of administrative law in Russian copyright will, in our view, lie in the enforcement of copyright. The provisions in the Code on administrative infringements, aimed among others at street vendors of counterfeit products, and in various Government decrees, aimed at exploiters who (repeatedly) infringe copyright and neighboring rights,[67] can in future be an important instrument in copyright enforcement.

It is, however, uncertain whether this will also manifest itself in reality, given the combination of the highly developed arsenal of civil and criminal remedies, with the complete unfamiliarity of these administrative-law sanctions to Russian legal doctrine. To set against this there is, however, the long Russian tradition of government intervention in economic traffic. It is, therefore, not impossible that in the new conditions—in which the cultural administrations monitor the economic process in a more hands-off fashion, *i.e.*, not as "directors" of the administrative command economy, but as "regulators" of the otherwise autonomous market economy—the administrative sanctions will find wide application.

Section 3. Is Copyright an Exclusive Right to Intellectual Property?

§1. Copyright as a Right to Intellectual Property?

925. The idea of property pervaded Soviet copyright law for almost four decades. In 1922 a Decree described copyright as the right to a thing.[68] The Fundamentals of 1925 and 1928 contain a number of provisions which could have supported a property theory. Article 7 Fundamentals 1928, for example, provided that the author had the *exclusive* right ... to publish his work and to reproduce and distribute it in all legal ways, as well as to profit from the said exclusive right in all legal ways. And also: "the copyright can be partly or completely *alienated* by a publishing contract, a will or in another legal way".[69] These stipulations date from the NEP-period and remained part of the law until 1961. In the Fundamentals 1961, however, every reference to "exclusivity" and the "alienation of copyright" disappeared.

65. See Point 3 PP RF, "O minimal'nykh stavkakh avtorskogo voznagrazhdeniia za nekotorye vidy ispol'zovaniia proizvedenii literatury i iskusstva", 21 March 1994, *SAPP RF*, 1994, No.13, item 994.
66. *Supra*, Nos.761 ff.
67. *Supra*, Nos.857 ff.
68. Dekret VtsIK, "Ob osnovnykh chastnykh imushchestvennykh pravakh, priznavaemykh RSFSR, okhraniaemykh zakonami i zashchishchaemykh sudami RSFSR", 22 May 1922, *SU RSFSR*, 1922, No.36, item 423. See also *supra*, No.105.
69. Art.16 para.1 Fundamentals 1928.

926. Until 1961 the idea that copyright might be a property right was repeatedly and explicitly rejected in the legal doctrine. How could it be otherwise? The equation of copyright with property rights was very comfortable for the capitalist publishers who obtained a right which was, in essence, similar to private property.[70]

According to Gordon, the author was not the owner of a good. His rights could not be reduced to the right to possess, use, and dispose over the object created. This applied not only to the personal rights of the author but, also, to his property rights which were completely distinct from the right to private property by content and method of use,[71] but what these differences may have been Gordon did not explain.

Serebrovskii, on the other hand, went into the differences between property rights and copyright. First of all, the object of private property is a thing, a material object, while copyright concerns a work, an intangible good. Furthermore, copyright—in contrast to private property—is of limited duration.[72] Also, the possibility to transfer (*otchuzdenie*) the rights is in no way comparable to property rights as, according to Serebrovskii, this only refers to a transfer of specified rights for a limited period (*ustupka*, *peredacha*).[73]

927. After 1961, Soviet jurists barely addressed the question of whether copyright was a property right at all: in their eyes the answer was evidently negative. This did not change when the USSR ratified the Treaty for the foundation of the World Intellectual Property Organization (WIPO/OMPI) in 1968.[74] Legal doctrine, at the very most, made mention of the use of this term in bourgeois countries,[75] or in a description of the international copyright traffic,[76] but never to describe the internal copyright law.[77] Soviet jurisprudence considered the very expression 'intellectual property' "a misnomer, inherited from the bourgeois world".[78]

70. Antimonov/Fleishits 21-22; Gordon 8.
71. Gordon 9.
72. Serebrovskii 26.
73. Serebrovskii 169-170. See also Antimonov/Fleishits 49-54.
74. UPVS SSSR, "O ratifikatsii stokgol'mskogo akta parizhskoi konventsii po okhrane promyshlennoi sobstvennosti i konventsii, uchrezhdaiushchei vsemirnuiu organizatsiiu intellektual'noi sobstvennosti", 19 September 1968, *VVS SSSR*, 1968, No.40, item 363.
75. I.V. Savel'eva, "Razvitie teorii intellektual'noi sobstvennosti na proizvedeniia nauki, literatury i iskusstva v burzhuaznom prave", in *Metodologicheskie i teoreticheskie problemy iuridicheskoi nauki*, M.N. Marchenko, (ed.), M., Izd. Moskovskogo Universiteta, 1986, 197-212.
76. Kuznetsov 9.
77. "In the Soviet legal literature almost no attention was given to this question [the theory of intellectual property]. The main reason for this is apparently that the legal science of our country rejected out of hand any attempt to draw an analogy between copyright and property rights, from the earliest years of its existence."
(I.V. Savel'eva, *loc.cit.*, 209).
78. J.N. Hazard, *Communists and Their Law*, Chicago, The University of Chicago Press, 1969, 243.

§2. Copyright as an Exclusive Right?

928. With regard to the exclusive nature of copyright, there was a comparable evolution: before 1961 legal doctrine made attempts to reduce the meaning of the law then in force in which the exclusivity of copyright was affirmed; after the disappearance of the term "exclusive" in the law of 1961, this discussion came to an end.

929. In the fifties, Gordon declared that, although exclusivity in the capitalist countries meant a monopoly in the hands of the holder of the rights (which was particularly beneficial to capitalist businesses), this term in the Soviet Union had only a relative meaning since the author's right of disposition was limited by the interests of society and the author's remuneration was regulated by the state. The name 'exclusive right' had to be seen as a consequence of the link between copyright and the personality of the creator of new works.[79]

According to Serebrovskii, the expression 'exclusive rights' normally referred to subjective rights which guaranteed their holders exclusive powers for the execution of certain actions (positive aspect) with simultaneously a prohibition of all third parties to carry out these actions without the permission of the holder of these rights (negative aspect).[80] Serebrovskii, however, refused to acknowledge that the author could have a monopoly on his work since this would be unthinkable in a socialist society in which the author does not work for himself but for society. The exclusivity of copyright meant that the author—and no one but the author—could determine the time and the way in which the work was communicated to the public (possibly anonymously or under a pseudonym).[81] This exclusivity was, Serebrovskii posited, not 'relative', as Gordon had maintained, since the limitations of copyright to the advantage of society were already recorded in the law itself. Within these limitations, exclusivity applied to the full.[82]

Antimonov and Fleishits interpreted the exclusivity of copyright as the non-transferability of copyright, *i.e.*, the rights belonged solely to the person who created the work.[83]

930. In the Fundamentals 1961 and CC RSFSR, the qualification 'exclusive' disappeared from the copyright laws to the great relief of many jurists who had taken great pains to interpret a law from the NEP period so that its contents could be reconciled with the socialization of the economy.[84] If later legal theory gave attention to this issue at all, it was to say in a single sentence that Soviet law did not recognize an exclusive copyright.[85]

79. Gordon 76.
80. Serebrovskii 23.
81. Serebrovskii 24. Equally: Chernysheva 1979, 110.
82. Serebrovskii 25.
83. Antimonov/Fleishits 59-61.
84. Levitsky 1964, 73.
85. See, *e.g.*, R. Gorelik, "Etude générale: le droit d'auteur en URSS", *Bulletin du droit d'auteur*, 1969, No.4, 35; Gringol'ts 1969, 436.

931.However, after the USSR's entry to the UCC, voices could again be heard declaring, although without much explanation, that copyrights were 'exclusive'. First Gringol'ts declared in 1975 that the author's prerogatives amounted to an exclusive right.[86] A year later, Gavrilov did not hesitate to call the copyright law "un droit absolu, exclusif", without further comment.[87] And another decade later, Savel'eva wrote that traditional copyrights—just like the other rights which arise from creative activity—are to be characterized as exclusive rights.[88] For her, as for Antimonov and Fleishits,[89] the inseparability of copyright from the author's person was grounds for describing the copyright as exclusive.[90]

932.In summary we can therefore posit that Soviet legal doctrine radically rejected the idea of considering copyright to be a property right.The exclusive nature of copyright was also radically rejected when it was given meaning of a monopoly but *was* accepted in another interpretation, namely as indicating the unbreakable tie between the author and his rights as an author.With such an interpretation, one obviously came close to classifying copyright as a personal right.

§ 3. From Ideological Disgust to Fad

933. On the eve of *perestroika*, Soviet legal theory brought its ideological artillery to bear against the application of the property concept to copyright.

Thus, Maslov and Pushkin wrote in 1983:

> In the bourgeois civil law as well as in the international conventions the rights to the products of creative activity are considered to be among the objects of 'intellectual property'. [...] In the conditions of the capitalist relations of production the products of creative activity are seen as goods, the most important purpose of which is to make a profit for their owners. Bourgeois law is geared to the protection of the interests of those who acquire the rights to the exclusive enjoyment of the objects of creation.The holder of this right is often the owner of the capital to whom the authors sell their rights, often at a very low price.The institution of the exclusive right in bourgeois law was introduced to separate the products of creative activity from the person of the author and bring them into the economic traffic of capitalist society.[91]

Three years later Kuznetsov, with Marx's materialism to hand, rejected the concept of intellectual "property" in principle, since "this is not an economic

86. Gringolts 1973, 22.
87. Gavrilov 1976, 100. See, also, O.N. Sadikov, (ed.), *Sovetskoe grazhdanskoe pravo*, M., Iuridicheskaia Literatura, 1983, in English as *Soviet Civil Law*, New York, M.E. Sharpe, Inc., 1988, 390.
88. Savel'eva 1986, 69.
89. *Supra*, No.929.
90. Savel'eva 1986, 6.
91. Maslov/Pushkin 407-408.

category and cannot exist outside the law".[92] But, in his work on conflict of laws problems relating to copyright, the same author did not hesitate to use the term "intellectual, industrial and literary-artistic property [...] in the meaning which Soviet legal theory [*sic*], the international practice of conventions and the legal measures of the capitalist countries give to it".[93] And Savel'eva too, in an enquiry into the "true class roots of the theory of intellectual property",[94] finally came to the conclusion that the theory of copyright as intellectual property offered no way out of the crisis afflicting copyright in the bourgeois countries. The reasons for this, according to Savel'eva, are to be sought in the economic and social conditions of life, "in the chasm which separates the authors—creators of works from the monopolies which use them, in the contradiction between the individual, essentially unique nature of the creative work and the leveling demands of mass culture, which is geared to the use of intellectual values as if they were material goods".[95]

934. The system transformation altered the preconditions within which copyright had to function, and ultimately changed copyright itself, so that new views of the nature of copyright became possible. Of cardinal importance was the switch from a planned economy to a market economy, with the recognition of private ownership of the means of production. Marx was swept away, capital was allowed. The view on western copyright also became more positive although a certain skepticism remained.[96]

It was only to be expected that with the reinvention of the wheel of the market economy and private property in the means of production, the concept of intellectual property would also triumph. In the political discourse it did indeed become a fad, and in the legislation the term intellectual property appeared repeatedly; but as an academically founded legal theory, which would

92. Kuznetsov 7.

93. Kuznetsov 8.

94. I.V. Savel'eva, "Razvitie teorii intellektual'noi sobstvennosti na proizvedeniia nauki, literatury i iskusstva v burzhuaznom prave", in *Metodologicheskie i teoreticheskie problemy iuridicheskoi nauki*, M.N. Marchenko, (ed.), M., Izd. Moskovskogo Universiteta, 1986, 197.

95. *Ibid.*, 212.

96. Thus, Iafaev wrote that although even today copyright in the West "serves primarily the interests of the enterprises which use the various works of creative labor for purposes of profit" and "the fundamental social-economic goal of copyright [...] lies in establishing a monopoly on the use of the work which functions as a commodity, and in the determination of the conditions of the transfer of this monopoly from the author to the enterprise", nevertheless the higher degree of organization among the authors means that "in the last decades a tendency towards the widening of the protection of the rights of the authors has become apparent in a series of Western countries". But, Iafaev concludes that copyright is even now still largely a "publisher's right" and not an "author's right" (A.I. Iafaev, "Avtorskoe pravo", in *Grazhdanskoe i torgovoe pravo kapitalisticheskikh gosudarstv*, Vasil'ev, *et al.* (ed.), M., Mezhdunarodnye otnosheniia, 1993, 471-472).

reveal the essence of copyright, the theory of intellectual property was much discussed but was rejected by the majority of legal theorists.

§ 4. The Legislation and Jurisprudence

935. On 6 March 1990 the legislator, for the first time since 1922, linked copyright to property rights. The Law on property in the USSR[97] provided in article 2 (4): "The relations concerning the creation and the use of inventions, discoveries, works of science, literature and art and other objects of intellectual property are regulated by special legislation of the USSR, the Union republics and the autonomous Republics".[98] The expression "intellectual property" is here used as a collective term and, thus, not as a synonym for copyright.[99] This provision had led to discussions during the parliamentary debate on the bill.[100] A number of representatives were of the opinion that "intellectual property" should be regulated in the property law itself, but ultimately the legislator went no further than the just cited reference to specialized legislation.[101]

936. In the framework of the "war of laws" which broke out at the end of the eighties, the Russian Supreme Soviet on 24 December 1990 approved its own Law on property in the RSFSR.[102] Just like the federal act, the RSFSR's property Law contained a provision which, for the regulation of the relations concerning the creation and use of works of science, literature and art, discoveries, inventions, rationalization proposals, industrial designs, computer programs, and other objects of intellectual property, refers to the copyright law and other enactments of civil legislation as well as to international agreements.[103] It is

97. Zakon SSSR, "O sobstvennosti v SSSR", 6 March 1990, *VSND i VS SSSR*, 1990, No.11, item 164.
98. Malfliet 1994, 33. The term "industrial property" had already been used in two government decrees in 1987 concerning the setting up of joint ventures (*sovmestnye predpriiatiia*): point 12 PSM SSSR, "O poriadke sozdaniia na territorii SSSR i deiatel'nosti sovmestnykh predpriiatii, mezhdunarodnykh ob"edinenii i organizatsii SSSR i drugikh stran—chlenov SEV", 13 January 1987, *SP SSSR*, 1987, No.8, item 38; point 17 PSM SSSR, "O poriadke sozdaniia na territorii SSSR i deiatel'nosti sovmestnykh predpriiatii s uchastiem sovetskikh organizatsii i firm kapitalisticheskikh i razvivaiushchikhsia stran", 13 January 1987, *SP SSSR*, 1987, No.9, item 40.
99. In the draft bill, a distinction was still made between industrial and intellectual property, but in the ultimate text this distinction has gone: A.A. Podoprigora, "K zakonu o tvorchestve", in Gal'perin, 88-90.
100. Keizerov 90; Iu.K. Tolstoi, "Sobstvennost' i pravo sobstvennosti v usloviiakh perestroiki", *Pravovedenie*, 1990, No.4, 8.
101. Keizerov 90; Zenin 160. With this provision, the Russian legislator took the same path which the All-Russian Central Executive Committee took at the beginning of the NEP period with a decree of 22 May 1922 on rights of ownership which, with regard to copyright and rights to inventions, brands, industrial models and drawings, referred to separate legislation: *supra*, No.105.
102. Zakon RSFSR, "O sobstvennosti v RSFSR", 24 December 1990, *VSND i VS RSFSR*, 1990, No.30, item 416.
103. Art.1 (4) Law RSFSR on property.

explicitly stated, in article 2 (4), that "products of intellectual and creative labor" can be the object of property rights.

The term "intellectual property" also found a home in business law,[104] company law,[105] and the legislation concerning investments.[106] The common factor is the emphasis on the economic value of intellectual property as part of the assets of a company. This is an understanding of the term "intellectual property", which is broadly conceived in the number of subfields, which come under it, but which still remains quite narrow in that it is limited to the property rights of authors, inventors, and suchlike. Any moral rights do not come into such an economic view of the concept of "intellectual property".

937. The term "intellectual property", ultimately, found its confirmation in constitutional and civil law. *Firstly*, article 28 (1) Declaration of the Rights and Liberties of Man and the Citizen[107] declared that "intellectual property is protected by the law", a provision which was later adopted word-for-word in a new article 60 of the Constitution RSFSR of 1978 introduced in 1992,[108] and ultimately also in article 44 (1) Constitution 1993.[109] *Furthermore*, the Supreme Court RF found in an order of 9 November 1994 that "intellectual property" (with a reference to article 2 (4) of the Russian property law of 24 December 1990 referred to above[110]) also enjoys protection under article 8 (2) Constitution 1993 which recognizes and guarantees all forms of property equally.[111]

In the Fundamentals of civil legislation of 1991, the term "intellectual property" did not appear, and consistent use was made of "(the rights to) the results of intellectual activity"[112] or "the results of creation/creative activity".[113] In the CC RF on the contrary, the term "intellectual property" does appear repeatedly as an alternative to the also used expression "(the exclusive rights to) the results of intellectual activity".[114]

104. Art.16 Zakon RSFSR, "O predpriiatiiakh i predprinimatel'skoi deiatel'nosti", 25 December 1990, *VSND i VS RSFSR*, 1990, No.30, item 418.
105. See, *e.g.*, PSM SSSR, point 16 "Polozhenie ob aktsionernykh obshchestvakh i obshchestvakh s ogranichennoi otvetstvennost'iu", 19 June 1990, *SP SSSR*, 1990, No.15, item 82.
106. Art.3 Zakon RSFSR, "Ob investitsionnoi deiatel'nosti v RSFSR", 26 June 1991, *VSND i VS RSFSR*, 1991, No.29, item 1005; art.32 Zakon RSFSR "Ob innostrannykh investitsiiakh v RSFSR", 4 July 1991, *VSND i VS RSFSR*, 1991, No.29, item 1008.
107. PVS RSFSR, "Deklaratsiia prav i svobod cheloveka i grazhdanina", 22 November 1991, *VSND i VS RSFSR*, 1991, No.52, item 1865.
108. *VSND i VS RF*, 1992, No.20, item 1084. See also the new arts.71 (o) and 81 (1) (i) Const.1993 which contain the regulation of powers in federal Russia in relation to "the legal regulation of intellectual property".
109. With regard to the division of jurisdiction between the Federation and its constituent entitities, see also art.71 (o) Const.1993.
110. *Supra*, No.936.
111. PPVS RF, 9 November 1994, *BVS RF*, 1995, No.1, 11, English translation in *IIC*, 1996, 111, with note T. Kowal-Wolk.
112. Arts.2 (5), 3 para.2, 4 (1), 9 (2) para.1 Fundamentals 1991.
113. Art.134 (1) and the Title of Section V Fundamentals 1991.

§ 5. Legal Theory

938. Once the legislator had broken the taboo on the expression "intellectual property", a great discussion developed in the legal theory about the precise meaning of the term.[115] There was a theoretical consensus from the end of the eighties into the early nineties that the non-recognition (patent law) or only formal recognition of exclusive rights (copyright) in Soviet times could no longer be maintained due to Russia's great technological lag,[116] the challenges posed to the legal system by the postindustrial information society, in which information has become merchandise,[117] and the introduction of the market economy in the Russian Federation.[118] Did this also mean that copyright had to be conceived of as an intellectual property right?

Zhukov wrote in 1989: "Psychologically we are not yet ready to adopt the institution of intellectual property. All too often we have heard 'scientific' judgments of its 'bourgeois character' [...]".[119] From the following overview, it will be apparent that most of the legal theorists effectively reject the application of the theory of property to the "results of intellectual activity", moreover without the regret, which can be detected in Zhukov's remark.

939. The most outspoken proponents of the theory of intellectual property are Rassudovskii, Gal'perin, and Mikhailova. They consider the term "property" to be fully applicable to the results of intellectual activity.[120] This means that the "classic triad" of powers, which makes up the essence of the property right, namely the rights of possession, enjoyment, and disposal, is also applicable to the rights to the results of an intellectual activity. Thus, according to Rassudovskii, in this context the right of possession means "the actual knowledge of the subject, of those ideas and solutions from which the innovation [*novshestvo*] and the ensuing personal non-patrimonial rights of the author proceed".[121] With regard to the powers of enjoyment and disposal ("the point of gravity of the right of intellectual property"), he speaks of "the exclusive right of the owner in the sense of a monopoly of the author, since all other persons can only use

114. Arts.2 (1) para.1, 8 (1) para.2, 18, 128, 138 CC RF.
115. S.A. Chernysheva, "Formirovanie pravovoi doktriny ob intellektual'noi sobstvennosti v usloviiakh stanovleniia rynochnykh otnoshenii v Rossii", in Chernysheva 1998, 8-31; Keizerov 90.
116. Rassudovskii 1994a, 60-62.
117. Zhukov 9-11; see, also, the round-table meeting reported in "Intellektual'naia sobstvennost': vzgliad iz zavtra, Kruglyi stol", *Sots. Zak.*, 1990, No.5, 13-16; 1990, No.11, 45-48; 1991, No.9, 8-12.
118. Gal'perin/Mikhailova 37.
119. Zhukov 10.
120. L.B. Gal'perin and L.A. Mikhailova, "Intellektual'naia sobstevnnost': sushchnost' i pravovaia priroda", in Gal'perin 13-14; Rassudovskii 1994a, 63 and 1994b, 11.
121. Rassudovskii 1994a, 64 and 1994b, 11.

the objects of the exclusive right with the permission of the monopolist of that right".[122] And Rassudovskii continues:

> Furthermore, one cannot see the remuneration of the author in any other way but as a payment for the license permitted or the right relinquished to the object of intellectual property. Enjoyment in the economic sense means the exploitation of material supports of the results of creation for the satisfaction of the requirements of production, the receipt of income etc.[123]

Gal'perin and Mikhailova too apply the classical powers of an owner to the ideal, non-material results of intellectual activity. The "owner" of an intellectual product is said to have *the right of possession*, *i.e.*, to actually hold certain materials (a manuscript, a monograph, a scientific report or a lab model, the papers or magnetic recording of a program, the artistic expression of a trademark); *the right to enjoy or use*, which in its economic meaning refers to the exploitation of the material supports of the creation in accordance with their purpose, and here indicates the possibility of getting useful properties from one's intellectual product for the satisfaction of collective or personal needs or for the acquiring of income; and *the right of disposal* over his intellectual product, *i.e.*, the possibility allowed by the law to determine the legal fate of the object of the legal relations of intellectual property.[124]

Yet even these three authors admit that intellectual property rights cannot simply be equated with a business-law right of ownership in material goods. The identification of both sorts of rights was, according to Rassudovskii, overcome in legal thought at the beginning of the 19th century when a consciousness grew of the fundamental principle that the results of the creative, mental, intellectual activity necessarily had to be considered an object of a special, intellectual property.[125] After all, in the case of intellectual property, the contents of the powers of possession, enjoyment, and disposal are influenced by the complex of powers relating to authorship of the results of intellectual activity as provided by the Copyright Law and the Patent Law.[126] Nonetheless this concerns a special form of property in the real, legal meaning of the word: there can be no question of any "conditionality" (*uslovnost'*) of the term intellectual property[127] as the opponents of this theory claim.[128] Gal'perin and Mikhailova too recognize that intellectual property does show certain characteristics of its own, such as the special procedure needed to originate the right of intellectual property in most cases (but not in copyright), its limitation in time and its territorial character.[129]

122. Rassudovskii 1994a, 64 and 1994b, 11.
123. Rassudovskii 1994a, 64 and 1994b, 11.
124. Gal'perin/Mikhailova 40-41.
125. Rassudovskii 1994b, 10-11.
126. Rassudovskii 1994a, 63-64 and 1994b, 11.
127. Rassudovskii 1994b, 11.
128. See, *e.g.*, Mozolin 56.
129. Gal'perin/Mikhailova 41-42.

940. Rassudovskii, Gal'perin, and Mikhailova clearly express a minority opinion in the legal theory. Boguslavskii, Dozortsev, Gorodov, Grishaev, Mozolin, Sukhanov, Tolstoi, Tsimbalov, and Zenin all oppose the application of the property concept to the rights in non-material objects.

941. First of all, these legal theorists refer to "the well-known multiplication effect that is unique to the product of creative labor".[130] The rights of possession, enjoyment, and disposal are not applicable to the rights to the results of intellectual activity[131] since these results—in contrast to material objects—can simultaneously be in the possession of different persons. Thus, one could speak of an appropriation to oneself of artistic forms as an object of copyright protection but not in the sense of a business-law power of possession as physical mastery over a thing.[132] Only a limited number of people can utilize (enjoy, use) a material thing while the result of an intellectual activity can be used by an unlimited group of persons.[133] The products of human intellectual activity can, after their publication and communication to society, no longer be appropriated by separate persons. They become the property (*dostoianie*) of society as a whole, in contrast to the material objects which individual persons can appropriate to themselves at any time to the exclusion of all third parties.[134] The fact that the use of a result of intellectual creation can be limited by the legal right holder at his own discretion by prohibiting use, or giving permission for use to a single person or a group of people, therefore does not follow from the very nature of the object of protection.[135]

With material objects, re-vindication is possible; if a poem is signed by a person who is not the author, other means of redress are necessary. The term of the rights to ideas has to be limited since—in contrast to material objects—an idea is not subject to physical "amortization", *i.e.*, consumption.[136] Finally, ideas are, in contrast to material goods (especially real estate) not tied to a territory, which is why rights to ideas have to have a territorial character.[137]

942. As a second argument against the "intellectual property concept" reference is made to the complexity of the relevant rights to immaterial

130. Gorodov 5.
131. Dozortsev 1993b, 39 and 1994, 18-19; Gorodov 5; Mozolin 54; I.A. Zenin, in Sukhanov 1993, 316.
132. Zenin 166; I.A. Zenin, in Sukhanov 1993, 316.
133. Mozolin 54-55; Sukhanov 1995b, 94-95; I.A. Zenin, in Sukhanov 1993, I, 316; Zenin 166-167. Dozortsev 1993b, 38 expresses this as follows: "If you have an apple and I have an apple and we swap, each of us will have one apple. But if you have an idea and I have an idea and we swap, each of us will have two ideas."
134. Mozolin 54.
135. I.A. Zenin, in Sukhanov 1993, I, 316; Zenin 166-167.
136. Dozortsev 1993b, 38 and 1994, 16-17; I.A. Zenin, in Sukhanov 1993, I, 316; Zenin 166-167.
137. Dozortsev 1993b, 38 and 1994, 16-17.

goods. Copyright in particular is made up of a complex of personal rights and patrimonial rights,[138] which collectively function as one.[139] The property theory cannot sufficiently express this complexity. In any case, the regulation of copyright relations according to the textbook model of business law would only worsen the position of the author. He would, in such a case, himself lose all rights to his work ("object of intellectual property") at its alienation, and the new "owner" would have the possibility of altering the object as he thinks fit and, in general, to consider it his exclusive property.[140]

943. Additional arguments are found in the fact that, in the laws on various intellectual property rights, there is no mention of the "property right" to an immaterial good;[141] that the category of "intellectual property rights" also includes unfair competition, which in contrast to the property right has no absolute character,[142] as well as the legal relations with regard to the means of individualization of producers and products which are not the result of an intellectual, creative activity (*e.g.*, trademarks, company names),[143] so that the concept of "intellectual property" cannot possibly express the diversity within this category of rights.

944. Then how do these theorists explain the use of the expression "intellectual property" in the Russian legislation? Zenin ascribes the use of the term 'intellectual property' to the influence of international treaties signed by the RF (the Convention of Paris on the protection of industrial property, the Convention establishing the WIPO) but, also, to the desire of authors to have a right to the fruits of their labor, analogous to the right of an owner to his property.[144] The roots of the theory of property, according to Zenin, lie in the desire of its defenders to underline the absolute character of these rights, using the right of private ownership as a model, in order to find a place for this relatively new legal institution in the traditional scheme.[145] Grishaev is also of

138. Mozolin 55; Sukhanov 1995b, 94; I.A. Zenin, in Sukhanov 1993, I, 316.
139. Iu.K. Tolstoi, "Sobstvennost' i pravo sobstvennosti v usloviiakh perestroiki", *Pravovedenie*, 1990, No.4, 8.
140. I.A. Zenin, in Sukhanov 1993, I, 316.
141. Gorodov 6.
142. Gorodov 7-8.
143. Dozortsev 1994, 21.
144. Zenin 159.
145. I.A. Zenin, in Sukhanov 1993, I, 317; Zenin 164. In an earlier publication, this author had situated the origin of the concept of industrial and intellectual property in immaterial goods in the changed conditions of social production, in the context of which it was easier to recognize the author as a producer of goods, who was able to alienate the result of his labors for money, taking into account the fact that the right of ownership had been proclaimed a "human right by virtue of birth": I.A. Zenin, "O kontseptsii prava intellektual'noi sobstvennosti v SSSR", in Gal'perin 42.

the opinion that the term intellectual property was used in order to guarantee a more effective and reliable protection of the rights of the creators.[146]

Yet the expression itself has no legal meaning. One should not—posits Dozortsev—confuse the *function* and the *essence* of the property rights to material goods, with the rights to immaterial goods which arise from intellectual activity. The function of both rights is the same, to wit making it possible that material or immaterial goods, respectively, be brought into economic traffic of the market. But the legal instrument used to fulfill this function differs essentially in the two cases.[147] The term "intellectual property" has to be understood purely as a literary form, not as a term with a precise legal meaning.[148] The magic bound up with the term "intellectual property", as though the recognition of a property right to ideal objects in itself provided some guarantee against infringements, Dozortsev sees as groundless.[149] The term gives the impression that it is one variety of the right of ownership, and that is "a dangerous error".[150] The concept "intellectual property" is only acceptable as a political slogan or as a collective term for a set of very diverse rights.[151] The opponents of the theory of intellectual property, therefore, rejoice in the fact that there are no substantial provisions concerning copyright, patent rights, and suchlike in the law on property,[152] but only in separate enactments, and that is in the interest of the authors, as only in such laws can account be taken of the full uniqueness of creative labor.[153]

146. Grishaev 1991, 6.
147. Dozortsev 1993b, 38 and 1994, 21; Gorodov 8 ("the legislator, by choosing a concrete form of legal protection for an object of intellectual property and determining its limits, grants the beneficiary such powers as are adequate for that form, working from the goals pursued by society. And these legal powers do not coincide with the model of "business" property"); Mozolin 53 ("the legal regulation of creation, use and protection of the products of human intellectual activity is essentially not to be separated from the legal regulation of the origin, use and protection of the material objects of the right of ownership"); Zenin 163-165.
148. Dozortsev 1993b, 38 and 1994, 21.
149. Dozortsev 1993b, 39.
150. Dozortsev 1994, 21. Compare Sukhanov 1995b, 94, who calls the use of the term intellectual property "un-thought-through", given the immaterial character of the results of creative activity.
151. Typical is the expression "objects of the right of industrial property" used in the Patent Law as a collective term for inventions, utility models and industrial designs (art.1 Patentnyi Zakon RF, 23 September 1992, *VSND i VS RF*, 1992, No.42, item 2319. See, also, Zenin 162).
152. Although some observers also regret this reference in the law on property to the separate IP laws: Mozolin 55.
153. Iu.K. Tolstoi, "Sobstvennost' i pravo sobstvennosti v usloviiakh perestroiki", *Pravovedenie*, 1990, No.4, 8.

945. These theorists describe copyright, patent rights, the rights to drawings and models, and so on, as exclusive rights to immaterial goods[154] (or to "results of intellectual activity"[155]), which together with the right of ownership of material goods form the umbrella category of absolute rights.[156] An exclusive right, such as copyright, is therefore an absolute right to an immaterial object.[157]

The exclusive character of these rights then refers to the fact that the holder of them can, within the bounds of the law, undertake particular actions with regard to the results of the creative activity, which are their object as they think fit and, at the same time, prohibit or allow the same actions to others.[158]

The absolute character of these rights refers to the fact that they apply to any third party who desires to use an object of intellectual property without the permission of the right holder.[159]

946. Besides this exclusive and absolute character—which is also typical of rights of ownership to material things[160]—all or most rights to the results of intellectual activity also have a number of common characteristics which do distinguish them from ownership rights: the fact that the object of such rights has an immaterial, incorporeal (*netelesnyi*), ideal character,[161] the rights are tied to territory[162] and limited in time,[163] they result from a creative activity,[164] they can be licensed to others,[165] etc.

947. The defenders of the theory of intellectual property in essence give the same common characteristics: (1) these objects are all the result of human, intellectual activity; (2) which like other products of human labor can be

154. Dozortsev 1993b, 39 and 1994, 21; Sukhanov 1995b, 94.
155. M.M. Boguslavskii, "Venskaia konventsiia o dogovorakh mezhdunarodnoi kupli-prodazhi tovarov i voprosy intellektual'noi sobstvennosti", *Moskovskii zhurnal mezhdunarodnogo prava*, 1992, No.3, 111.
156. Dozortsev 1994, 42; Mozolin 56; M.M. Tsimbalov, in Dement'ev 10; I.A. Zenin, in Sukhanov 1993, I, 314; Zenin 158-159.
157. Dozortsev 1994, 42.
158. Art.16 (2) CL 1993 ("The exclusive rights of the author to the use of the work consist in the right to perform or to authorize performance of the following acts [...]"). See, also, M.M. Tsimbalov, in Dement'ev 10; I.A. Zenin, in Sukhanov 1993, I, 314; Zenin 158 and 169-170. Sergeev (123-124) also calls copyright an exclusive right in the sense given to this term in "civilized" countries, namely that only the copyright holder can decide whether or not to allow the exercising of the author's powers and the use of the work.
159. M.M. Tsimbalov, in Dement'ev 10. Comp. E.B. Silimova, in Dement'ev 158-159.
160. Zhukov 14.
161. Zenin 158; Zhukov 13.
162. M.M. Tsimbalov, in Dement'ev 10.
163. M.M. Tsimbalov, in Dement'ev 10; Zenin 158. After expiry these rights become part of the "social heritage" (*obshchestvennoe dostoianie*): M.M. Tsimbalov, in Dement'ev 10.
164. Dozortsev 1993b, 40 and 1994, 28-29.
165. Dozortsev 1993b, 40 and 1994, 28-29; I.A. Zenin, in Sukhanov 1993, I, 316; Zenin 167-168.

individually appropriated without the co-operation of third parties; (3) and are supports of information, goods of an immaterial character which can be brought into economic traffic thanks to their expression into a material form; (4) most objects of intellectual property rights have an author whose name always accompanies the object (brands and other marks individualize producers or products); (5) these objects are not subject to wear, their value can even rise with the passage of time; (6) there is a structural linking between the various objects of intellectual property, a sort of chain of dependence, *e.g.*, scientific labor and result (theories, hypotheses, discoveries) are expressed in publications (copyrighted works) which serve as the basis for experimental research resulting in technical solutions (inventions, industrial designs), which are then taken into industrial production and commercial dissemination (know-how, brands, business names, appellations of origin, unfair competition); (7) these objects are the occasion for social relations to arise which are subject to legal regulation.[166] Gal'perin[167] adds an eighth point, namely that the results of intellectual activity can be used by an unlimited number of people at once.

948. The common characteristics notwithstanding these various rights are divided by legislation into two categories: the exclusive rights to the results of intellectual activity on the one hand (copyright, neighboring rights, patents and suchlike), and the means for the individualization of a legal person, of a product, of performed works or services on the other hand (brand rights, the right to a company name, appellations of origin, etc.).[168] Neither can be used without the permission of the right holder.[169] Dozortsev distinguishes between these rights on the basis of whether or not the fulfillment of a formality is a constitutive requirement for the enjoyment of protection: he considers patent right, brand right etc. as a single group, distinct from copyright and neighboring rights.[170]

166. Gal'perin/Mikhailova 39. Compare Rassudovskii 1994a, 62-63.
167. Gal'perin 12.
168. See, *e.g.*, art.138 (1) CC RF; art.1 (11) (b) Federal'nyi Zakon RF, "O vnesenii izmenenii i dopolnenii v Zakon RSFSR 'O konkurentsii i ogranichenii monopolisticheskoi deiatel'nosti na tovarnykh rynkakh'", 25 May 1995, *SZ RF*, 1995, No.22, item 1977, *Rossiiskaia gazeta*, 30 May 1995 (alteration of art.10 of the original Anti-monopoly Act of 22 March 1991: *supra*, Nos.429 ff.); art.2 Federal'nyi Zakon RF, "O gosudarstvennom regulirovanii vneshnetorgovoi deiatel'nosti", 13 October 1995, *Rossiiskaia gazeta*, 24 October 1995. The expression "means of individualization" is a novelty in Russian law: V. Smirnov, "Chitaia novyi grazhdanskii kodeks", *I.S.*, 1995, No.5-6, 75.
169. Art.138 para.2 CC RF.
170. Dozortsev 1993b, 39-40 and 1994, 22-28. Novosel'tsev also divides "intellectual property" into industrial property (including inventions, but, also, brands, appelations of origin, company names) on the one side, and copyright on the other (O. Novosel'tsev, "Intellektual'naia sobstvennost' v ustavnom kapitale", *Khoziaistvo i Pravo*, 1994, No.5, 135-136).

The protection of commercial and production secrets, know-how,[171] and the regulations concerning unfair competition are not considered being part of the intellectual property concept.[172]

949. In conclusion, we have to say that the vast majority of legal theorists gives no legal meaning to the concept "intellectual property", an expression which is fashionable[173] but which is, in fact, no more than a collective term for what most legal theorists call the exclusive rights to the results of intellectual activity. Intellectual property is just a rather pragmatic synonym of "my own", "created by me", "belonging to me".[174]

The justification of the rejection of this description no longer comes from ideological scruples (namely the fear for exploitation by capitalist enterprises) but, rather, from the impossibility of expressing the complex character of the exclusive rights as a collection of personal and economic rights through text-book property law's triad of possession, enjoyment, and disposal. The temporal and territorial limitations of the rights to ideal goods, which result from an intellectual activity, argue against the theory of intellectual property.

Section 4. Is Copyright a Personal Right?

950. The rejection of the application of the concept of ownership to (*inter alia*) copyright, with the argument that property rights inadequately express the intricate character of copyright as a complex of economic and personal rights, automatically transfers attention to the non-property component of copyright and the connection which this might have with either the economic rights or the personal rights other than copyright. The emphasis would, then, be less on the economic function of the copyright and more on the protection of the author's personality and the unbreakable tie between the author and his work.

In the socialist countries of Central and Eastern Europe, legal theory did not hesitate in situating the basis of copyright in personal rights. We refer here to Püschel (GDR),[175] Knap (Czechoslovakia),[176] Benard and Boytha[177] and

171. Art. 139 CC R.F.
172. Art. 138 CC R.F.
173. Dozortsev 1993b, 38 remarks that it has recently become "bon ton" to speak of the right of intellectual property.
174. Malfliet 1994, 43.
175. H. Püschel, "Funktion und Inhalt des subjektiven Urheberrechts in der Deutschen Demokratischen Republik", in *Les droits des auteurs—contenu et fonction—des pays socialistes de l'Europe*, J. Serda, (ed.), Warschau, Panstwowe Wydawnictwo Naukowe, 1988, 86-87.
176. Knap 103-106. This author emphasizes that the socialist theory of personal rights cannot be equated with the merely individualistic concepts of the old personal-right theories of copyright. After all, the work, as the result of the author's creative achievement, is not only inseparably tied to his personality but, also, with society, because it arises in society, because by its impact it partakes of the development of society and thus also of the further development of the personalities of the members of society.

Ficsor (Hungary).[178] They defended the position that the creative activity is of an essentially personal nature even though this personality should not be understood in an individualistic but in a social way: it was, on the one hand, partly shaped by society and, on the other hand, strove for recognition by society. The author did not only create for himself but so that his work would be used by society.[179] What opinions were there in the Soviet Union in this regard? Was there anything like a category of personal(ity) rights? And if so, was copyright considered to be among them? And how did the system transformation influence opinions and rules in this regard?

In this section, we will first give a general picture of the developments with regard to theorizing concerning the personal rights in general (§ 1). Then we will examine five test cases to determine the position of copyright within this theory (§ 2).

§ 1. Personal, Non-Patrimonial Rights in Soviet and Russian Law

1.1. Soviet Law

951. Under communist rule, the idea that a person had rights inherent to being human was unacceptable. This rejection expressed itself in public law in a rigidly positivist understanding of the fundamental rights and liberties of humankind. At the level of private law this negative attitude resulted in a great reserve in the civil-law recognition of absolute personal rights which could be called on *erga omnes*. In the totalitarian USSR, the authorities aimed for complete control of the activities of the subject; consequently, there was no place for a private sphere except insofar as it was defined by the authorities themselves.

The Constitution of 1977, for example, declared that in the relationship between citizens and the authorities the following aspects of personality are legal goods which deserved protection: privacy, the confidentiality of the mail, telephone and telegraph, and respect for the personality of the citizens.[180] These rights did, however, have the same limitations as all the other rights and liberties of the citizens, such as the unbreakable tie between these rights and the duties of the citizens, the prohibition of harming the interests of society, the absence of direct effect, etc. They were in any case not rights which could be called up *against* the state.[181] Because of this, they obviously lost a lot of their meaning, namely as a guarantee for a private sphere of life free from state interference.

952. The legal relationships which were regulated by the civil law were classified into three categories:

(1) property relationships;
(2) property relationships linked to personal, non-property relationships;

177. Benard/Boytha 77.
178. Ficsor 39-41.
179. Benard/Boytha 63-67.
180. Arts.56 and 57 Const.1977.
181. Levitsky 1979a, 451.

(3) and, only in the cases provided by law, also other personal, non-property relationships, independent of property rights.[182]

The first two categories were linked to the goal of the creation of a material-technical basis for communism and a constantly broader satisfaction of the material and spiritual needs of the citizens. With the third category, this aim was not repeated.[183]

It seemed that some room was left here for a private sphere in which the Soviet citizen could move and develop freely, unimpeded by any ideological goal and unrestricted by the economic infrastructure—here were personal rights not linked to property rights in any way. The reservation of the Soviet legislator becomes apparent from the fact that these "pure" personal rights were merely granted "in the cases provided by the law".

953. Concretely, Soviet civil law recognized three personal rights, which were entirely independent of property rights: the protection of the honor and dignity of persons,[184] the right to one's image,[185] and the right to the confidentiality of personal writings (although this last one only in the Civil Codes of Kazakhstan and Uzbekistan).[186]

These rights were, however, not seen as examples of a general personality right or right to privacy.[187] In the motherland of Communism, the Soviet Union, there was never to be a complete, general theory of personal rights.[188]

182. Art.1 para.1 Fundamentals 1961 and CC RSFSR. Prior to this codification, a segment of the legal theory argued that the non-property relations not linked to property rights were not *regulated* by the civil law, but only *protected* by it, *i.e.*, the rights and duties of the holder of the personal rights or the restricted acts he is entitled to undertake did not have to be determined by law. The civil law had only to refer to the integrity of the respective personal goods and to the methods of enforcing them (Maleina 13). This view was not adopted by the Soviet legislator, as these right relations were also "regulated" by the civil law.

183. Art.1 para.1 Fundamentals 1961 and CC RSFSR.

184. Art.7 CC RSFSR.

185. Art.514 CC RSFSR. The right to one's image did not apply when the publication, reproduction and dissemination of the work of fine art in which the person was portrayed, was in the interests of the state or of society. More on the right to one's image in M.N. Maleina, "Pravo grazhdanina na individual'nyi oblik (vid)", *SGiP*, 1990, No.11, 134-138.

186. On these three rights, see Levitsky 1979a. In legal theory, there were arguments in favor of a fourth personal right, the right to name, but this was not reflected in the legislation: Levitsky 1979a, 452-458.

187. "Soviet civilists did not think it incumbent upon them to go further and investigate the relationship of the 'personality' aspects of these rights to a hypothetical 'general right of personality' (*allgemeines Persönlichkeitsrecht*) or analyze the relevance of the 'intimate, private sphere' which these rights protected, in relation to a hypothetical 'general right of privacy'."

(Levitsky 1979a, 423; S.L. Levitsky, "The Statutory Framework of the Soviet Law of Privacy", *Rev. Soc. L.*, 1983, 209-210).

188. The only attempt was undertaken in 1941 by Fleishits, *et al.*, *Lichnye prava v grazhdanskom prave Soiuza SSR i kapitalisticheskikh stran*, M., 1941, 9, 121, quoted by Serebrovskii 97-98.

1.2. Russian Law

954. Gorbachev's attentiveness to the human factor[189] and the development of the rule of law ultimately led to a revaluation of the individual interests and rights of Soviet citizens and to the acceptance of a concept of human rights according to which the citizen was guaranteed a sphere private from any government intervention. Within the category of human rights, the personal rights were brought to the fore as is apparent from the Constitution 1993.[190] This greater attention for personal rights manifested itself in the civil law with the adoption of the Fundamentals of 1991.

955. In these Fundamentals 1991, the "pure" personal rights (*i.e.*, those rights not related to patrimonial rights) were no longer said to be regulated by the civil law *only in those cases provided for by the law*, but rather regulated by the civil law *insofar as nothing other is provided by the legislative acts of the Union or the Republics of the Union, nor anything else proceeds from the nature of the personal, non-property relation*.[191]

For the first time, personal non-patrimonial rights were recognized by the civil law in a general fashion[192] so that infringements of personal rights not explicitly listed in the civil legislation, such as the right to inviolability of the person, the privacy of correspondence, the confidentiality of adoption, medical confidentiality, etc., could be protected by civil-law means.[193] Since these are personal rights with no link at all to patrimonial rights, it was not unimportant that the Fundamentals 1991 also contained the first civil-law possibility of suing for monetary compensation for moral damages.[194]

956. The CC RF opted for a different formulation. By virtue of article 2 (1) para.1 CC RF, the civil legislation determines the basis for the origination and the way of exercising the rights of ownership and other rights *in rem*, and the exclusive rights in the results of intellectual activity (intellectual property); it regulates other property relationships and personal non-property relationships related to them, based on equality, autonomy of the will, and the property independency of its participants. And article 2 (2) CC RF adds: "Inalienable human rights and freedoms and other immaterial goods [*nematerial'nye blaga*] are protected by the civil legislation unless something else flows from the essence of these immaterial goods". In other words, there is no longer mention

189. *Supra*, No.158.

190. *Supra*, No.238.

191. Art.1 (2) Fundamentals 1991. In art.4 (1) Fundamentals 1991, non-material goods are mentioned as an object of civil rights.

192. Iu. Kalmykov, "Osnovnoi zakon rynka", *Khoziaistvo i Pravo*, 1991, No.9, 6; A. Makovskii, "Osnovy grazhdanskogo zakonodatel'stva Soiuza SSR i respublik (Kommentarii statei 1-4 glavy 1 "Osnovnye polozheniia")", *Khoziaistvo i Pravo*, 1991, No.10, 10. Maleina 16-17 had called for such a general recognition.

193. A. Makovskii, *l.c.*, 10.

194. Art.130 Fundamentals 1991.

of personal non-patrimonial rights unrelated to patrimonial rights but, rather, of "immaterial goods"; the relationships with regard to these last are no longer "regulated" but, rather, "protected" by the civil law.[195]

957. Chapter 8 of the First Part of the CC RF (Subsection 3: "Objects of civil rights") is devoted to these "non-material goods and their protection" (arts. 150-152).[196]

Article 150 (1) CC RF, under the heading "the non-material goods", gives an non-exhaustive list of, on the one hand, immaterial goods worthy of legal protection, such as life and health, the dignity of the person, the inviolability of the person, honor and good name, business reputation, the inviolability of private life, and personal and family privacy, and, on the other hand, a number of personal non-patrimonial rights, such as the right to freedom of movement and to the choice of place of residence and abode, the right to be named, and the right of authorship.[197]

The text of the law does not, however, clarify whether these are personal rights *unrelated to patrimonial rights*. This could, nevertheless, be deduced from the fact that these personal non-patrimonial rights are, in article 150 (1) CC RF, mentioned together with non-material goods which according to articles 2 and 150 (2) CC RF are "protected" and not "regulated" as are the personal rights related to patrimonial rights.

Article 151 CC RF then provides the possibility of monetary compensation for physical or moral suffering (moral damages) brought about by actions which infringe the personal non-patrimonial rights and other non-material goods belonging to the citizen. Finally, article 152 CC RF contains a new rule concerning the civil-law protection of the honor, dignity, and business reputation of the citizen and—only for business reputation—of legal persons.

958. Recent Russian legal theory (which does go back to before the ratification of the CC RF), in general, applauds the revaluation of personal

195. M. Braginskii, "Obshchie polozheniia novogo Grazhdanskogo kodeksa", *Khoziaistvo i Pravo*, 1995, No. 1, 5-6. See, also, art. 150 (2) CC RF. With this provision the CC RF went against the doctrinair stream, which rejected the contrast between the "regulation" of rights and their "protection": A.E. Sherstobitov, in Sukhanov 1993, I, 359.

196. See, also, M. Maleina, "Nematerial'nye blaga i perspektivy ikh razvitiia", *Zakon*, 1995, No. 10, 102-105.

197. Notable by its absence is the right of portrayal, which in the Soviet legislation was regulated by art. 514 CC RSFSR in the Part dealing with copyright. It was recognized in legal theory that this positioning was due purely to the absence of a separate section dealing with personal rights and that the right of personal portrayal had ended up in the part on copyright solely due to the superficial link with the dissemination of works of visual art, without having anything essentially in common with this author's right (A.E. Sherstobitov, in Sukhanov 1993, I, 374-375). This coincidence, in our view, means that art. 514 CC RSFSR is still in force, since Section IV of the CC RSFSR has still not been repealed and its provisions thus continue to apply insofar as they are not contrary to later legislation (Fundamentals 1991, Copyright Law 1993, CC RF).

rights[198] and considers the following elements to be the most important common characteristics of personal rights (whether or not related to economic rights):

— these rights have no economic significance, they cannot be given a monetary value;[199]
— the sanction for infringement of these rights cannot be real damages but only compensation;[200]
— their object is immaterial, intellectual, and consequently inseparable from the person;[201]
— these rights individualize the personality, that is, the institute of personal non-patrimonial rights allows one legal subject to be distinguished from another.[202]

The personal non-patrimonial rights are subjective, absolute rights, which their holder can oppose to any third party. Thus, by way of the civil law, they protect the personal, individual sphere from outside interference.[203]

They can be divided up in various ways: according to their link with patrimonial rights, according to their purpose, or according to the person in whom the rights are vested.

959. To take the last first, in Russian legal theory it is accepted that a number of personal non-patrimonial rights appertain only to citizens (health, personal portrayal, medical confidentiality, confidentiality of adoption), while others only (or also) appertain to legal persons (the right to a company name, business reputation, the right to a brand name, etc.).[204]

It is, in any case, remarkable that according to some Russian legal theorists industrial or commercial rights which identify producers (legal persons) or products, should be counted among the personal *non*-patrimonial rights. Company name and trademarks are apparently considered to be economically valueless in themselves. Furthermore, this puts pressure on the idea that personal rights are inseparable from the person since rights to brand names certainly are alienable.[205] In article 150 CC RF cited above, trademarks and company names do not appear in the list of "non-material goods".

198. A.E. Sherstobitov, in Sukhanov 1993, I, 358.
199. Dozortsev 1994, 40; V.P. Gribanov, in Sukhanov 1993, I, 20; S.M. Korneev, in M.N. Marchenko and P.F. Lungu, (ed.), *Osnovy gosudarstva i prava*, M., MGU, 1992, 70: Maleina 6.
200. Dozortsev 1994, 41.
201. V.P. Gribanov, in Sukhanov 1993, I, 20; S.M. Korneev, in M.N. Marchenko, and P.F. Lungu, (ed.), *Osnovy gosudarstva i prava*, M., MGU, 1992, 70: Maleina 6-7. Art.150 (1) CC RF refers to personal non-patrimonial rights and immaterial goods as "neither alienable, nor in any way transferable".
202. Maleina 9.
203. A.E. Sherstobitov, in Sukhanov 1993, I, 361.
204. V.P. Gribanov, in Sukhanov 1993, I, 20; Maleina 15.

960. With regard to the division according to the purpose of the personal non-patrimonial rights, Maleina suggests the following classification dependent on the issue of whether the personal non-patrimonial right in question:

— guarantees the physical well-being of the person (right to life, health, healthy environment);
— forms the individuality of the person (right to name, to individual portrayal, to honor and dignity);
— guarantees the autonomy of the person and private life (right to lawyer-client confidentiality, confidentiality of notarial acts, banker confidentiality, medical confidentiality, confidentiality of adoption, privacy of correspondence and telephone conversations, inviolability of the home, inviolability of documents of a personal nature);
— protects the results of intellectual and other activities (non-patrimonial rights of authors of works of science, literature and art, inventions, rationalization proposals, discoveries, industrial designs, the right to a brand name).[206]

961. Finally, a number of personal rights are accepted as being related to patrimonial rights while such a relationship is denied to other rights.[207]

The first category includes, *e.g.*, the industrial rights of organizations to a company name, production and brand names: the company name or the trademark are points of orientation for the purchaser to judge the quality of a product and they thus directly influence company profits.[208] The moral rights of the author also belong to this category.

The second category comprises, *inter alia*, the right to a name, to personal portrayal, the right to honor and dignity, the right to personal privacy, privacy of correspondence, etc.[209]

This last distinction was, as we have said, also confirmed in article 1 Fundamentals 1991, but it is much less clearly present in the CC R.F. In recent legal thought, the distinction between the two categories has also been put into perspective. We will see below that the relationship in the first category, between the personal rights and the patrimonial rights, has been more nuanced

205. Maleina 6-7. See arts.25-27 Zakon R.F. "O tovarnykh znakakh, znakakh obsluzhivaniia i naimenovaniiakh mest proiskhozhdeniia tovarov", 23 September 1992, *VSND i VS RF*, 1992, No.42, item 2322.
206. Maleina 15. Compare A.E. Sherstobitov, in Sukhanov 1993, I (362-363) who does not, however, mention the last category of Maleina's scheme, and puts the right to a brand in the category of personal rights aimed at the individualization of, as the case may be, the organization or citizen that exercises a productive, trade or other economic, commercial activity.
207. Dozortsev 1994, 40; V.P. Gribanov, in Sukhanov 1993, I, 20-21; Maleina 11.
208. V.P. Gribanov, in Sukhanov 1993, 20-21.
209. V.P. Gribanov, in Sukhanov 1993, 21; Maleina 11.

in recent legal theory.[210] Here, we would like to indicate the opposite tendency, now that it has been recognized that the exercising of the rights in the second category is not entirely without consequences for patrimonial rights.

Thus, Zenin indicates that even the violation of the "purely" personal rights can have negative consequences for the economic interests of the right holder.[211] Gribanov explicitly recognizes that the violation of the honor and dignity or business reputation of a citizen can entail economic loss for the same (*e.g.*, because of the necessity of changing place of work or residence), which has to be compensated according to the civil-law standards. In his view, this is the very reason that the "purely" personal rights are regulated by the civil law.[212] In a certain sense, Dozortsev also leaves room for such a reading when he writes that the confidentiality of private life, good name, honor, and dignity are protected *irrespective of whether the violation of these rights entailed any material damage*.[213] This author, in other words, implicitly admits that the violation of personal rights, unrelated to patrimonial rights, *can* cause economic damage.

962. Let us finally mention that Dozortsev differentiates, within the category of personal rights unrelated to patrimonial rights, between rights which only give the person entitled to them a negative power to resist their infringement (such as the protection of honor and dignity) and rights which also allow the holder to take positive steps (*e.g.*, to change his place of residence).[214]

§ 2. Copyright and the Theory of Personal Rights: Some Test Cases

2.0. Introduction

963. In rejecting the theory of intellectual property,[215] one argument which clearly presents itself is that copyright is more than just an economic right: it is an intricate complex of patrimonial and personal non-patrimonial rights. According to some these personal rights, which in themselves have no economic content,[216] are the most important element within the complex of author's rights.[217]

In a number of test cases, we will now investigate whether, and if so in how far, the constant personal bond between the author and his work was (and is) made concrete in Soviet law on the one hand, and in the Copyright Law of 1993 on the other hand. For this purpose, we will take five problem

210. *Infra*, No.986.
211. Zenin 148.
212. V.P. Gribanov, in Sukhanov 1993, I, 21.
213. Dozortsev 1994, 40.
214. Dozortsev 1994, 41.
215. *Supra*, No.942.
216. Gavrilov 1993a, XIX.
217. I.V. Savel'eva, "Razvitie teorii intellektual'noi sobstvennosti na proizvedeniia nauki, literatury i iskusstva v burzhuaznom prave", in *Metodologicheskie i teoreticheskie problemy iuridicheskoi nauki*, M.N. Marchenko, (ed.), M., Izd. Moskovskogo Universiteta, 1986, 210.
218. Art.96 para.2 Fundamentals 1961; art.475 para.2 CC RSFSR.

areas: the criterion for protection, the mutual relation between economic and personal rights, the initial ownership of copyright, the issue of the transferability of rights, and the exercise of moral rights after the author's death.

2.1. The Criterion of Protection

964. That copyright protects the special bond between the author and his work, could first of all be apparent from the criterion which creations have to satisfy in order to be protected by copyright. In Soviet legislation,[218] the Fundamentals 1991,[219] the 1992 Law on the legal protection of computer programs and databases[220] and the Copyright Law 1993[221] a work of science, literature, or the arts[222] is considered worthy of protection if it is "the result of creative activity" (*rezul'tat tvorcheskoi deiatel'nosti*).

Form, purpose, value, means of reproduction or expression of the work and whether the work is disclosed or not are irrelevant criteria for the granting of copyright protection to an author's creations.[223] No formalities have to be complied with to enjoy copyright protection[224] with one exception in Soviet times in the case of photographic and analogous works.[225]

965. "Creativity" is, therefore, the key word. A work may be considered the result of a creative, intellectual[226] activity if it expresses the author's individual-

219. Art.134 (1) para.1 Fundamentals 1991.
220. Art.3 (3) Computer Law.
221. Art.6 (1) CL 1993.
222. According to Soviet legal theory, this classification did not as such entail any protection criterion: industrial models or technical solutions—which prima facie cannot be brought under the heading of science, literature or art—could be protected by copyright: Gavrilov 1979b, 8-9; Gavrilov 1980b, 63-64 (referring to art.47 Const.1977 which protects the rights of authors without any limitation with regard to the nature of the objects created by the author); Savel'eva 1986, 28. Apart from the copyright protection industrial models could also be protected by the special model protection system, see PSM SSSR, "O promyshlennykh obraztsakh", 9 July 1965, *SP SSSR*, 1965, No.15, item 119 and PSM SSSR "Ob utverzhdenii 'Polozheniia o promyshlennykh obraztsakh'", *SP SSSR*, 1981, No.19, item 114. Nothing in the copyright law forbade the accumulation of both protection systems: I.A. Gringol'ts, in Fleishits/Ioffe 704.
223. Art.96 para.1 and 2 Fundamentals 1961; art.475 para.1 and 2 CC RSFSR; art.134 (1) Fundamentals 1991; art.6 (1) CL 1993; art.3 (1) Computer Law.
224. Pursuant to an Order of the State Committee for the publishing industry of the USSR of 28 March 1973, immediately after accession to the UCC, every publisher was required to place a copyright sign in every book, followed by the name of the publisher (not of the author!): Prikaz Goskomizdata SSSR, "Ob utverzhdenii Instruktsii o poriadke primeneniia znaka okhrany avtorskogo prava na proizvedeniia literatury, nauki i iskusstva", 28 March 1973, *BNA SSSR*, 1973, No.7; Voronkova *et al.* 128-131. Non-compliance with this requirement did not, however, entail loss of copyright: Straus 199.
225. Every copy of a photographic work had to bear the name of the author, the place and the year of publication in order to enjoy copyright protection: art.475 para.4 CC RSFSR. This formality is presently no longer required.
226. Zenin 174.

ity,[227] if it is the reflection of the unity of the author's emotional and rational faculties, of his unique personal relationship with the world.[228]

Purely mechanical operations,[229] technical aid, such as the selection of materials, the drawing of tables, diagrams, graphs, and suchlike,[230] technical,[231] or purely editorial[232] work does not suffice.[233] Business correspondence,[234] telephone directories,[235] or other sources of information compiled according to fixed rules (principles of structure, systematization of the material)[236] were not considered sufficiently "creative". Nor was a departmental instruction which had its "bureaucratic dryness" removed and was published in a popularizing brochure subject to copyright.[237]

With this, the Soviet and Russian copyright law is clearly in keeping with the continental-European systems of copyright law which, in one way or another, formulate the imprint of the author's personality on his work as a condition for protection.

966. However, in the CL 1993, in the definition of the term "author"[238] and in the description of the conditions of protection for collections[239] the expression used is not "creative *activity*" but, rather, "creative *labor*".[240] One could deduce from this that now, more than was the case with the term "creative

227. V.A. Dozortsev, in Bratus'/Sadikov 559.
228. Chernysheva 1979, 72-73.
229. Zenin 174.
230. Point 1 para.3 PPVS SSSR, No.9 "O praktike rassmotreniia sudami sporov, vytekaiushchikh iz avtorskogo prava", 19 December 1967, *BVS SSSR*, 1968, No.1, 13; Grishaev 1991, 17.
231. Sergeev 85 who gives the example of the composition of a collection of normative acts arranged in chronological order.
232. Chernysheva 1979, 64; A.A. Luk'ianova, "Sub"ekty avtorskogo prava", in *Voprosy gosudarstva i prava*, G.P. Savicheva, (ed.), M., Izd. Moskovskogo Universiteta, 1985, 95.
233. This is also made explicit in relation to works of architecture by art.16 (4) Federal'nyi Zakon R.F. "Ob arkhitekturnoi deiatel'nosti v Rossiiskoi Federatsii", 17 November 1995, *SZ RF*, 1995, No.47, item 4473, *Rossiiskaia gazeta*, 29 November 1995: "The persons who have given technical, consultative or organizational assistance to the author of the work of architecture, or who organized the making of the plan and the actual building work and monitored the carrying out of the works, cannot be considered co-authors".
234. Levitsky 1985, 5.
235. Ionas 10.
236. Ionas 10; Levitsky 1985, 5.
237. Supreme Court of the RSFSR, 4 March 1929, in Azov/Shatsillo 26-27. See, also, Ionas 96; H.B. Zobel, "Copyrights, Comrades, and Capitalists. An Inquiry into the Legal Rights of Soviet and American Authors", *Bulletin of the Copyright Society of the U.S.A.*, 1960-61, 214.
238. See, also, art.7 (1) CL 1993.
239. Art.11 (1) para.1 CL 1993.
240. Nevertheless, see art.8 (1) para.1 Computer Law, which defines the author of a computer program or database as the natural person by whose creative *activity* these works were brought into being.

activity", reference is made to the intellectual *effort* ("labor") rather than to the stamp of the author's personality on his work. This phraseology is identical to the terms used for industrial patrimonial rights. Thus, the author of an invention, utility model, or industrial design is defined by the Patent Law of 23 September 1992 as "the natural person by whose creative labor the invention, utility model, [or] industrial design is created".[241]

Nonetheless, it would in our view be premature to conclude from this that Russian copyright protects only the intellectual effort. Just as in the Patent Law the conditions of protection for inventions, utility models, and industrial designs are not to be found in the definition of the "author" of these intellectual goods but, rather, in the specific provisions on that issue,[242] one should not derive the criterion of copyright protection from the definition of "author" in the Copyright Law. Both in the Copyright Law[243] and in the Computer Law[244] the old prerequisite, namely that of the result of creative *activity*, remains in force. Either way, a certain effort is required for the creation of any work, namely to give a (protectable) objective form to unprotected thoughts. Labor and activity are, in our view, to be read as synonyms. This follows from the logical connection between the concepts "author" and "author's work": the author is, after all, the person who creates an author's work, the author's work proceeds from the author's intellectual activity. The same is true of collections. Furthermore, we must not forget that not all labor produces a copyright-protected object, for only the results of *creative* labor apply,[245] so that the requirement of originality cannot in any case be reduced to simply not having copied another work but, also, presumes a personal contribution by the author. Consequently, in our view, the current conditions for protection do not differ substantially from the conditions previously in force.

Still, one must concede that Zenin, the only author to have given any attention to this issue after the coming into force of the Copyright Law, seems to set a low threshold: an activity is creative if it is productive rather than reproductive.[246] In practice, according to this author, it comes down to the simple fact of determining an intellectual, rational activity, and the result of this is

241. Art.7 (1) Patentnyi zakon RF, 23 September 1992, *VSND i VS RF*, 1992, No.42, item 2319.
242. Art.4 (inventions: novelty, inventiveness and industrial applicability), 5 (utility model: novelty and industrial applicability) and 6 (industrial design: novelty, originality and industrial applicability) Patent Law.
243. Art.6 (1) CL 1993.
244. Art.3 (2) Computer Law.
245. Compare, in this regard, the provisions concerning coauthorship: art.482 para.1 CC RSFSR ("copyright on a work brought into being by *the joint effort* of two or more persons"), and art.135 (3) Fundamentals 1991 and art.10 (1) para.1 CL 1993 ("Copyright in a work created by *the joint creative labor* of two or more citizens/persons").
246. I.A. Zenin, in Sukhanov 1993, I, 312; Zenin 174.

then protected by copyright *unless it can be shown that this result is a consequence of direct copying, borrowing, plagiarism* (italics ME).[247] According to Zenin, it thus apparently suffices that a work not be copied from an already existing work for it to enjoy copyright protection.

In the same sense, a recommendation of the Judicial Chamber for Informational Disputes (JChID)[248] of 19 May 1994[249] recognizes that

> the schedule of broadcasts is created as a result of a creative activity in the broadcasting organizations and consequently, in accordance with article 2 (4) para.2 of the RF Law "On property in the RSFSR", as well as with article 2 (8) Convention establishing the World Intellectual Property Organization of 17 July 1967 [...] is an object of intellectual property. In connection with it the right of disposal over the broadcasting schedules, including the right to their distribution, appertains to the broadcasters.

It continues that

> in the relations between the broadcasting organizations which have the distribution right for the broadcasting schedules, and the editorial bodies of the written press in determining the amount due account must be taken of the mutual interest in the dissemination of broadcasting schedules through the mass media

and that

> the broadcasters can use the legal measures of protection from unfair competition ('piracy') in the dissemination of broadcasting schedules, including recompense for damages from those who infringe their intellectual property rights.

This recommendation can be criticized in many ways: it contains no reference to the Copyright Law 1993, speaks of a "right of disposal of the author" unknown to Russian copyright law, grants this right to the broadcasting organization (employer) without justification, and refers to the legal means for protection from unfair competition but not to the means for the maintenance of copyright provided by the Copyright Law.[250] For us, it is only important to note that a collection of factual statements is considered to be protected by copyright without giving any justification with regard to the condition for protection. The fact that broadcasting schedules can be considered copyright-protected, without any nuance and in the abstract, seems to indicate that the threshold of originality—at least in the eyes of this administrative body—is not very high.[251]

967. The issue of the "novelty" of a work as an independent criterion of protection is also an element in this debate. The bulk of Soviet legal opinion did indeed accept this[252] on the basis of article 103 point 1 Fundamentals 1961 or the identical article 492 point 1 CC RSFSR which allowed free use of

247. Zenin 175-176.

248. *Supra*, Nos.327 ff.

249. Rekomendatsiia Sudebnoi palaty po informatsionnym sporam pri Prezidente RF, "O pravovoi prirode programm tele- i radioperedach, publikuemykh v periodicheskikh pechatnykh izdaniiakh", 19 May 1994, *Rossiiskaia gazeta*, 28 May 1994. For a discussion of this Recommendation, see Gavrilov 1995a, 688-689.

the published work of others for the creation of a *new*, creatively independent work.[253] It was admitted, though, that absolute novelty cannot be achieved in the realm of art. Therefore, in copyright law, it needed be a subjective novelty not an objective novelty such as for the protection of inventions, drawings and models, or discoveries.[254]

250. We have not addressed the question of whether the JChID was even competent to speak in matters of copyright, since it was only empowered for disputes and other affairs arising in the field of activity of the mass media *excluding such disputes as are reserved by law to the jurisdiction of the courts of the Russian Federation* (Ukaz Prezidenta RF, point 8 "Polozhenie o Sudebnoi palate po informatsionnym sporam pri Prezidente Rossiiskoi Federatsii", 31 January 1994, *SAPP RF*, 1994, No.6, item 434, *Rossiiskaia gazeta*, 3 February 1994). This last is by virtue of art.49 (3) CL 1993 indeed the case for copyright. See, also, V. Verin, "Ne imeesh' prava—ne prodavai", *Rossiiskaia gazeta*, 8 June 1994; V. Verin, "Ne stoit sravnivat' versty s pudami", *Rossiiskaia gazeta*, 13 July 1994. In the written press a storm of protest broke out against what was felt to be a new burden for a medium already badly hit by the economic slump (See, *e.g.*, V. Verin, "Akula sotsializma-3", *Rossiiskaia gazeta*, 28 May 1994. See also the various commentaries in *Rossiiskaia gazeta*, 8 July 1994, 12). The Chairman of the JChID, Anatolii Vengerov, reacted with an extensive letter for publication in which he clarified that the only issue to be resolved by the JChID was

> "whether broadcasting schedules are the object of intellectual property, *i.e.*, whether they are created as a result of creative labor, or are the result of ordinary routine administrative labor, like an informative communication". The conclusion was that "a broadcasting schedule is the result of the creative labor of a large collective of broadcasting company employees and that the broadcasting company is the owner of this intellectual property." In reaching this decision the JChID was led by the creative character of the work, but, also, "the novelty, the possibility of multiplying copies of the schedule for an unlimited number of users, the elements of artistry in the composition of the schedule etc."

(A. Vengerov, "Ne khochesh'—ne pokupai", *Rossiiskaia gazeta*, 8 June 1994).

251. The recommendation of the JChID was not without political reaction. In an undated Declaration of the State *Duma*'s Committee for information policy and communication ("Zaiavlenie Komiteta po informatsionnoi politike i sviazi Gosdumy", *Rossiiskaia Gazeta*, 24 June 1994), it is stated that broadcasting schedules "by their typological characteristics" fall into the category of works which are *not* protected by copyright, namely "communications on events and facts of an informational nature" (art.8 CL 1993). In a draft Federal Bill "on television and radio broadcasting" drawn up by the same Committee the state broadcasting corporations are obliged to provide broadcasting schedules to the editorial bodies of the periodical press on demand and free of charge (art.28 para.4 Proekt Federal'nogo Zakona, "O televidenii i radioveshchanii", *Rossiiskaia gazeta*, 5 November 1994).
252. Antimonov/Fleishits 98; Chernysheva 1979, 74-75; I.A. Gringol'ts, in Fleishits/Ioffe 72; Gerassimov 25-26; Ionas 12-13 and 22-23; B.V. Kaitmazova, "Proizvedenie khoreografii—ob"ekt avtorskogo prava", *SGiP*, 1983, No.11, 57; V.A. Popov, "O poniatii i priznakakh ob"ekta avtorskogo prava", in Boguslavskii *et al.* 63-64; L.V. Zueva, "Nekotorye voprosy avtorskogo prava pri ispol'zovanii proizvedenii dekorativno-prikladnogo iskusstva v promyshlennosti", in Boguslavskii *et al.* 158. *Contra*: Gavrilov 1980b, 61 and 1984a, 84-85, and Savel'eva 1986, 24.
253. Levitsky 1985, 8 writes: "Although the norm relates expressly only to the copyrightability of derivative works, authorities consider this to be a criterion of copyright protection applicable to *all* works."

This article is no longer to be found in the Fundamentals 1991, nor in the Copyright Law 1993, so that the most important textual support for accepting novelty as a separate criterion of protection has disappeared.

968. Zenin defines the term "creative" (*tvorcheskoi*) as the rational (mental, intellectual) activity which is completed by the creation of a *new*, creatively independent result in the field of science, technology, literature, or art.[255] This author himself in another place expressly rejects novelty as a requirement for copyright protection, but immediately adds that "creativity", *just like novelty*, is a subjective category: what one person finds creative, another will not.[256]

Gavrilov defines creative activity as "the thought process of the creation of something new, previously unknown, original. This means that the result is creative, if it is original".[257] Gavrilov, however, was previously always an opponent of the recognition of "novelty" as an independent criterion of protection and thought that "novelty" was to be understood only as a synonym for "creative independence",[258] a position which is not contradicted by the passage just cited.

Sergeev seems to follow Gavrilov in this. According to him, novelty has to be seen as a synonym for the originality of the work. It can be expressed in novel contents, in the work being given a novel form, in a new idea, in a new scientific concept, etc. In this sense, Sergeev sees every creative work as characterized by originality, novelty, non-repeatability, and uniqueness. And he adds that in copyright, which protects the form of a work, the characteristic of novelty as an independent criterion for its protection is redundant since it is entirely subsumed in the characteristic of creativity.[259]

Chernysheva in a commentary on the Fundamentals 1991 continues, just as previously,[260] to see novelty as an independent protection criterion. Nevertheless, she distinguishes between the *novelty of the work*, which in her view is not provided for by the law on copyright, and the *novelty of the creative process*, which is required but which is already present if the author creates an original work or uses an existing work as the basis for the creation of a creatively independent work.[261] Chernysheva's position barely differs from Gavrilov's, namely that novelty be understood as a synonym for creative independence or originality.

254. Chernysheva 1979, 74-76; Gordon 63; Ionas 17-18; Pechtl 43. On the discussion in the West with regard to subjective and objective novelty in copyright, see F.W. Grosheide, *Auteursrecht op maat*, Deventer, Kluwer, 1986, 242-244.
255. I.A. Zenin, in Sukhanov 1993, I, 312; I.A. Zenin, "O kontseptsii prava intellektual'noi sobstvennosti v SSSR", in Gal'perin 39.
256. Zenin 175.
257. Gavrilov 1993a, IX.
258. Gavrilov 1984a, 84-85.
259. Sergeev 40-41.
260. Chernysheva 1979, 74-75.
261. S.A. Chernysheva, in Sukhanov 1993, I, 321.

969. In summary, with regard to the definition of the criterion of protection, we believe—despite some terminological shifts—a high degree of continuity can be ascertained. The earlier textual support for seeing novelty as a separate criterion of protection has disappeared in current copyright legislation. The general trend in Russian law of revaluing the individual and personal rights, consequently, seems to have penetrated to the condition for the eligibility for copyright protection, not through a reformulation of this criterion, but through the dropping of provisions which indirectly could compromise this criterion. There was (and is) no doubt that "creativity" is the key criterion for copyright protection so that entering the sphere of copyright protection in any case presupposes passing a "personality test".

However, it remains to be seen whether this conclusion will also be confirmed in the legal findings, and namely whether the judges will not be inclined to place greater emphasis on the effort expended by the author ("labor") than on the creativity with which a work was brought into being.

2.2. Original Ownership of Copyright Vested in Natural Persons Only

970. The bond between the author and his work also finds expression in the fact that only the natural person who brings the work into being is recognized as original holder of the copyrights to that work. However important the economic investments of enterprises may be in the bringing into being and the dissemination of an author's work, it is initially a natural person who creates a work with his personality and creativity. From a personal-law perspective, therefore, only this natural person can be seen as the author of the work.

971. The CC RSFSR already implicitly assumed that the natural person who brings a work of science, literature, or art into being, has to be considered its author. This principle was also maintained, in theory at least, for works made for hire.[262] With regard to works brought into being in the context of an em-

262. Art. 100 para. 2 Fundamentals 1961; art. 483 para. 1 CC RSFSR. In order to qualify for a work made for hire ("a service work", *sluzhebnoe proizvedenie*) it is *not* relevant whether the employee had used the employer's materials or tools (Point 9 PPVS SSSR, No. 9, "O praktike rassmotreniia sudami sporov, vytekaiushchikh iz avtorskogo prava", 19 December 1967, *BVS SSSR*, 1968, No. 1, 13. See also I.A. Gringol'ts, in Fleishits/Ioffe 714; Ioffe 1969, 38; Parshukovskaia *et al.* 24-25), but it *is* relevant that the employer gave the employee the time during working hours to create the work and that there was no aim for commercial profit (Supreme Court RSFSR, 15 June 1928, *Sudebnaia praktika RSFSR*, 1929, No. 1, 8; Azov/Shatsillo 27). In scientific institutions the result of research was considered being a work made for hire, if the creation of such work was part of the individual work plan of a researcher (Supreme Court USSR, without date (probably 1973), *BVS SSSR*, 1973, No. 8, 2, translated in Hazard *et al.* 342-343). If this was not the case, *i.e.*, if the individual plan did not make explicit that the research should result in the creation of a work, than the unplanned work would not be considered being a "service work" and consequently the ordinary rules concerning use and remuneration applied (People's court of the Brezhnev-district in Moscow, 3 April 1984, quoted by Gavrilov 1987, 233; Parshukovskaia *et al.* 24).

ployment contract or an employee task (employee-created works), the Soviet legislation did respect the principle of authorship,[263] but a regulation for the procedure for the use of the work by the employer and the cases of payment of remuneration was announced[264] (although never ratified).[265] In practice, the absence of any regulation meant that the employer could freely use a work created by his employee[266] without paying remuneration[267] but only if the work was used in accordance with its purpose as apparent in the contract of employment (or in accordance with the plan in force).[268]

972. The law also formulated some important exceptions to the general rule, in explicitly vesting original author's rights in legal persons.[269] These author's rights, moreover, applied in perpetuity.[270]

The original copyright to cinema or television films, for example, was vested in the enterprise which made the recording.[271] The screenwriter, the composer, the director, the head cameraman, the set designer, and the authors of other works which went to make up the film each retained the rights to their own work.[272] With such a regulation, the director was left in the cold. The result of his creative input cannot be exploited separately from the film as a whole,[273] and yet he is not considered the author of the film.[274] Moreover, the director was—just like the head cameraman and the set designer—normally an employee of the film studio[275] so that by article 483 CC RSFSR he had,

263. Art.483 para.1 CC RSFSR.
264. Art.483 para.2 CC RSFSR.
265. See, however, art.481 CC of Kazakhstan.
266. V.A. Dozortsev, in Bratus'/Sadikov 573; Parshukovskaia *et al.* 28. *Contra*: Gavrilov 1984a, 71.
267. Supreme Court RSFSR, 14 February 1975, *BVS RSFSR*, 1975 translated in Hazard *et al.* 340-341. For similar judgments, see Supreme Court RSFSR, 3 May 1927, *Sudebnaia praktika RSFSR*, 1927, No.18, 9, translated in *SSD*, 1977-78, No.2, 146; two judicial decisions published in 1929, as quoted by J.N. Hazard, *Communists and Their Law*, Chicago, The University of Chicago Press, 1969, 265-266; Dietz 1981, 163; Garibian 83; P. Gyertyanfy, "Les possibilités de protéger le logiciel par le droit d'auteur dans les pays socialistes européens", *DA*, 1989, 132.
268. Antimonov/Fleishits 174; Rassudovskii, as quoted by Gavrilov 1983, 787.
269. Art.100 para.1 Fundamentals 1961; art.484 CC RSFSR. Antimonov/Fleishits 77; Chernysheva 1979, 60-62 and Chernysheva 1984, 30-31; Ioffe/Tolstoi 401; A.A. Luk'ianova, "Sub"ekty avtorskogo prava" in *Voprosy gosudarstva i prava*, G.P. Savicheva, (ed.), M., Izd. Moskovskogo Universiteta, 1985, 96.
270. Art.498 CC RSFSR; Gavrilov 1977, 30.
271. Art.486 para.1 CC RSFSR. In case of an amateur film, copyright belongs to the maker thereof: art.486 para.2 CC RSFSR.
272. Art.486 para.3 CC RSFSR. For a general discussion, see Vaksberg 1972, 59-121. According to a decision of the RSFSR Supreme Court of 5 March 1948, quoted by Antimonov/Fleishits 94, Koretskii 257 and Serebrovskii 60, a film operator is entitled to make independently separate photographs from a film.
273. Savel'eva 1986, 39. Compare Vaksberg 1972, 105-107 and Ioffe/Tolstoi 401.

on the one hand, no say with regard to the use of the film (in the opinion of most Soviet lawyers, at any rate); on the other hand, apart from his salary, he only had the right to remuneration in the cases laid down by law.[276] No such cases were ever determined by the legislator.[277]

Broadcasting organizations held copyright to their radio and television broadcasts.[278] The organizations which published scientific collections, encyclopedic dictionaries, magazines, and other periodicals—independently or through the intermediary of a publishing house—enjoyed the copyright to these publications.[279] In both cases, the copyright of the authors of the individual contributions which together constituted such broadcasts or periodicals were indemnified.[280] By special Decrees, copyright protection was finally granted to the press agencies TASS[281] and Novosti (APN)[282] for the reports distributed by them, and to the Marx-Engels Institute for all the works published under its auspices,[283] while the rights of publication and distribution of reproductions of exhibited objects were granted to the Museum of the Revolution.[284]

274. If, on the one hand, it is impossible to separate the film director's creation from the film as a whole, and, he retains his copyright in his own creation, and on the other hand the law considers the film producer to be the author of the movie, one could argue on the basis of Soviet legislation that the film director and film producer were coauthors. However, this theory did not find any advocates in Soviet legal doctrine.
275. I.A. Gringol'ts, in Fleishits/Ioffe 718; Levitsky 1964, 147 and 171-172; M. Niedzielska, "Les problèmes juridiques de la paternité de l'oeuvre cinématographique dans les pays socialistes", *DA*, 1983, 271. On television programs and films, see M. Petrov, "Normativnye akty, reguliruiushchie avtorskie otnosheniia na televidenii", *Sov. Iust.*, 1981, No.7, 14-15. Performing artists and actors usually were employed by the film studios (Chernysheva 1984, 124), whereas scriptwriters and composers usually worked independently. Consequently there was a need to conclude author's agreements for the creation of a film script or film music (Chernysheva 1984, 69-115).
276. A.M. Garibian, "Avtorskoe pravo na proizvedeniia, sozdannye v poriadke vypolneniia sluzhebnogo zadaniia, po zakonodatel'stvu evropeiskikh sotsialisticheskikh stran", in Boguslavskii *et al.* 77.
277. The additional fees paid to the director when a film was released, were no royalties but bonuses in the framework of their labor agreement (Vaksberg 1972, 107-109).
278. Art.486 para.4 CC RSFSR. Radio and television broadcasts were subject matter of copyright (art.475 para.3 CC RSFSR). Soviet law did not recognize neighboring rights.
279. Art.485 para.1 CC RSFSR.
280. Art.485 para.2 and 486 para.4 CC RSFSR.
281. Para.14 Polozhenie, "O Telegrafnom Agentstve Soiuza Sovetskikh Sotsialisticheskikh Respublik i Telegrafnykh Agentstvakh Soiuznykh Respublik", 15 January 1935, *SZ SSSR*, 1935, No.5, item 36-b; Azov/Shatsillo 32.
282. M.Ia. Kirillova, "Sub"ekty avtorskogo prava" in Boguslavskii/Krasavchikov 57.
283. Postanovlenie Prezidiuma TsIK SSSR, "Polozhenie ob Institute Karla Marksa i Fridrikha Engel'sa pri Tsentral'nom Ispolnitel'nom Komitete Soiuza SSSR", 28 June 1929, *SZ SSSR*, 1929, No.42, item 373; 1931, No.68, item 455; Azov/Shatsillo 31.
284. Postanovlenie Prezidiuma TsIK SSSR, "Polozhenie o Muzee revoliutsii Soiuza SSR", 6 March 1930, *SZ SSSR*, 1930, No.18, item 201; Azov/Shatsillo 32.

973.Because of the acknowledgement of legal persons as original holders of copyright, the Soviet copyright legal doctrine clearly distanced itself from the personal-rights approach to copyright by moving closer to a more economically-oriented concept. It is then all the more striking that Soviet legal theory almost unanimously[285] called for the abolition of original copyright vested in legal persons. It was emphasized that, from the nature of the creative work, it follows that it always happens through a natural person, and so copyright can never originate with a legal person.[286] Or, as Savel'eva expressed it: "Because of the deep personal, individual nature of the creative labor, only the fact of the creation of an object of copyright can be the basis for the acknowledgement of copyright vested in a person."[287]

Those learned in the law began to seek possible justifications for the then existing regulation, but rejected them all. These three cases (films, broadcasts, collective publications) would involve complex works (*slozhnye proizvedeniia*), in which the creative labor of the authors of different works, which were included as a whole in the work, was combined with the organizational labor of many members of the personnel of that legal person. With such complex works it would—according to this justification—ultimately be the legal person who brought about the creation by selection (*podbor*) and arrangement (*sostavlenie*) and, therefore, was correctly to be regarded as the original holder of the copyright.[288]

Such complex works were, however, difficult to distinguish from works of compilation (*sostavnoe proizvedenie*) or anthologies, for which the physical person who performed the compilation was acknowledged as the author.[289] Why would, for instance, a scientific joint project be a complex work[290] whereas an anthology of essays of works of artistic, political, scientific, and technical literature was, under article 487 CC RSFSR, a compiled work? Or why categorize a professional film as a complex work and consider the amateur film, in nature and characteristics similar, as a work of co-authorship?[291] The legal person's organizational activity, placing material facilities at disposal, giving directions in the course of the process of creation, were considered insufficient to justify a legal person's original copyright.[292]

285. Except for Chernysheva 1984, 31. Compare Gordon 197.
286. See, *e.g.*, Gavrilov 1986, 65; Gavrilov 1984a, 131-132; Gringol'ts 1969, 438; Savel'eva 1986, 65.
287. I.V. Savel'eva, "Effektivnost' pravovogo regulirovaniia otnoshenii v sfere khudozhestvennogo tvorchestva" in Gribanov 148-149.
288. Gavrilov 1986, 65.
289. Art.487 CC RSFSR.
290. Art.485 CC RSFSR.
291. Gavrilov 1986, 65. Comp. art.486 paras.1 and 2 CC RSFSR.
292. Savel'eva 1986, 65; Serebrovskii 91-92.

Another argument put forward to justify legal persons' original copyright was based on the large number of people who participated in the creation of the work concerned, without mutual legal relationships arising between them (*e.g.*, between director and screenwriter, camera man, actor, composer).[293] As a result, there was uncertainty on the ownership in these works, and this could only be removed by appointing the organizing legal person as the original author. This was supposed to make the exploitation of the work easier.

In practice, however, it appeared that the legal person exercised no or very little copyright and that it was, in fact, the natural persons who had brought about the creation who exercised copyright to the whole of the work.[294] The argument of the simplification of exploitation was, thus, empirically refuted.

The simplification of the international traffic in rights by the acknowledgement of a copyright *ab initio* vested in the legal persons also played role, according to some people, giving such examples as the export of films, co-productions with foreign studios, international exchanges of radio and television programs, etc.[295] But, Savel'eva wondered, why did this regulation then not apply to all works rather than only to those mentioned in articles 485 and 486 CC RSFSR?[296]

According to Vaksberg, finally, in cinematography, material and intellectual production were largely interdependent. Because of the planned economy, material production was entrusted to a state enterprise (the film studio), so it was logical to entrust the rights in the intellectual production to the same state enterprise.[297] In other words, the combination of a fact and an ideological axiom justified the vesting of an original copyright in the state film studios, the fact being that for cinematographic works not only the exploitation but even the creation demanded the necessary material, technical and organizational support of an enterprise, and the ideological axiom being the one of the nationalization of the means of production to bring about the emancipation of workers (and artists).

974. Whatever the case may be, the opponents of the original copyright of the legal person could not get round the letter of the law. Their plea for the abolition of this arrangement went hand-in-hand with a minimalization of its significance.

Thus, it was pointed out that the right to copyright protection and the right to name of the legal person in which original copyright was vested, was nothing special: a publishing house had the right to be credited not only on the encyclopedic dictionaries it published but, also, on all its publications.[298]

293. Gordon 51; Serebrovskii 91-92.
294. Savel'eva 1986, 66-67.
295. I.A. Gringol'ts, in Fleishits/Ioffe 716; Straus 198; Vaksberg 1972, 69.
296. Savel'eva 1986, 66-67.
297. Vaksberg 1972, 65.

With regard to such legal persons' right of integrity, it was maintained that this only had significance in the international trade in rights.[299] In the internal rights traffic, no case was known in which a film studio had initiated proceedings for the violation of its right of integrity on a film it had made. In such a case, proceedings would be instituted by the separate authors of the creative contributions to the creation of the film, such as the screenwriter or the director.[300] An alteration in the whole work automatically meant an alteration in at least one of the parts of the work, and this required the consent of the author of that part.[301]

The said legal persons, according to the legal doctrine, had neither authorial competence with regard to the use of a work nor did they have an effective right to an author's remuneration.[302] The essence of the author's remuneration in socialist society, and the principles on which its standardization depended, led to the fact that legal persons did not in practice exercise their right to receive remuneration for the use of a work in the USSR.[303] The Council of Ministers, for example, never fixed tariffs for remuneration for the use of such works, and such remuneration could, therefore, be freely fixed by the parties.[304] The author's remuneration for the work, as a whole, was divided among the authors of the parts of the work. According to the legal theory, the legal person or members of its personnel who were responsible for the organizational work did not receive part of the author's remuneration.[305] This also applied to the use of the work abroad.[306] Of course the film studios, broadcasters, and publishers did profit from the exploitation of works which had been realized by them; this was, however, not classified as the remuneration of an author but, rather, as profits made from an economic activity.[307]

298. Gavrilov 1984a, 130. Chernysheva, although advocate of the original copyright of film studios, stated that the right of authorship belonged to the real author (who is not defined). No right of authorship for legal persons implied also no right to a name for the legal person, but that was no problem as art.29 CC RSFSR recognized to right of legal persons to a business name, independent of copyright law (Chernysheva 1984, 30-32).
299. A.I.Vaksberg and I.A. Gringol'ts, *Avtor v kino*, M., Iskusstvo, 1961, 64.
300. Gavrilov 1984a, 130.
301. V.A. Dozortsev, in Bratus'/Sadikov 575.
302. Straus 198.
303. I.A. Gringol'ts, in Fleishits/Ioffe 716.
304. Gavrilov 1977, 30.
305. "[... E]n URSS, le fait qu'une organization soit titulaire du droit d'auteur sur une oeuvre collective n'entraîne aucun profit, la loi ne stipulant expressément ni profit, ni taux de rémunération pour les organizations; dans la pratique, les profits résultant de l'utilization des oeuvres collectives ne sont répartis qu'entre les auteurs des diverses contributions. Le droit d'auteur dont les organizations susmentionnées sont titulaires ne joue donc aucun rôle dans le produit national."
    Gerassimov 27.
306. Gavrilov 1984a, 131.
307. V.A. Dozortsev, in Bratus'/Sadikov 575.

975. When the lawyers argued for the abolition of the vesting of original copyright in legal persons, this did not mean that they had no sympathy for some of the needs of production companies, publishing houses, and broadcasting corporations. Gringol'ts asked that the rights of the legal person not be called copyright but "den Urheberrechten entsprechende oder an sie grenzende Rechte".[308] Savel'eva deemed it purposeful to grant legal persons limited competence to dispose over the work as a product of the activity of that organization, but this could not, in her opinion, possibly be copyright since it did not originate from the fact of creative activity.[309]

976. Given the critique formulated in Soviet times on the exceptions to the principle that only natural persons be considered original owners of copyright, it can be hardly surprising that in post-communist Russia the original copyright of legal persons has been excised from the legislation and the principle of authorship reserved to natural persons has been made explicit in an unambiguous fashion.

In the Fundamentals 1991, this occurred in a somewhat unfortunate fashion through reference to the "citizen" by whose creative labor the work had been created,[310] but in the Computer Law [311] and the Copyright Law 1993[312] this became the "natural person". Legal persons are consequently without exception excluded from initial copyright.[313] Legal persons can only acquire the rights of use, *i.e.*, only a portion of the copyrights, which bears witness to the derivative status (*proizvodnyi status*) of these copyright holders.[314]

This naturally does not mean that the legislator was blind to economic reality or to the complex character of certain works. This is apparent from the special measures concerning the transfer of economic rights (employee-created works, audiovisual works, certain collections), and in the case of audiovisual works even a special regulation concerning copyright ownership.

977. With regard to employee-created works, both the Fundamentals 1991 and the CL 1993 continued to consider the employee the author of the work.[315]

The Fundamentals 1991 provided a *cessio legis* in favor of the employer of the exploitation rights to an employee-created work[316] albeit limited by the

308. Gringol'ts 1969, 438.
309. Savel'eva 1986, 66-67.
310. Art.135 (1) Fundamentals 1991.
311. Art.8 (1) para.1 Computer Law.
312. Art.4 CL 1993 (definition "author").
313. Savel'eva 1993b, 35.
314. Korchagin *et al.* 177.
315. Art.140 para.1 Fundamentals 1991; art.14 (1) CL 1993; implicitly also art.12 Computer Law. See, however, in the legislation on education, art.39 (7) Zakon RF "Ob obrazovanii", 10 July 1992, *VSND i VS RF*, 1992, No.30, item 1797, amended 13 January 1996, *Rossiiskaia gazeta*, 23 January 1996.
316. Art.140 para.2 Fundamentals 1991.

purpose of the employee task[317] and only for a period of three years.[318] The employee-author did retain a right to remuneration "in those cases and in accordance with the amounts provided by the legislation",[319] but such legislation was never passed, the practical consequence being that the employer could exploit employee-created works freely within the limits mentioned.

In the Copyright Law 1993 and in the Computer Law, the *cessio legis* was changed to a rebuttable assumption of the transfer of the exclusive rights to the use of the employee-created works in favor of the employer,[320] and an agreement between the two parties was to fix the level and the method of payment of the author's remuneration for each sort of use of the employee-created work.[321] The possibility of disproving the assumption, and to force the amount of remuneration to a reasonable level, depends on the economic strength of the author in the negotiations with his employer.[322] The limitation in time and the purpose-related character of the transfer of rights have, however, disappeared from the Copyright Law.[323] The author consequently retains—except for the right of remuneration—no property rights in his work if it is created in the context of employment. It is all the more problematic that the employer is placed under no obligation to exploit the work.[324]

978. The former initial copyright of the film producers[325] also perished in the Fundamentals 1991, in which the original right to audiovisual works was assigned to undefined "authors", being the natural persons by whose creative labor the work is brought into being. These authors of audiovisual works transferred the right to use the film to the producer within the contractually provided limits.[326] In any case, they retained their right to remuneration.[327]

The new Copyright Law 1993 is also in the case of audiovisual works based on the principle that solely physical persons may be initial copyright holders, but gives—in contrast to the Fundamentals 1991—an exhaustive list of the natural persons who are irrefutably assumed to be the authors of the

317. Art.140 para.2 and 4 Fundamentals 1991.
318. Art.140 para.3 Fundamentals 1991.
319. Art.140 para.2 Fundamentals 1991.
320. Art.14 (2) para.1 CL 1993; art.12 (1) Computer Law. See Savel'eva 1993b, 36.
321. Art.14 (2) para.2 CL 1993. See, also, Savel'eva 1993a, 804. Art.12 (2) Computer Law does not mention that the amount of the remuneration has to be specified "for each sort of use".
322. Prins 1994a, 27.
323. Prins 1994a, 27 incorrectly assumes that the rights to employee-created works only pass to the employer for a period of 3 years, after which they automatically return to the author.
324. Pozhitkov 1994, 61.
325. Art.486 para.1 CC RSFSR.
326. Art.135 (5) para.1 Fundamentals 1991.
327. *Supra*, No.605.

audiovisual work, namely the director, the scriptwriter and the composer of musical work specially created for the audiovisual work in question.[328] There is a rebuttable presumption of the transfer of a number of exhaustively listed rights from the authors of the audiovisual work to the film producer for the entire duration of copyright to that audiovisual work[329] with only the composer of music written especially for the film retaining a right to remuneration for the public performance of the audiovisual work.[330]

979. The initial copyright of the broadcasting organization to its broadcasts[331] was also abolished. It was replaced with a neighboring right for the broadcasting organizations.[332] They can naturally still acquire derivative copyright to programs made by their employees or by free-lancers.

980. Finally, for a special category of collections (encyclopedias, dictionaries, scientific series, magazines and newspapers, and suchlike), the initial copyright of the publisher or the publishing organization[333] was abolished although the measures in both the Fundamentals 1991 and the CL 1993 leave it unclear who should actually be considered the author of such works: the compiler of these works, or the authors of the contributions included in them. As we have argued above, we believe the first is the case.[334] At any rate, the rights to use such a publication were transferred by a refutable (in the Fundamentals 1991[335]) or irrefutable (in the CL 1993[336]) assumption of transfer to the publisher. The rights of the publisher are, thus, in each case derivative rights and not initial copyright.

981. From this short overview, it is clearly apparent that the Russian legislator, more consistently than his Soviet predecessor, sees the natural person who brings the work into being through his creative activity, as initial holder of the copyright. In the Copyright Law 1993, there is not a single exception to the principle of authorship. Assumptions of transfer, refutable or not, of certain or all exploitation rights to the employer, producer, or publisher take account of economic reality, but never to the extent that recognition of the unbreakable bond between the author and his work is threatened.

328. Art.13 (1) CL 1993.
329. Art.13 (2) CL 1993.
330. Art.13 (3) CL 1993. For more details on the special regime for audiovisual works, see *supra*, Nos.672 ff.
331. Art.486 para.4 CC RSFSR.
332. Art.141 (3) Fundamentals 1991; art.40 CL 1993. See, also, Prins 1994a, 27-28.
333. Art.485 CC RSFSR.
334. *Supra*, Nos.687 ff.
335. Art.135 (4) para.3 Fundamentals 1991.
336. Art.11 (2) para.1 CL 1993.

2.3. The Mutual Relations of Patrimonial and Non-Patrimonial Rights

982. Soviet copyright included property rights as well as non-property rights, but the classification of different rights within one of both categories was the subject of great discussion in the Soviet legal doctrine.[337]

According to most legal scholars,[338] only the right to remuneration (which they considered an independent right) was a property right; all the author's other rights were personal, non-property rights, characterized by their inseparability from the person of the author and the absence of physical content. Ioffe and Tolstoi, for instance, argued that these non-property rights had no economic value.[339] Ioffe deduced this from the fact that according to Article 499 CC RSFSR, no pecuniary redress was available for the violation of personal rights[340]—as financial compensation for moral damages was rejected as being contrary to the spirit of socialist law[341]—and this in contrast to the damages awarded for the breach of property rights (art.500 CC RSFSR).[342] Gerassimov, in contrast, considered the rights of publication, reproduction, and distribution to be property rights of the author although he admitted that there were also moral aspects to the right of publication.[343]

Gavrilov took up an intermediate position. According to him, apart from the right of authorship, the right to name, and the right of integrity of the work, only the right to publish was among the moral rights of the author. All the other rights (of reproduction, distribution, public performance or exhibition, broadcasting, recording, translation, adaptation) he categorizes under a general "right to the use of the work", which was without doubt a property right.[344]

337. Antimonov/Fleishits 43.
338. I.A. Gringol'ts, in Fleishits/Ioffe 707; Krasavchikov, II, 453; Savel'eva 1986, 71-72; Shatrov 105.
339. Ioffe/Tolstoi 396.
340. *Contra:* A.K. Iurchenko, "Zashchita imushchestvennykh prav avtora", *VLU*, 1974, No.3, 119-120. According to Savel'eva 1986, 134 one could only imagine pecuniary redress for the simultaneous violation of both non-property and property rights.
341. Levitsky 1979a, 15, 394, 398. See, *e.g.*, M.M. Boguslavskii, "The Soviet Union", in Stewart 463.
342. Ioffe 1969, 26-27.
343. Gerassimov 28-29.
344. Gavrilov deducted this general right to the use of the work from art.101 para.1 Fundamentals 1961 and art.488 CC RSFSR: "The use of the author's work (including the translation to another language) by other persons is not allowed unless an agreement is concluded with the author or his legal successor, except in the cases indicated by the law" (Gavrilov 1984a, 134-137). Gavrilov also maintained that the right to remuneration was not an independent right, but a right which is always linked to the use of the work in one of the named forms or means of exploitation, so that it was in any case also a property right (Gavrilov 1984a, 137-138; E.P. Gavrilov, "Soderzhanie sub"ektivnogo avtorskogo prava", *SGiP*, 1977, No.8, 134). Notice that the Polish author Serda equally considered that in Soviet law the rights of reproduction and dissemination and the right to remuneration—which he regards as an independent right—were property rights, whereas the right of publication was a personal, non-property right (Serda 106-111).

983. The Copyright Law of 9 July 1993 largely brought an end to this discussion. Article 15 CL 1993 provides a list of the author's personal non-patrimonial rights (right of authorship, name, disclosure—including withdrawal—and to the protection of the author's reputation), while article 16 CL 1993 gives a list of the author's patrimonial rights. It is remarkable that the right of disclosure is clearly considered a moral right, and not, as some legal theorists claimed in the Soviet period with regard to the equivalent right of publication, a patrimonial right.[345]

Some doubt is still possible about the status of certain of the rights listed in article 17 CL 1993, namely the *droit de suite* (resale right) and the right of access to a work of visual art. These are two rights which were not recognized expressly by Soviet law. This was certainly not surprising for the resale right as there was hardly any commercial art trade in the Soviet Union;[346] thus, the author did not need be protected against the speculative buying up and selling on of his works as is the case in capitalist countries.[347] Some legal scholars did, however, deduce the existence of the right of access from the rule that the visual artist preserved the moral rights in his work after the transfer of ownership in the physical object in which the work of art was expressed,[348] either as a necessity for the realization of the author's economic rights[349] or as a means to protect the author's right to a name and to the integrity of his work.[350]

The *droit de suite* has, like all the other rights of remuneration, a clear economic content and, consequently, has to be placed among the patrimonial rights.

The status of the right of access in the CL 1993 is less sure. The rationale of the right lies in the effective achievement of the right of reproduction,[351] and as such could be seen as an "auxiliary right", an accessorium with regard to an exploitation right. Yet this right follows directly from the unbreakable bond between the author and his work; presumably, that is why the still scanty legal theory for the present classifies the right of access among the personal, moral rights.[352] This also seems to be confirmed by the Federal Act on architectural activity in Russia of 17 November 1995, in which, specifically in relation to

345. The Computer Law is in this regard still oriented according to the old phraseology and doctrinal schemes, by not speaking of the right of disclosure but rather of the right of publication of the computer program or database, and considering this right a partrimonial right: arts. 1 (1) and 10 Computer Law. See, also, Newcity 1993a, 363-364; Savel'eva 1993b, 42.
346. Dietz 1981, 182, note 119.
347. Loeber 1980, 30.
348. I.A. Gringol'ts, in Fleishits/Ioffe, 752; Sergeev 154-155.
349. V.A. Dozortsev, in Bratus'/Sadikov 593 and 613.
350. Chertkov 1973, 114.
351. Art. 17 (1) CL 1993.
352. Gavrilov 1993a, XX and 1996, 99-100. Dietz 1994b, 153 indicates that this "droit d'accès à l'oeuvre" has a mixed character.

architectural works (including landscaping) the author is given the right to require the owner or possessor of the construction (or landscaped garden, building, etc.) to allow him to take photographs and make video recordings thereof unless otherwise agreed.[353] The legislator expressly describes this variation of the right to access as a personal, non-patrimonial right.

984. Whatever the classification of rights into property or non-property rights may have been (or is), it was (and is) stressed in legal theory that this classification is relatively unimportant and misleading as the different rights are mutually intertwined and protect each property as well as non-property interests and rights.[354] In Russian copyright tradition, looking at both categories separately is a matter of scientific demarcation and, thus, not a matter of principle.[355] This became very clear in the phrasing of article 1 Fundamentals 1961 and article 1 CC RSFSR, in which there is mention of the property rights (*in casu* the economic rights of the author) and the personal, non-property rights *which are linked to the property rights* (*in casu* the author's moral rights). Recently, Sergeev argued that the author's rights are so intertwined that the division of these rights into patrimonial and non-patrimonial rights is fairly difficult. Practically, each of the author's rights contains within itself both personal and property elements. Not infrequently their concrete content only becomes clear from the context, *e.g.*, when the author's purpose in striving to exercise a certain power is known or when the nature of the violated interest can be understood.[356] Hence, it was (and is) assumed that a violation of the right to name, the right of authorship, or the right of integrity may have a direct impact on the economic interests of the author.[357]

It is clear that Soviet and Russian legal doctrine took and takes up intellectual positions along the lines of German monism—although this term does not occur anywhere in Soviet or Russian literature[358]—which considered copyright to be a single, inseparable right with property-right and personal-

353. Art. 18 (2) Federal'nyi Zakon R.F, "Ob arkhitekturnoi deiatel'nosti v Rossiiskoi Federatsii", 17 November 1995, *SZ RF*, 1995, No. 47, item 4473, *Rossiiskaia Gazeta*, 29 November 1995.

354. Ficsor 39-41; A.K. Iurchenko, "Zashchita imushchestvennykh prav avtora", *VLU*, 1974, No. 3, 118; Serebrovskii 101-102.

355. Gordon 77-78.

356. Sergeev 127-129. In the same sense: Baryshev 183.

357. In the Soviet period: E. Gavrilov, "Okhrana lichnykh neimushchestvennykh prav avtorov", *Sov. Iust.*, 1977, No. 7, 18; I.A. Gringol'ts, in Fleishits/Ioffe 707-708; Serebrovskii 101-102. And in the post-Soviet period: S.A. Chernysheva, in Sukhanov 1993, I, 332-333; Dozortsev 1994, 40; V.P. Gribanov, in Sukhanov 1993, I, 20-21; S.M. Korneev, in M.N. Marchenko and P.F. Lungu, (ed.), *Osnovy gosudarstva i prava*, M., MGU, 1992, 70: Maleina 11; Sergeev 127-129.

358. Serda, a Polish author, does use the term in his commentary on Soviet copyright law (Serda 104).

right components which are partly distinct and partly mutually reinforcing. The personal rights protect mainly, but not solely, the spiritual interests of the author, while the property rights in the first, but not the only, instance protect his economic interests.[359]

985. Already in the Soviet Union, there was no discussion of the prioritization of the two categories. Such a discussion was considered typical of capitalist countries, where "undoubtedly" interests of a material nature (and then not even the author's but those of the industries) prevailed.[360] Socialist copyright law charged itself with the global protection of the material and intangible interests of the person[361] and acknowledged that all the rights of the author were the fruits of his labor.[362] Some claimed, however, that the property rights originated in the personal, non-property rights of the author,[363] but this was not seen as a sufficient reason to give either category of rights priority over the other.[364] Among the Soviet legal theorists who commented on copyright, was Gringol'ts, the only writer to base copyright in both its aspects (moral and property rights) on the "theory of Socialist personal rights". According to this lawyer, the author had both personal non-material rights (*nichtmaterielle Persönlichkeitsrechte*) and personal material rights (*materielle Persönlichkeitsrechte*).[365] Savel'eva expressed herself more cautiously, on the one hand, admitting that the then current theory of civil law acknowledged no category of personal property rights[366] but, on the other hand, arguing for their recognition on the grounds that such a category would accord with the Socialist principles of

359. This is exactly what Ulmer meant when he described the monist view on copyright:
> "Die beide Interessengruppen erscheinen, wie bei einem Baum, als die Wurzeln des Urheberrechts, und dieses selbst als der einheitliche Stamm. Die urheberrechtlichen Befugnisse aber sind den Ästen und Zweigen vergleichbar, die aus dem Stamm erwachsen. Sie ziehen die Kraft bald aus beiden, bald ganz oder vorwiegend aus einer der Wurzeln."

(E. Ulmer, *Urheber- und Verlagsrecht*, in *Enzyklopädie der Rechts- und Staatswissenschaft (Abteilung Rechtswissenschaft)*, H. Albach, *et al.* (ed.), Berlin, Springer-Verlag, 116). See also Strowel 528 ff. In relation to Soviet copyright law, Levitsky 1988, (293) states:
> "Some Soviet civilists believe that all rights granted to the author under art.479 RSFSR Civil Code are parts of one single 'subjective copyright' (in the singular, in the same sense as *droit moral* is used in the singular), characterized by unity of personal and property rights and the author-personality-orientation of 'subjective copyright' (in contrast to 'intellectual property')."

360. Gordon 77-78.
361. Mozolin, V.P. in P.E. Orlovskii and S.M. Korneev, (ed.), *Grazhdanskoe pravo*, II, M., 1970, 452-453; Serebrovskii 105-106.
362. Serebrovskii 107.
363. Maslov/Pushkin, II, 426.
364. Serebrovskii 105-106.
365. Gringol'ts 1969, 437.
366. *Contra*: Egorov 31.

Soviet civil law and with the specificity of copyright as an institution of civil law.[367]

986. The fact that in Russian legal theory it is generally accepted that the patrimonial and moral rights of the author are closely related to one another, does not prevent some legal thinkers from emphasizing the independent significance of these personal non-patrimonial rights now more than previously, and this despite their connections with the patrimonial rights. They find support for this in article 15 (3) CL 1993 which—like article 6bis BC—recognizes that the personal, non-patrimonial rights belong to the author independently of his patrimonial rights, and that he retains these personal rights when transferring the exclusive rights to the use of the work.

Maleina points out that the patrimonial rights are secondary to the personal rights related to the patrimonial rights: thus, the author's right of paternity is closely related to his right to remuneration, but it can be exercised independently, *e.g.*, in the cases in which the author no longer has any right to remuneration.[368]

Gribanov, taking the same line, writes that the bond of certain personal rights with the property rights does not mean that they lose their independent meaning. In other words, the recognition of authorship on the work itself, *i.e.*, irrespective of the following remuneration, is independently legally protected by the recognition as author of just that person and no other. The law also protects—in the phrasing of the new Copyright Law—the inviolability of the author's work from any corrections at all made without the author's permission.[369] This also applies in cases in which no damage to patrimonial rights can be shown.

987. The moral copyrights thus belong to the category of the personal non-patrimonial rights related to patrimonial rights, but their independence is nevertheless emphasized. This takes place just at the time that it is recognized that personal rights unrelated to patrimonial rights can also have consequences for the patrimonial rights.[370] The distinction between both categories of personal rights, thus, fades. Two more innovations confirm this trend.

In the Copyright Law 1993, the former right to the inviolability of the work is renamed the right to the protection of the author's reputation.[371] This new name brings this personal non-patrimonial right related to patrimonial

367. Savel'eva 1986, 72-73.
368. Maleina 11. See, in the current Copyright Law 1993, *e.g.*, arts.19 and 20 which under particular conditions allow the use of a work without the permission of the author, and without any obligation to pay a remuneration, but with the obligatory indication of the author's name.
369. V.P. Gribanov, in Sukhanov 1993, I, 21.
370. *Supra*, No.961.
371. Art.15 (1) CL 1993.

rights into the proximity of a personal right unrelated to the patrimonial rights, namely the protection of the honor and dignity of the citizen.[372] This is also apparent from the definition of this right, now that the right holder has to demonstrate a mutilation of his work which can damage the honor and dignity of the author. In this way, the author's moral right becomes a special case of the general personality right which protects the honor and dignity of the citizen, namely in the case when the honor and dignity of an author is threatened in his relation to his work.

The status of the right of authorship has also become less clear with the passing of the first part of the CC R.F. After all, the right of authorship also occurs in the list of "non-material goods".[373] As we have seen, the status of the rights mentioned in this list is not entirely clear, but they are probably to be considered personal rights unrelated to patrimonial rights. If this is the case, it means that the right of authorship has changed status and is no longer considered to be "related to patrimonial rights". The right of authorship is then only "protected", and no longer "regulated", by the civil law. But then this contradicts the Copyright Law of 9 July 1993 which, being part of the civil law,[374] "regulates"[375] the right of authorship.[376]

Both cases from copyright illustrate at a more general level that there is a growing opinion that being related or unrelated to patrimonial rights is a criterion of distinction between the personal rights, which should be dropped. The subjective rights would then simply be divided into patrimonial rights and personal rights. Copyright, then, occupies the middle ground between the two as a complex of patrimonial and non-patrimonial powers.

2.4. The Transferability of Rights

2.4.1. Economic Rights

2.4.1.1. The Soviet Period

988. One of the most confusing problems in Soviet copyright law, as it was interpreted by legal doctrine, was the question whether it was possible to transfer author's rights, and if so, then what was the exact legal nature of such transfer.

989. The legislation approved during the NEP period provided for the "alienation" (*otchuzhdenie*) or "ceding" (*ustupka*) of the author's material rights,[377] while the moral rights of the author were considered inalienable. In a judgment of the Supreme Court of the USSR of 28 December 1940, this was expressed

372. Art.7 Fundamentals 1991; art.152 CC R.F.
373. Art.150 (1) CC R.F.
374. Art.2 CL 1993.
375. Art.1 CL 1993.
376. Art.15 (1) CL 1993.
377. In art.16 Fundamentals 1928, both terms were used as synonyms.

as: "according to the applicable law on copyright [...] the personal rights of the author [are] inalienable. With regard to the material rights of citizens who are authors, the law allows their partial or complete alienation".[378]

In 1961, however, every reference to such a transfer of rights disappeared. The term successor-in-title also disappeared from the normative acts. Article 503 para.2 CC RSFSR provided that

> according to the author's contract the author *transfers his work* or undertakes to create a work and within the period determined by the contract to transfer it to an organization for its *use* in the manner stipulated by the contract, while the organization is obliged to complete or commence this use within the period determined by the agreement, as well as to remunerate the author, except in such cases as are indicated by law.

However, Article 516 CC RSFSR on adaptation contracts stated that the author, according to the agreed terms, "*granted to another person his right to adapt* his narrative work into a dramatic work or a script, or *vice versa*, or his dramatic work into a script or *vice versa*."[379] In the first case, *the work* was transferred for use—in the second case, the adaptation *rights* to the work.

990. As a result of the USSR's accession to the UCC, the internal legislation on author's contracts was again revised in 1974. First of all, the term successor-in-title (*pravopreemnik*) again appeared in the legislation,[380] which presumes a certain transfer of rights. Furthermore, it was more clearly stated than previously that there were two sorts of contracts.

The first sort of contract, namely "the author's agreement on the transfer of the work for use" (*avtorskii dogovor o peredache proizvedeniia dlia ispol'zovaniia*), was defined in the same way as formerly, but with the addition of the term 'legal inheritor' as a possible substitute for the author: the author or his legal inheritor transfer the work, and the organization has to remunerate the author or his legal inheritor.[381]

The second contract was called the "license agreement" (*avtorskii litsenzionnyi dogovor*) and concerned the author or his legal heir's transfer of the right to the use of the work (which included translation or adaptation).[382] This was, then, a clear broadening in comparison with the original version of the CC RSFSR and could, in principle, concern any use.[383]

In interpreting the said rules, there was a high degree of consensus among Soviet legal scholars in relation to the impossibility of alienating copyright as a whole[384] or alienating moral, non-property rights. In this manner, the lasting tie between the author and his work is affirmed. The legal theorists were, in

378. Azov/Shatsillo 39-40. See, also, Musiiaka 10-11.
379. Gordon 94 called this agreement a license agreement.
380. Arts.477, 478, 488, 489, 499, 500 and 503 CC RSFSR.
381. Art.503 para.3 CC RSFSR.
382. Art.503 para.4 and art.516 CC RSFSR.
383. Gavrilov 1974, 73.

contrast, highly divided over the question of whether individual economic rights were assignable among the living.

991. According to the dominant movement in Soviet legal thought, the patrimonial rights of the author were non-transferable: the author only gave his permission for a one-off actual use of the work,[385] he only transferred power with regard to the actual use of the work,[386] or, put a third way, the author limited himself, for the duration of the term of the contract, in his power of decision over the work.[387] This so-called "theory of permission" *(teoriia razresheniia)*[388] was mainly based on article 503 CC RSFSR, which referred to the *transfer of the work* for use, *not* of the *transfer of any right at all*. In the context of a planned economy, this was quite logical: the author could not transfer more rights than he himself had (*Nemo plus juris transferre potest quam ipse habet*).[389] The publication, reproduction, and dissemination of a work was not part of the author's legal capacity[390] but, rather, was reserved to the competent state enterprises. When copyright law attributed to the author the rights of publication, reproduction, and distribution, this did not mean that he could effectively also proceed to these actions but, merely, that he could allow an authorized socialist organization to do so.

The proponents of the permission theory were brought into difficulties when, in 1974, the so-called license agreements were introduced into law.[391] Could one maintain that there was no substantial difference between the contract on the transfer of a work for use, and the licensing contract, because the former simply concerned the exploitation of a work in its original form, whereas the latter concerned the use of a work in translation or in an adapted form, but that in neither cases rights were alienated?[392] Or did one have to

384. "Das sowjetische Recht erlaubt nicht den Übergang aller Rechte vom Urheber auf den Nutzer. Der Urheber kann nicht das gesamte Urheberrecht abtreten [...]", Shatrov 109. See, also, for the period before 1961: Koretskii 202; Serebrovskii 171; A.I. Vaksberg, "Osnovnye cherty izdatel'skogo dogovora po sovetskomu grazhdanskomu pravu", in *Uchenye Zapiski VIIuN. Vyp.3*, M., 1955, 121.

385. Dozortsev 1984a, 166.

386. Savel'eva 1986, 69.

387. Savel'eva 1986, 110-111.

388. This theory originated in the mid-fifties in reaction to the maintenance of the property-law oriented concept of copyright in a state in which socialism was considered realized: Antimonov/Fleishits 48-65; I.A. Gringol'ts, *Prava avtora stsenicheskogo proizvedeniia v SSSR*, Avtoreferat diss., M., 1953, 67; M.I. Nikitina, *Izdatel'skii dogovor na literaturnoe proizvedenie v sovetskom avtorskom prave*, Avtoreferat diss., M., 1954, 6; A.I. Vaksberg, "Nekotorye voprosy sovetskogo avtorskogo prava", *SGiP*, 1954, No.8, 40.

389. Chernysheva 1984, 79; Vaksberg 1969, 7.

390. I.V. Savel'eva, "Pravo avtora na perevod i avtorskii litsenzionnyi dogovor", *VMU*, 1980, No.3, 63-64.

391. On the context hereof, *i.e.*, the USSR's accession to the UCC, see *supra*, Nos.129 ff.

392. Klyk 24-25; I.V. Savel'eva, "Pravo avtora na perevod i avtorskii litsenzionnyi dogovor", *VMU*, 1980, No.3, 64; Savel'eva 1986, 114-116.

accept that one and the same rights were alienable with one type of contract (the licensing agreement), with legal succession as a result, but inalienable with the second agreement (on the transfer of the work for use)?[393]

The theory of permission undoubtedly came closest to the legislator's intention in 1961-1964,[394] and fitted in best with the administrative command system in which each was given his own role: the author created, the publisher published. The publishing house did not need permission to be able to publish, as it already had this authority through the specialization and division of labor which had been implemented in the planned economy. According to this theory, the publishing house only needed the author's permission for the *factual* use of the work, there being no question of any transfer of rights.

But, the critics of the theory of permission wondered, was there then still a legal relationship between the publisher and the author? And if so, did the author's agreement then still belong to the domain of civil law or was the relationship purely governed by administrative law?[395]

992. These critics defended the "theory of the cession of rights" (*teoriia ustupki prav*). This theory acknowledged that the author could indeed transfer ("cede") certain powers to third parties.[396] It developed after the approval of the changes in the national legislation as a result of the USSR's entry into the UCC. The reintroduction of the terms "legal succession" and "legal successor" seemed to imply the possibility of some sort of transfer of rights,[397] and this could not possibly be explained by the theory of permission.[398]

Moreover, Gavrilov posited, it was absurd to interpret the expression "transfer of a work for use" in article 503 CC RSFSR other than as synonymous with "the transfer of the right to use a work". If one were to read article 503 CC RSFSR literally anyway, this would imply that the transfer of a material object was meant, and this is clearly not the subject matter of copyright.

Gavrilov was also of the opinion that the content of the right of the author and of the user organization with regard to the use of a work did indeed coincide even though he had to admit that, when exploiting a work, the user organization acted not only on the basis of rights obtained from the author but, also, on a special right which the author himself did not have.[399]

393. V.A. Dozortsev, "Avtorskii dogovor i ego tipy", *SGiP*, 1977, No.2, 45-47 and *Sots. Zak.*, 1984, No.5, 23; V.A. Dozortsev, in Bratus'/Sadikov 596-598; Klyk 24-25.
394. Savel'eva 1986, 107.
395. Gavrilov 1984a, 94; Musiiaka 26.
396. Gavrilov 1978, 40-45; Matveev 1980, 41-44; B.N. Mezrin, "Usloviia stanovleniia avtorskikh prav", in Boguslavskii *et al.* 116; A.V. Turkin, "Dogovory ob ispol'zovanii v SSSR proizvedenii avtorov iz zarubezhnykh sotsialisticheskikh stran", in *Sovetskii ezhegodnik mezhdunarodnogo prava. 1977*, M., 1979, 236.
397. Pechtl 34-35 and 68-69.
398. Levitsky 1985, 12.
399. Gavrilov 1983, 790-791.

According to the theory of the cession of rights, the agreement on the transfer of a work for use, as well as the licensing agreement, contained the transfer of separate author's rights to the legal successor.[400] The difference between both types of agreement was said to lie in the fact that the first agreement was to regulate the transfer of rights between a Soviet author and a Soviet enterprise, whereas the licensing agreement—which only occurred in legislation after the entry of the USSR into the UCC—was said to be intended to regulate the import and export of copyrights.[401]

2.4.1.2. The Post-Soviet Period

993. It is against this background of confusion in Soviet legal doctrine that one has to see the Soviet legislator's 1991 decision only to keep one type of author's contract in the Fundamentals 1991. By virtue of an author's contract, the author was obliged to create a work in accordance with the contract and then to transfer for use the commissioned work (or an already existing work); the user undertook to begin exploitation in the manner, to the extent and within the period provided for in the contract, and to pay the author a fee as fixed in the contract.[402] This definition was of a piece of what the previous legislation called the contract for the transfer of a work for use. Exit license agreement and the transferability of economic rights? By no means, since another provision prescribed that "the author can transfer *the right to use* his work to any (including foreign) citizens and legal persons, both on the territory of the USSR and abroad".[403] This clearly posited the transferability of the economic right to use,[404] not solely of the work itself,[405] and this both for domestic and foreign use. The dualism which arose after the USSR's accession to the UCC[406] was consequently abolished. But a certain ambiguity nevertheless remained because the definition of the author's contract still spoke of the transfer of *a work* for use, not just the transfer of *rights*.

994. What is the situation under the Copyright Law 1993? According to article 30 (1) para.1 CL 1993, the patrimonial rights of the author indicated in article 16 CL can be transferred (*peredavat'sia*) by an author's contract.[407]

In relation to the object of the transfer, the first thing to notice is that here there is mention of the patrimonial right*s* (in plural), not the patrimonial right and certainly not copyright in its entirety. The CL 1993 nowhere

400. Boguslavskii/Gavrilov 23; Matveev 1980, 43.
401. Gavrilov 1981, 44-49.
402. Art.139 (1) para.2 Fundamentals 1991.
403. Art.135 (2) para.2 Fundamentals 1991.
404. But not of the right to a remuneration which is considered a separate right.
405. See, also, explicitly art.135 (6) para.2 Fundamentals 1991.
406. *Supra*, Nos.124 ff.
407. Compare art.11 (1) para.1 Computer Law. In the case of free use or compulsory license (arts.18-26 CL 1993), the conclusion of an author's contract is naturally not required.

explicitly prohibits the transfer of copyright in its entirety, but from the use of the plural in this and other[408] provisions one can nonetheless deduce that the legislator was only thinking of the transfer of separate, explicitly contractually agreed exploitation rights. This also follows from the rule that the author's contract expressly provide a clause which concretely indicates the rights being transferred.[409] The "copyright" in its entirety can consequently not be transferred.[410] Even if an author's contract contained a complete list of all possible patrimonial rights, the author still retains a kernel of property-right powers, namely rights of use still unknown at the time the contract was concluded. The Copyright Law prescribes that such unknown rights cannot be the object of an author's contract.[411] Russian copyright in this respect is clearly close to German monism.

Secondly, this provision clearly states that *rights* to an author's work are transferred and, thus, not the work itself "for use" as was still the case in the Soviet period in an author's contract on the transfer of a work for use.[412] This also did away with the ambiguity in the Fundamentals 1991 mentioned above.[413]

995. The economic author's rights are transferred by an author's contract in an exclusive[414] or non-exclusive[415] manner.

It is remarkable that, upon the transfer of exclusive rights, the co-contracting party in principle acquires the power to take legal action against infringements of the rights transferred.[416] One could, in other words, argue that by virtue of the said contract the rights listed in it disappear from the patrimony of the author and arise in the patrimony, the property of the co-contracting party, who can oppose these rights to anyone and, on the basis of his own right, can

408. See, *e.g.*, art.6 (5) para.2 CL 1993 (the transfer of the right of ownership of the material object [...] does not entail in itself the transfer of *any author's rights* in the work); arts.11 (2), 13 (2) and 14 (2) CL 1993 (assumption of transfer of the *exclusive rights* in favor of the publisher of composite works, the film producer and the employer).
409. Art.31 (1) CL 1993.
410. Dietz 1994b, 173-175 deduces the principle of the inalienability of copyright from the rules of contract law which always keep a concrete form of use in view as the basis for an author's contract.
411. Art.31 (2) para.2 CL 1993.
412. Art.503 para.3 CC RSFSR. Sergeev (215), however, writes even now—and in our view incorrectly—that the object of the author's contract is "the work of science, literature and art". In any case, the change was regretted by S.A. Chernysheva, "Dogovornyi poriadok ispol'zovniia proizvedenii khudozhestvannogo tvorchestva", in Chernysheva 1998, 101-102.
413. Only in the case of the contract commissioning a work is there clear mention of the author's obligation to transfer the work to the commissioner (art.33 (1) CL 1993), but in our view this refers to the corpus mechanicum, not the corpus mysticum. In an author's contract of commission, the author also has to transfer certain property rights to the commissioning co-contracting party in addition to the transfer of the commissioned work; otherwise, it is not an author's contract.

independently bring an action against infringers of the rights he has acquired. This is, then, not merely the granting of a license but a real alienation of certain rights. According to this interpretation, the distinction between the two types of contract mentioned in the Copyright Law 1993 cannot rest entirely on whether the co-contracting party alone can exercise the rights transferred within the contractual conditions and limits, or whether he has to put up with the competition of the author and possibly of parties to other contracts for the transfer of non-exclusive rights. The distinction must go deeper and concerns either the nature or the extent of the transfer of rights. One contract would, then, be a true alienation of rights valid *erga omnes*, whereas the other one can be seen as a (non-exclusive) license agreement.[417]

In our view, this interpretation is incorrect. Firstly, the distinction between the two contracts cannot be drawn on the basis of terminology since, in both cases, there is mention of a transfer (*peredacha*) of exclusive and non-exclusive rights respectively. This term "transfer" could have either an umbrella meaning for both alienation and license[418] or a narrower meaning of "alienation" standing besides the license.[419] This last, narrower meaning cannot possibly be meant here since one would then have to speak of an alienation of non-ex-

414. Art.30 (2) CL 1993 provides that:
"An *author's contract for the transfer of exclusive rights* authorizes solely the person to whom the rights are transferred, to use a work by the method determined and within the limits established by the contract, and gives such person the right to prohibit such use of a work by other persons. The author of the work may exercise the right to prohibit use of his work by other persons, if the person to whom the exclusive rights were transferred, does not protect this right."
Art.30 (3) CL 1993 states:
"An *author's contract for the transfer of non-exclusive rights* authorizes the user to use the work on equal terms with the owner of the exclusive rights, who has transferred these rights, and/or other persons who have received authorization to use this work by the same method."

415. Art.30 (2) CL 1993. Compare art.49 CL 1993 which gives the "owner of exclusive rights" (*obladatel' iskliuchitel'nykh avtorskikh prav*) the right to take legal action against counterfeiters.

416. The English translation of the Russian Copyright Law drawn up by WIPO seems to follow this interpretation by translating the contract for the transfer of exclusive rights as "the author's contract for the *assignment* of exclusive rights", while the author's contract for the transfer of non-exclusive rights is translated as "the author's contract for the *licensing* of non-exclusive rights" (*Copyright, Laws and Treaties, Russian Federation*—Text 3-01, 010).

417. *WIPO Glossary* 251.

418. *WIPO Glossary* 14.

419. Art.30 (2) para.2 CL 1993. This provision does leave a number of questions unanswered, such as: "how long does the author have to wait to allow the licensee to take action against counterfeiters, before taking action himself?", and "do the licenser and the licensee have a mutual obligation to inform each other when they obtain knowledge of infringements of copyright?"

clusive rights, which is a contradiction in terms. We are left with the broader meaning of "transfer", which in itself gives no definite answer as to whether a license or an alienation is meant.

Furthermore, the author retains the right to prohibit the use of his work by third parties if the person, to whom the exclusive exploitation rights were transferred, does not take legal action.[420] Thus, *despite* the conclusion of an author's contract for the transfer of certain exclusive rights, the author retains the right to prohibit third parties from taking action which come under the transferred exploitation rights if no steps are taken by the other party to the contract. Consequently, this means that the rights listed in the author's contract for the transfer of exclusive rights are not alienated from the author. The rights do not change owner, the other party to the contract acquires only certain user's rights. This is *a fortiori* true for authors' contracts on the transfer of non-exclusive rights.

In both contracts, the transfer of rights in reality means "permission to use"; in other words, the granting of a right of use and, thus, not an actual transfer in the sense of an alienation (*otchuzhdenie*) or relinquishing (*ustupka*) of rights.[421]

The difference between the two sorts of contract, in our view, lies only in the fact that—in the author's contract for the transfer of exclusive rights—the other party to the contract is guaranteed the exclusivity of the rights of use granted him within the contractual and any legal limitations, while such exclusivity is not ensured in the second sort of authors' contracts. This is the classic distinction between the exclusive and the non-exclusive license.

996. If we reach the conclusion that the author's contract mentioned in the CL 1993 is a license agreement, we can only be amazed at the legislator's fear of using the term "license agreement" in the Copyright Law. In all drafts the same definition was used for an author's contract, but with explicit use of such terms as "*litsenziia*", "*litsenziar*" and "*litsenziat*". In the final CL 1993, the term *litsenziia* is used only to indicate the relationship between the collecting society and the users.[422] The reason for this reluctance to use this term is unknown to us. In the legislation on other exclusive, intellectual rights, the term appears repeatedly.[423]

420. Notice, for instance, that the Supreme Court and the Supreme Court of Arbitration of the RF stated in a joint Decree that a stake in a company *cannot* consist of an object of intellectual property (a patent, an object of copyright, including a computer program etc.) or know how. A *right of use* to an object of intellectual property can be brought in, by *transferring this right by a license agreement* (italics ME): point 17 PPVS RF i PVAS RF No.6/8 "O nekotorykh voprosakh, sviazannykh s primeneniem chasti pervoi Grazhdanskogo kodeksa Rossiiskoi Federatsii", 1 July 1996, *Rossiiskaia Gazeta*, 13 August 1996.

421. See, also, O. Verina, "GK RF o poniatii i usloviiakh dogovora po litsenzionnym soglasheniiam na ob"ekty IS", *I.S.*, 1996, Nos. 1-2, 30-34.

997. All this leaves untouched the question of whether the current regulation *prevents* an alienation of separate patrimonial rights.

In legal doctrine with regard to intellectual property rights in general, one makes a distinction between contracts on the relinquishing of rights (*dogovory po ustupke prav*) and contracts on the granting of a right to use (*dogovory o predostavlenii prava ispol'zovaniia*);[424] and in the law on trademarks, there is in so many words the license agreement (*litsenzionnoi dogovor*) in addition to the contract for the relinquishing of the trademark (*dogovor ob ustupke tovarnogo znake*);[425] but the Copyright Law remains silent. It is true that the Copyright Law 1993 nowhere excludes the alienation of patrimonial rights. The Copyright Law 1993 only regulates license agreements and says not a word on agreements on the alienation of patrimonial rights: forgetfulness on the part of the legislator or a conscious choice? No definitive answer can be given.[426] The discussion of this subject will, at any rate, have to take account of the following three elements.

One. The Computer Law provides, besides the contract for the use of computer programs and databases,[427] the possibility of a *complete or partial* transfer of patrimonial rights on computer programs and databases to other natural or legal persons,[428] by means of a contract on the complete relinquishing of all

422. Arts.45 (3) and 46 CL 1993. For each of the methods of use for which the remuneration is regulated by the Decree of 21 March 1994 on the minimum rates, a fee is paid in order to acquire permission or "the license" for that particular method of exploitation: point 26 Part III Appendix 1; point 4 Part II Appendix 2; point 4 Part II Appendix 3 PP RF, "O minimal'nykh stavkakh avtorskogo voznagrazhdeniia za nekotorye vidy ispol'zovaniia proizvedenii literatury i iskusstva", 21 March 1994, *SAPP RF*, 1994, No.13, item 994.
423. Art.13 Patentnyi Zakon RF, 23 September 1992, *VSND i VS RF*, 1992, No.42, item 2319 (patent law); art.16-21 Zakon RF "O selektsionnykh dostizheniiakh", 23 September 1992, *Rossiiskaia gazeta*, 3 September 1993 (breeders' law); art.26 Zakon RF, "O tovarnykh znakakh, znakakh obsluzhivaniia i naimenovaniiakh mest proiskhozhdeniia tovarov", 23 September 1992, *VSND i VS RF*, 1992, No.42, item 2322 (trademark law). According to Sulimova, license agreements are agreements by virtue of which one party grants the other person the right to use a protected object of industrial property to the extent and on the conditions determined in the agreement in exchange for a fee, adding that in practice and in the literature authors' contracts are described as license agreements. This author does not hesitate to speak of exclusive and non-exclusive authors' license agreements (E.B. Sulimova, in Dement'ev 159-166 and 183).
424. E.B. Sulimova, in Dement'ev 159; I.A. Zenin, in Sukhanov 1993, I, 316; Zenin 167-168.
425. Arts.25-27 Zakon RF, "O tovarnykh znakakh, znakakh obsluzhivaniia i naimenovaniiakh mest proiskhozhdeniia tovarov", 23 September 1992, *VSND i VS RF*, 1992, No.42, item 2322.
426. In legal theory to date, only Gavrilov has expressed an opinion on this point. According to this author, the patrimonial rights cannot be relinquished (*ustupleny*), but only given in license: Gavrilov 1995b, 63-64.
427. Art.14 Computer Law.
428. Art.11 (1) para.1 Computer Law.

patrimonial rights (*dogovor o polnoi ustupke vsekh imushchestvennykh prav*) or a contract on the transfer of patrimonial rights (*dogovor o peredache imushchestvennykh prav*).[429] The relationship between this Act and the Copyright Law 1993 is unclear at this point too, but the absence of any measure concerning contracts for the complete relinquishing of rights in the Copyright Law 1993, in contrast with the Computer Law, could indicate that in 1993 the legislator judged such contracts to be out of place in the general copyright law.

Two. By virtue of the Copyright Law 1993, the "personal non-patrimonial rights belong to the author independently of his patrimonial rights, and shall be retained by him in the case of relinquishing [*ustupka*] of his exclusive rights to the use of the work".[430] This provision is the literal repetition of the introductory phrase of article 6bis (1) BC in the Russian translation provided by WIPO. In our view, the "relinquishing of rights" (*ustupka prav*) is an umbrella term which does not express an opinion as to whether or not this "relinquishment" involves an alienation of rights.[431]

Three. The Copyright Law 1993 refers to the *droit de suite* as "inalienable" (*neotchuzhdaemyi*): by virtue of the law, it passes only to the heirs of the author for the duration of copyright.[432] Should one deduce from this explicit statement with regard to the *droit de suite* that, contrarily, the other rights are "alienable"? Or is this just an explicit statement of something which is implicitly true of the other rights?

The fact that these questions must remain unanswered leads one to suspect that, in future, the old quarrel between proponents of the theory of permission and the proponents of the theory of the relinquishing of rights will continue.

However, the debate will take place now in a very different environment. One of the most important arguments of the proponents of the theory of permission was the fact that, in the administrative command economy, natural persons did not themselves have the right to exploit works they authored. It is clear that under the present market conditions, and within the legislative framework of today's Russia, this can no longer be an argument.[433] If one is to defend the inalienability of the author's economic rights, one should stick to arguments based on social policy and the protection of the person of the author through the recognition of an unbreakable bond between the author and his work.

429. Art.13 (5) Computer Law.
430. Art.15 (3) CL 1993.
431. In the *WIPO Glossary* (257), the transfer (*peredat'*) and the relinquishing (*ustupit'*) of rights are given as synonyms.
432. Art.17 (2) para.2 CL 1993.
433. See, also, Sergeev 196–197.

2.4.2. Moral Rights

998. In the USSR, the non-transferability of the author's moral rights, and especially his rights of authorship, to name, and of integrity, was beyond discussion.[434] With regard to the rights to name and the right of integrity, the law provided that the agreement of the author—at the time of signing the author's contract—to alterations to his work, its title or the name given on the publication, public performance or any other use of the work, or to the addition of illustrations, prefaces and postscripts, comments and any clarification at the publication of his work, could not be revoked unilaterally.[435] This shows that agreements concerning the said moral rights were indeed possible insofar as the author, with complete knowledge of affairs, agreed to concrete alterations to a certain work at the exploitation of this work. There was here, thus, no question of the general renunciation of these rights.

The Fundamentals 1991 declared only the right to use the work to be transferable,[436] which implied that all moral rights (and the right to remuneration) were non-transferable among the living.[437]

The CL 1993 does not express itself explicitly on the (in)transferability of the moral rights of the living author. Article 15 (3) CL 1993, inspired by the introductory phrase of article 6bis BC, does provide that "personal non-patrimonial rights belong to the author independently of his patrimonial rights, and shall be retained by him in case of relinquishing of his exclusive rights to the use of the work", but strictly this says nothing about the (im)possibility of the transfer of moral rights.[438]

Article 30 (1) CL 1993 regulates the transfer of the patrimonial rights and provides that this can only take place by means of an author's contract; a comparable article concerning the transfer of moral rights does not exist.

999. The first Russian commentators on the new Copyright Law unanimously accepted the non-transferability of the author's moral rights.[439] They are ultimately supported in this by article 150 (1) CC RF, which mentions the right of authorship and other personal non-patrimonial rights (including, in our view, the author's other moral rights) in a list of rights which "appertain to the citizen by virtue of birth or by virtue of the law, which are inalienable, and cannot be transferred in any other way".[440] This would seem to make

434. See, *e.g.*, the judgment of the Supreme Court of the USSR of 28 December 1940, in Azov/Shatsillo 39-40. See also Musiiaka 10-11; Shatrov 109.
435. Art.480 para.3 CC RSFSR.
436. Art.135 (2) para.2 and (6) para.2 Fundamentals 1991.
437. Grishaev 1991, 7.
438. With regard to art.6bis BC on this point, see Nordemann *et al.* 87 No.3 ("The text sidesteps the question of transferability of the moral rights of the author").
439. Gavrilov 1993a, XX; Savel'eva 1993b, 39 and 50 (but without reference to the right of disclosure); Sergeev 6-7. See, also, Pozhitkov 1994, 63.
440. Art.2 (2) CC RF also speaks of the "*inalienable* human rights and liberties and other non-material goods".

contractual clauses in which the author knowingly undertook to refrain from exercising a particular moral right at the exploitation of a particular work (*e.g.*, a "ghostwriting contract"), null although they were valid in the Soviet legislation.

But maybe this conclusion is too strict. As indicated above, a non-patrimonial right, the right of access, is granted by the Federal Act on architectural activity in Russia of 17 November 1995, to the author of a work of architecture, landscape art, *unless otherwise agreed*.[441] Contractual provisions limiting the architect's right of access are therefore perfectly valid.

2.4.3. Conclusion

1000. There is continuity in the view that copyright in its entirety is inalienable and that the moral rights are inalienable. There is also continuity in the confusion on the question whether or not it is possible to alienate separate economic rights. According to the dominating opinion in the Soviet Union, such economic rights were inalienable. And the Russian legislator regulates only contracts for the granting of rights of use, not for the alienation of rights. So here, too, there may be continuity in legal thinking. There is, however, discontinuity in the fact that the present law does not provide in general terms for any possibility to contract on moral rights.

It is, at this point, that the Russian legislator seems to drift away from the German monist opinion with regard to the inalienability of the one and indivisible copyright.[442] The German monist theory was—and to a great extent—is indeed dominating in the USSR[443] and Russia. Although in the CL 1993 moral rights and economic rights are clearly regulated separately, it is within the Russian tradition of legal thought that economic and moral rights are considered to be strongly intertwined; there are good arguments to state that there was and is a strong tendency to accept the inalienability, not only of copyright as a whole but, also, of separate moral and economic author's rights. If so, it would, however, be logic—as is the case in German legal thought—that it is possible to contract not only on economic rights but, also, on the author's

441. Art. 18 (2) Federal'nyi Zakon R.F, "Ob arkhitekturnoi deiatel'nosti v Rossiiskoi Federatsii", 17 November 1995, *SZ RF*, 1995, No. 47, item 4473, *Rossiiskaia gazeta*, 29 November 1995.

442. See, *e.g.*, A. Dietz, *Das Droit Moral des Urhebers im neuen französischen und deutschen Urheberrecht*, München, C.H. Beck'sche Verlagsbuchhandlung, 1968, 129-130.

443. The supporters of the theory of permission, which came closest to the German monistic theory, nonetheless made no mention of the striking resemblance with the German law. They saw in their rejection of the possibility of alienation of the (property or non-property) rights of the author an example of the author's emancipation from the economic pressure exerted by the capitalist entrepreneur. It was, thus, difficult to admit that in a capitalist, Western European country the author was already protected from exploitation by the same legal technique.

moral rights. In Soviet law this was possible; it is far from sure that it is still possible under present Russian law.

What is sure, though, is that both the Soviet and Russian legislators—in their regulation of the (uni)transferability of author's rights—accepted the inseparable bond between the author and his work. If this still needs proof, we may refer to the rule in the present law that the "transfer" of rights—unknown at the time of the conclusion of a contract—is prohibited. It means that, notwithstanding any legal transaction the author retains not only a personal-right component of copyright but, also, a patrimonial component. In this manner, the enduring bond between the author's person and his work is ensured.

2.5. Non-Patrimonial Rights after the Death of the Author

1001. The last test case and cause of dissension concerned the transfer of the moral rights of the author *mortis causa* and, in particular, the duration of such rights; the question of whether the rights of the heirs, the artistic or literary executor, or the copyright organizations were transferred author's rights or independent rights of the said persons; and the extent of these rights.

2.5.1. The Term of Protection for Moral Rights

1002. The pre-1991 copyright legislation provided a term of protection for copyright (singular) running to 25 years *p.m.a.*[444] Since the codification of civil law in 1961-1964, the author could designate a testamentary executor who was enjoined to protect the right of integrity of the work throughout his lifetime (and thus possibly for longer than 25 years after the author's death[445]). In default of such designation of a testamentary executor, the right of integrity of the work was exercised by the heirs or the competent organizations for authors' rights and by default of heirs, *or after the expiry of the term of 25 years p.m.a.*, by the organizations for authors' rights alone.[446] The competence of the organizations for authors' rights concerning the protection of the right to the integrity of the work was not limited to any term, so that administrative protection of the integrity of the work was in perpetuity.[447]

Whether this was also the case for the right to a name was not clear.[448] Article 496 CC RSFSR, in relation to the posthumous exercise of this right, did refer to articles 480 and 481 CC RSFSR, but article 481 did not discuss the right to name, whereas article 480 only regulated the exercise of the right to a name (and to the integrity of the work) *during the lifetime of the author.*

444. Art.105 para.1 Fundamentals 1961; art.496 para.1 CC RSFSR.
445. V.A. Dozortsev, in Bratus'/Sadikov 569. *Contra*: Gavrilov 1977, 35-36.
446. Art.481 CC RSFSR. See, also, Gringol'ts, I.A., in Fleishits/Ioffe 711.
447. V.A. Dozortsev, in Bratus'/Sadikov 569-570; I.A. Gringol'ts, in Fleishits/Ioffe 711; Levitsky 1988, 301
448. Gavrilov 1977, 35, note 12; Levitsky 1988, 302-303.

Any lack of clarity on the duration of both rights was removed by the bilateral treaties on the mutual recognition of copyright, which the USSR concluded with Czechoslovakia (1975)[449] and Hungary (1977).[450] Article 4 (2) of the first treaty, and Article 3 para.2 of the second treaty stipulated that "the name of the author and the integrity of the work are to be protected *without limitation of time*". Even though these provisions could only be called on in the Soviet Union by Czechoslovakian and Hungarian authors[451] and authors from third countries whose work was first published in Hungary,[452] it seems clear that the Soviet Union wished to do no more than recognize the rights of foreign authors for the same duration as was granted to Soviet authors in the internal legislation.[453]

The right of authorship, which was not recognized in the legislation but was unanimously maintained in the legal theory, was also of unlimited duration. In this regard, reference was made to the criminal sanction for plagiarism (art.141 CrC 1960) which was to be enforced irrespective of whether the term of protection of the plagiarized work had already expired.[454]

1003. The perpetual character of the protection of the rights of authorship, name, and the inviolability of the work, and the protection of the author's reputation was finally legally fixed in both the Fundamentals 1991[455] and the CL 1993.[456]

In the Copyright Law 1993, there was the explicit addition that these moral rights are still protected even when the work has passed into the public domain.[457] One should remark here that the public domain contains not only works of which the period of protection has expired, but, also, such works as

449. "Soglashenie mezhdu SSSR i Chekhoslovatskoi Sotsialisticheskoi Respubliki o vzaimnoi okhrane avtorskikh prav na proizvedeniia literatury, nauki i iskusstva", 18 March 1975, *VVS SSSR*, 1975, No.43, item 684.
450. "Soglashenie mezhdu Pravitel'stvom SSSR i Pravitel'stvom Vengerskoi Narodnoi Respubliki o vzaimnoi okhrane avtorskikh prav", 16 November 1977, *SP SSSR*, 1978, No.3, item 22.
451. Art.2 Agreement with Czechoslovakia and art.2 para.1 Agreement with Hungary.
452. Art.2 para.2 Agreement with Hungary, *supra*, note 451. No similar extension of the field of application was present in the Agreement with Czechoslovakia.
453. Gerassimov 31: "En URSS, les droits moraux des auteurs bénéficient d'une protection perpétuelle; le message des auteurs du passé est ainsi préservé pour les générations futures". Comp. V.G. Kamyshev, *Prava avtorov literaturnykh proizvedenii*, M., 1972, 22. Boguslavskii and Gavrilov admitted that in the legal theory the perpetual character of the personal, non-property rights was upheld, but warned that the problem of the duration of these rights remained unsolved, given the silence of the law (Boguslavskii/Gavrilov 26).
454. Gavrilov 1977, 34. V.A. Dozortsev, in Bratus'/Sadikov 570 refers to exactly the same provision to prove the eternal character of the right to a name.
455. Art.137 (3) Fundamentals 1991.
456. Art.27 (1) para.2 CL 1993. Comp. art.6 (4) Computer Law.
457. Art.28 (2) CL 1993.

were never protected on the territory of the RF,[458] such as for instance the works of non-Russians first published in a country with which Russia has no copyright treaty relations, or published in a country which was a party to the UCC, if publication took place prior to 27 May 1973. Even for this category of works the Copyright Law 1993 consequently recognizes a right of authorship, a right to name, and a right to the protection of the author's reputation. In this way, the *droit moral* obtains the nature of a right, inherent to all human beings who create works of art and literature.

The term of protection of the right of disclosure is not mentioned either explicitly in the Fundamentals 1991 or in the Copyright Law, so that the general period of protection of 50 years *p.m.a.* applies. This is also true of the related right of withdrawal, which is in our view—given the serious curtailment of third parties rights entailed by exercising this right—aberrant.[459]

The right of access to a work of visual art,[460] which is a right of a mixed nature, also applies up to 50 years *p.m.a.*[461]

2.5.2. The Nature of the Heirs' Powers

1004. Before 1973, a number of lawyers held that the heirs, the artistic or literary executor, or the copyright organizations retained all or some of the moral rights of the author, which he had transferred by bequest. Among them were Gorodetskii,[462] Serebrovskii (only with regard to the right to publish),[463] Koretskii (the right of integrity and the right to publish, but not the right of paternity),[464] Ioffe (the right of integrity),[465] and Antimonov and Fleishits. These last indicated that all the property and moral rights of the author were transferred *mortis causa*: since the property rights relied on the moral rights, it was unthinkable that the one category of rights was, and the other was not, transferable by bequest.[466]

Raigorodskii arrived at an original solution. According to him, each of the author's powers could be divided into two elements: a positive element by virtue of which the author himself could carry out certain actions, and a

458. Art.28 (1) para.2 CL 1993.
459. *Supra*, No.695.
460. *Supra*, No.699.
461. *Contra*: Gavrilov 1993a, XX, according to whom the right of access applies only during the author's life.
462. B.N. Gorodetskii, *Pravovoe polozhenie pisatelei i kompozitorov*, 1946, 112, quoted by Koretskii 288.
463. Serebrovskii 232-234.
464. Koretskii 291, 296.
465. Ioffe 1969, 39. The same author had, however, in earlier writings, together with Tolstoi, expressed the opinion that not only the right of authorship and the right to a name, but, also, the right of integrity "died" together with the author: these rights could not be transferred to other persons: Ioffe/Tolstoi 408-409.
466. Antimonov/Fleishits 143.

negative one according to which the author could prohibit third parties from carrying out these actions. He was of the opinion that the positive element of the moral rights did not fall to the heirs, whereas the negative, defensive element was transferred by bequest in full force.[467]

Serebrovskii, however, called this distinction between positive and negative elements artificial since both elements were inextricably linked,[468] and Koretskii also indicated that both elements were treated simultaneously in the copyright legislation (of 1928).[469]

According to Gordon,[470] Gringol'ts,[471] and Chertkov,[472] not a single personal, non-property right was transferred by bequest. The heirs' rights were not of a copyright nature but, rather, independent, separate powers granted to them by law.

1005. The legal changes of 1973-1974 settled this dispute by accepting the transfer of copyright by bequest in principle with the exception of the rights to name and integrity.[473] When one of the latter two rights was exercised by the artistic executor, the heirs, and the organizations, it was established they were no copyright powers but independent rights granted to them by virtue of the law.[474]

In the Fundamentals 1991, however, it was stated that the right to protection of the inviolability of the work, the rights of publication, use, and remuneration for use pass to the heirs.[475] With relation to the inviolability (integrity) of the work, this meant a reversal of position, but with regard to the right to name as well as the right of authorship, which was officially recognized for the first time, everything remained as it had been, *i.e.*, there was no transfer by inheritance.

The Copyright Law 1993 restored orthodoxy by providing that copyright passes by inheritance with the exception of the right of authorship, the right to name, and the right to the protection of the reputation of the author of the work.[476] The moral rights to disclosure, and withdrawal consequently do pass to the author's heirs,[477] and can be exercised by these heirs as they think best even contrary to the known wishes of the author.[478]

467. N.A. Raigorodskii, "Nasledovanie imushchestvennykh prav avtorov", *Sots. Zak.*, 1956, No.2, 15. See, also, Pechtl 57.
468. Serebrovskii 229.
469. Koretskii 292.
470. Gordon 34 and 124.
471. I.A. Gringol'ts, in Fleishits/Ioffe 711 and 730.
472. V.L. Chertkov, "Nasledovanie avtorskikh prav", *SGiP*, 1970, No.11, 120.
473. Art.105 para.3 and 4 Fundamentals 1961 *juncto* art.496 para.2 CC RSFSR.
474. Savel'eva 1986, 60-62 and 80.
475. Art.135 (6) para.1 Fundamentals 1991.
476. Art.29 CL 1993.
477. Sergeev 111-112.
478. Sergeev 147-148.

As under Soviet legislation, the author can appoint a person, in the same manner as a testamentary executor is appointed, whom he can charge with the protection of these three rights (authorship, name, reputation) after his death.[479] This person exercises these powers during his own lifetime.[480] In the absence of such an appointment, the protection of these rights is to be executed by the author's heirs or by a specially authorized body of the RF which exercises such protection if there are no heirs (or if the copyright has expired).[481]

Compared to Soviet legislation, the measure for the exercising of certain moral rights after the author's death now explicitly extends to the right to name and the right of authorship; and in the absence of an artistic executor or heirs, the protection of the said three rights is no longer entrusted to an organization[482] but to a specially authorized body of the RF, which in all likelihood means an organ of state (*e.g.*, the Ministry of Culture) and not a private collecting society. So far as is known, no such body has yet been empowered. For the rest, continuity reigns. One may expect that this also implies that the rights, exercised by the authorized persons or bodies after the death of the author, are of an independent, non-copyright nature.

Finally, article 1112 of Book III of the Civil Code RF states unequivocally that personal, non-property rights and other immaterial goods are no part of the inheritance.

2.5.3. The Extent of the Heirs' Rights

1006. All Soviet lawyers except for one[483] agreed that the rights exercised by the heirs, the person designated by the author, or the copyright organizations, were of a more limited range than were the rights of the author during his lifetime, and this irrespective of whether these competences were considered either being of a copyright nature or of an independent nature.

1007. Thus Serebrovskii remarked, with regard to the *right to integrity*, that the heirs did not protect this right in their own interests but with the aim of protecting the integrity of the work of the deceased author.[484] According to Antimonov and Fleishits, the author's right to the integrity of his work was unconditional, while that of the heirs was of a limited nature although they gave little clarification of this view.[485] Savel'eva, too, maintained that the heirs'

479. Compare art.150 (1) CC RF:
> "In the cases and in the manner provided by Law the personal non-patrimonial rights and other non-material goods belonging to the deceased, are exercised and protected by others, including the heirs of the holder of the rights."

480. Art.27 (2) para.1 CL 1993.
481. Art.27 (2) para.2 and art.29 para.3 CL 1993.
482. Art.481 para.2 CC RSFSR.
483. B.N.Gorodetskii, *Pravovoe polozhenie pisatelei i kompozitorov*, 1946, 112, quoted by Koretskii 288.
484. Serebrovskii 226-229.
485. Antimonov/Fleishits 143-146. See, also, Koretskii 290.

powers with regard to protecting the integrity of the work's nature, purpose, extent, and duration were not to be equated with the author's powers.[486] The author could, according to Dozortsev, Gavrilov, and Gringol'ts, agree to whatever alteration he thought fit whereas, on the contrary, the persons in article 481 CC RSFSR could only introduce corrections or additions in the interest of society (*e.g.*, mention the latest scholarship in a textbook), and only in such a way that the reader could distinguish what had been written by the author and what had been added later.[487] According to Ioffe, the heirs exercised the right to integrity as a memorial to the deceased author and in the interests of society.[489] Because the heirs were not always able to take decisions with full knowledge of affairs, the state body managing the relevant area of ideological labor had the last word.[489] The organizations responsible for protecting authors' rights[490] thus did not, in the first instance, have to give their permission for the introduction of alterations to a work (unless there were no heirs); they had only a monitoring function, *i.e.*, the right to protest against the actions of the heirs.[491]

1008. In exercising the *right to publication*, the heirs—according to Serebrovskii—had to take account of the will of the author if he had in life expressed a desire against the posthumous publication of one of his works. Nevertheless, publication against the expressed will of the author could be in the interests of society, in which case the permission of the competent state body was required.[492]

1009. With regard to the *right to a name*, Ioffe wrote that after the author's death, the publication of his work had to be under the name which the author himself had chosen and certainly not under the name of the heirs. The heirs only had the right to demand that the name chosen by the author was used.[493]

486. Savel'eva 1986, 80. Comp. Gavrilov 1984a, 145:
"[...] in contemporary law the right to the projection of the inviolability of the work is not formulated as an author's power that is inheritable, but as a duty (*vis-à-vis* society) for the heirs to preserve the work in an unaltered form."
487. V.A. Dozortsev, in Bratus'/Sadikov 569-570; Gavrilov 1984a, 145; I.A. Gringol'ts, in Fleishits/Ioffe 711.
488. Ioffe 1969, 39; Ioffe/Tolstoi 408-409.
489. Ioffe 1969, 39. Comp. I.A. Gringol'ts, in Fleishits/Ioffe 712: "[...] the organizations indicated were entitled to express their veto against the publication and dissemination of a mutilated work independent of the heirs and even against them."
490. V.A. Dozortsev, in Bratus'/Sadikov 569 recalled the creative unions and *VAAP* as organizations meant by art.481 CC RSFSR; Gavrilov only mentioned *VAAP* (E.P. Gavrilov, "Nasledovanie v avtorskom prave", *Sov. Iust.*, 1975, No.18, 13).
491. V.A. Dozortsev, in Bratus'/Sadikov 569.
492. Serebrovskii 232-234. See, also, Koretskii 293.
493. See, *e.g.*, Ioffe 1969, 39.

1010. In summary, the heirs, the literary or artistic executor, or the organizations for authors' rights had to respect the will of the author in protecting the name of the author, the integrity of the work or in authorizing or refusing the posthumous publication of a work. The will of the author could, in some cases, be set aside in the interest of society. The rights of the heirs were more of a duty towards the deceased author and society, and for that very reason the exercise of these rights was monitored by the authorities through the organization(s) responsible for the protection of the author's rights.

Given the great continuity from the Soviet legislation and legal theory to the Russian Copyright Law with regard to the duration of protection and the posthumous protection of the rights of authorship, the right to name, and the right of integrity, one may assume that the positions defended in Soviet legal doctrine concerning the nature and extent of the rights of heirs in relation to these three rights continue to apply, namely that the persons who are to protect the said three rights after the death of the author (artistic executor, heirs, the authorized body), without limitation of time, do so on the basis of an independent right recognized by the law, not on the basis of transferred copyright. This independent right is more limited in extent than the corresponding moral rights of the author since the person in question can only exercise these rights with a view to the expressed or assumed wishes of the author[494] and, possibly and in any case cautiously, the interests of society. This—in theory—perpetual respect for the author's intentions shows how much copyright is linked with the protection of the creator's personality.

2.5.4. German Monism *versus* French Dualism

1011. From the system described above, it becomes clear that Soviet and Russian law have left the course of monism and have taken the road of dualism when it came to the protection of moral rights after the death of the author. Three moral rights are declared non-inheritable, whereas all other rights are inheritable; legal doctrine accepts that the moral rights of the author are transformed into a duty towards the deceased author and, consequently, have a narrower application than the rights of the original author; and that these rights—unlike other author's rights—were perpetual. Apparently, in this way the unity of moral and material rights which was held to exist during the author's lifetime was sundered at the author's death. Soviet lawyers did not remark that this showed a lack of theoretical consistency. It should be emphasized that the whole monist-dualist debate, which raged in Continental-European copyright

494. Thus, Sergeev (112-113 and 141-143) writes that the heirs can give their permission for editorial corrections, clarification of particular facts with regard to scientific advances, the addition of a preface or commentary etc., but their main task is the maintenance of the essence and originality of the work bequeathed. The heirs can resist any unauthorized alterations. They cannot give permission for fundamental changes.

theory, was unknown to Soviet lawyers and remains largely unknown at present day in Russia.

Section 5. Conclusion

1012. The most striking thing in this chapter is that everything in Soviet copyright law sounds so familiar to a continental European lawyer. The Soviet citizen, swimming in a sea of legal and *de facto* rightlessness (the impossibility of expressing an individual opinion, of publishing and distributing an author's works commercially, of associating with other citizens in art clubs, etc.) and sometimes drowning in the ideological and economic control by party and state, enjoyed without state interference, simply by creating a work which resulted from his artistic labor, a subjective title to that work.

To be sure, this title could not be abused to the detriment of the interests of the community or the state, but the theory of the abuse of rights was seldom used in practice to limit the exercise of copyright by the "disobedient". And the view that this title to an intangible good could in no way be equated with a private property right, is music to the ears of most continental European lawyers. That, furthermore, every ideological criterion for the origination of copyright was explicitly rejected in Soviet copyright, seemed to take away any grounds for the deviation of socialist copyright from the "bourgeois" systems of copyright. Copyright, indeed, seemed to fulfill the same stimulating function for the creation and dissemination of works in the USSR as it has in Western countries, and this irrespective of persons and regardless of the ideological level of the work.

Or to put it in another, more negative way: the Soviet legislator and Soviet legal theorists did not succeed in developing a distinctly socialist concept of copyright at a formal legal level.

1013. It is, however, precisely this conclusion which must put us on our guard. Did not the very "ordinariness", to Western eyes, of Soviet copyright indicate precisely the "unimportance" of copyright in the Soviet legal system? After all, from the moment that the author decided to publish his work, the machinery not only of the civil law but also, and even primarily, of the public and administrative law sprang into motion. Had Lenin not said that every sphere of life must lie within the realm of politics? Was that not why creation and enterprise, in the cultural sector as elsewhere, were declared part of the public domain?

The whole discussion of whether Soviet copyright was a property right or a personal right, was in fact irrelevant, since both theories assumed a private space for the Soviet artist, free of economic or political state interference. In the Soviet Union, such a space was limited to the few square meters within the walls of a workshop or study. The creative process itself could not be controlled by the Communist Party (unless the process required a considerable infrastructure,

as did cinematography). There the author could freely develop his personality. But once the author or artist wanted to have his work disseminated, he left the private domain and had to play according to communist rules.

One of the most important rules of the game was the subordination of individual interests to the common interest. Not the personality of the Soviet author was relevant but his "commonality". It is, therefore, in the way all interests fundamental to copyright are balanced and taken into account, rather than in the formal legal construction, that the specificity of Soviet copyright must be sought.

Chapter II. Copyright, Freedom of Art, and Freedom of Enterpreneurship in the System Transformation

Introduction

1014. In the previous chapter, we demonstrated that the impact of the system transformation on the formal legal construction of subjective copyright was not particularly great. This had to do with the lack of originality of the legal nature of socialist copyright, namely a subjective right, not a property right, but an entirety of closely linked property and non-property rights. If there were alterations since 1985, these were no more than a more consistent application of the options, which had already been taken in the past.

However, if we look at the contents of the copyright law, at the way in which the different interests were mutually balanced, we do notice a real transformation. Indeed, the system transformation has thoroughly altered the legal position of author, exploiter, and end user (Section 1), so that their mutual copyright relationships also had to be put on a new footing (Section 2). Copyright as a whole, moreover, as a result of the system transformation and the acknowledgement of the economic and intellectual freedom of the individual, was granted an altered function *and* a much larger weight in the regulation of creation and enterprise in the cultural sector in Russia (Section 3). At the same time, we hope to gather an explanation for the fact that in a totalitarian regime, in which political freedoms were completely crippled and market relations destroyed, a law of copyright could function which, in its nature, was comparable to the copyright law in force in the West-European constitutional states with free-market economies.

Section 1. The Legal Position of Author, Exploiters, and the Community of End Users

§ 1. The Legal Position of the Author

1.1. The Author and the Freedom of Enterprise

1015. In the USSR, the author was only granted the right to publish, reproduce and distribute his work *in all manners allowed by law*.[1] In the economic system of the Soviet Union, this meant that he was to sign an author's contract with "the suitable organization".[2] The publication and distribution of an author's works on a commercial basis and/or using certain apparatus (copying machines,

1. Art.98 Fundamentals 1961 and art.479 para.1 CC RSFSR.
2. Art.503 para.1 CC RSFSR. See, *e.g.*, Knap 101-102; Loeber 1985, 301-302 and 307: "A Soviet author is denied alternative avenues for the exercise of his rights, since all publishing enterprises are socialist organizations pursuing uniform publishing policies. An author's choice of publication outlets is narrowed further because publishing enterprises in the Soviet Union are specialized, and refrain from publishing works not in line with their 'profile'."

printing presses, radio broadcasting equipment, etc.) by the author himself or with his permission by other private persons, were not among the "manners of publication, reproduction and distribution allowed by law".[3] This was the concrete application in copyright of the rule that only that which was explicitly allowed, was not prohibited, a rule which is characteristic for a totalitarian regime.

In the Fundamentals 1991, the provision which limited the rights of the author on publication, reproduction, and distribution to those manners which were allowed by law disappeared.[4] With the right to the use of the work, it was mentioned (in parentheses) that this concerned the right to allow a number of actions such as to *make reproductions in any manner* or to allow a third party to do so.[5]

In the Copyright Law 1993, the author is granted the exclusive rights to the use of the work *in any form and in any manner*.[6] Here, too, it is made explicit that the exclusive exploitation rights include the right for a number of actions with regard to the work *to be executed by oneself* or for a third party to be permitted do so.[7]

The fundamental transformation of the basic economic principles is, thus, also visible in the copyright legislation itself. The freedom of entrepreneurship, the freedom of economic trade is the point of departure for the new economic model. The author can exercise his rights in any fashion, and he can do so by publishing his work himself or by giving permission to a third party to do so[8] except in those cases in which this would be prohibited by law. In other words, "everything is allowed which is not explicitly prohibited".

In itself, this transformation of the fundamental economic principles is of a rather symbolic value for the authors since most authors cannot themselves exploit their works materially, and, as in the past, they have to turn to publishers, theaters, film studios, broadcasters, etc. This transformation of the basic assumptions of the economic system, however, did restore subjective copyright's economic contents. Subjective copyright is again a right to allow or prohibit certain actions with regard to the protected work.

1.2. The Author and the Freedom of Art

1016. Unlike the economic transformation, at first sight the political-intellectual transformation does not have a legal reflection in the current copyright legislation. Continuity is the dominating impression simply because the Marxist-Leninist interpretation of freedom of expression in expression and in the arts could hardly be detected in the Soviet legal texts of objective copyright.

3. *Supra*, No.49.
4. Art.135 (2) Fundamentals 1991.
5. Art.135 (2) para.1 Fundamentals 1991.
6. Art.16 (1) CL 1993.
7. Compare art.10 Computer Law.
8. Grishaev 1991, 26: Maleina 107.

Just like in the past, copyright protection arises, without state intervention, from the moment of the creation of a work, *i.e.*, without any formality having to be fulfilled,[9] the linking of copyright protection to an axiological criterion is explicitly rejected.[10]

1017. Copyright specialists also retain the freedom of creation, understood as the right of the author to freely choose theme, form, composition, and genre, and to decide on the whether or not to publish the result of his creative labor,[11] as one of the fundamental principles of copyright.[12] This bond between copyright and the freedom of creation is—again as was the case in the Soviet period—expressed in the common mention of both in one and the same article in the Constitution.[13] In the Fundamentals on culture of 1992 the link between both rights is confirmed by the mention in the general definition of "creative workers" that in any case this category includes persons who are acknowledged as such by the Universal Copyright Convention, the Convention of Berne on the protection of works of literature and art, and the Convention of Rome on the protection of the rights of performing artists, producers of phonograms, and the broadcasting organizations (and this at a time when the Russian Federation was only a member of the UCC!).[14]

1018. This remarkable continuity with the past is illusory. In reality, it hides a fundamental transformation in the course of the past decade in the area of human rights and, in particular, freedom of speech.

Indeed, the Soviet author not only had few rights with regard to enterprise; he was, moreover, completely hamstrung at a political level by the eschatology of millenarian Marxism-Leninism, as formulated and interpreted by the CPSU. The goal-oriented interpretation of freedom of speech and freedom of artistic creation transformed them into duties, tasks, responsibilities which the author had towards society.[15] Extensive censorship and the party apparatus, combined with socialist ownership of the means of production, impeded the dissemination of creations which did not conform with "the inner necessity of the objective reality".[16] Thus the freedom of artistic creativity was, in fact, transformed into a duty to create works which buttressed the system.

9. Art.9 (1) CL 1993.
10. Art.6 (1) CL 1993. Compare Sergeev 5.
11. S.A. Chernysheva, in Sukhanov 1993, I, 318; Sergeev 5-6.
12. S.A. Chernysheva, in Sukhanov 1993, I, 318; Sergeev 5-6. Gavrilov 1988 (74) does recognize that the freedom of creation is of essential importance for other branches of the law, in the first place in the sphere of state and administrative law as a regulating principle for the organization and activity of scientific and cultural institutions.
13. Art.44 (1) Const.1993. *Supra*, Nos.333 ff. and 371.
14. Art.3 Fundamentals on culture.
15. Serebrovskii 28. The arts were to educate the new communist man: Krasavchikov, II, 432.
16. Rassudovskii 1986, 99.

Artistic creation itself is free in every political system until the moment the author decides that his work is ready to be revealed to the public, as the creative process itself cannot be regulated.[17] The right to publication is, hence, one of the most fundamental and personal rights. The restriction of this right to publication would be an indication of the author's political tutelage.

This is exactly what happened in the Soviet Union: the author's right to publication was reduced to the right to sign an author's contract with one of the authorized state enterprises; given the far-reaching specialization in most cultural sectors, there was often only one to choose from.

Nor was this all: the Soviet government had the power to nationalize separate exploitation rights on a work[18] *even if it had not yet been published*. This gave the state the legal option of terminating the creation process itself, by deciding when a work was ready for publication. In this way, the state could publish such works as it desired to see in mass distribution against the wishes of the author. The Soviet state, however, made no use of this legal option in the last few decades of its existence.[19]

From the moment the concept of the rule of law was propagated, this state-imposed eschatology could not be maintained: respect for the individual freedom of the artist presupposes that the definition of the aim of the artwork is left to the artist himself. The author is emancipated from the obligation to strive for communist construction. In contemporary Russia, the imposition by the state of a certain style, artistic direction, theme, form of artistic, expression etc. would be contrary to the constitutionally anchored principle of ideological and political pluralism.[20] Under the rule of law, the freedom of art is in the first place an individual defensive right against excessive government interference. The artist creates in accordance with his interests and capacities[21] and has a right to "personal cultural originality".[22]

1019. The only trace of the system transformation in the area of the spiritual freedom in copyright—apart from the abolition of the possibility to nationalize the rights in (even unpublished) works of literature and art—is to be found in contract law. In the model contracts, which applied in the Soviet period, it appeared that an author's contract could be dissolved when a manuscript could not be published on the grounds of the value of the work or due

17. Ioffe 1988a, 325. Some reservations must be made for the creation of professional films, television broadcasts and works of architecture in three-dimensional form which because of the necessary infrastructure can be monitored by the authorities even at the moment of creation.
18. Art.106 Fundamentals 1961; art.501 CC RSFSR.
19. E.P. Gavrilov, "Some Aspects of Soviet Copyright Law", *Nordiskt Immateriellt Rättskydd*, 1976, 28.
20. Art.13 Const.1993.
21. Art.10 Fundamentals on culture.
22. Art.11 Fundamentals on culture.

to the disclosure of secrets of state.[23] The protection of state secrets was, however, the euphemistic description of the function of the bodies of censorship so that at the moment of exploitation the goal-related nature of the freedom of creation, as defined and interpreted by the CPSU, was played to the full. Such a provision no longer appears in the current copyright legislation.

The Copyright Law does, however, contain a provision which declares invalid any clauses of an author's contract which limit the future creativity of the author with regard to a given theme or in a given area.[24] This provision is intended to prevent the author from being contractually obliged to limit his freedom of creation, by prohibiting him in future from creating works which cover the same theme or domain treated by the work which is the object of the author's contract in question. This form of contractual private censorship, inspired by anti-competitive motives, is thus excluded.[25]

§ 2. The Exploiter's Legal Position

1020. Cultural mediators, the exploiters of cultural products, were founded by the state, as were all other enterprises in the Soviet Union.[26] The state remained the owner of these cultural enterprises, "planned" their activities and could intervene in the daily economic and artistic policy of the enterprises. The collectivization of the means of production, the planned economy, and the presence of an apparatus of ideological control with branches extending into the enterprises themselves, had in the Soviet period, completely eliminated an independently functioning field of art mediators.

In exchange for this dependency, the state enterprises were placed in an *economically* luxurious position. The economic and political order freed them from any possible competition from private persons or competing state enterprises.

In their *artistic* policy, the cultural enterprises did not need to take too much notice of the consumers' subjective interests. The aim of the publishing houses, film studios, theaters etc. was not to satisfy the demands of the *cultural consumers* but, rather, to distribute such works as they produced in the objective interest that was contained in history itself and was formulated by the *cultural engineers.* The consumer had to be educated according to the CPSU's rules, and the state enterprises had the task of providing the required educational material on a large scale. Nor was the cultural enterprise tied to consumer demand from an economic perspective. Not sale but production was given priority in the instructions of the central plan.

23. Art.19 MPC.
24. Art.31 (6) CL 1993.
25. Of course, an author may not plagiarize himself by copying verbatim large sections of a work the reproduction rights in which have been transferred to one publisher, in another work which is published by a second publisher.
26. On enterprises in "social ownership", see *supra*, Nos.39 ff.

The cultural enterprises had to take the author a little more into account: by preserving the subjective copyright within the socialist economic order, the author's permission remained a condition for the exploitation of his works.[27] Thus, the relationship between the author and the exploiter must be sought in the field of tension between, on the one hand, the copyright which grants the author a monopoly on a work and, on the other side, the administrative command economy as a system which grants the user organization a monopoly on the exploitation of those works.

1021. The acknowledgement of the right of all legal subjects to free entrepreneurship, the privatization movement, the granting of greater independence to the remaining state enterprises, and the de-ideologization of all of Russian social life have thoroughly changed the legal position of the exploiters of an author's works. The statutory aims of at least part of the cultural enterprises are no longer determined by the state but by the private owners, and decision-making about whether or not to publish and market a work now resides entirely with the publishing house, the film studio, the theater, or the broadcasting corporation itself. They can decide solely on the basis of considerations of the work's genre, its artistic, literary or scientific quality, the suspected commercial value, the ideas expressed, its cultural importance, etc. The exploiters can, in other words, maintain an independent publishing or production policy, in principle, without economic or ideological monitoring from above.

This naturally also influenced their attitude towards the authors and their choice of works to be published, as well and especially the motives for this attitude and this choice (maximization of profit, developing their image in the marketplace, cost-effective exploitation of cultural goods considered valuable, etc.).

Nevertheless, even now the state keeps a firm finger in the pie, especially in the cultural sector. The privatization of enterprises is a very slow process in this sector, and where enterprises *are* privatized, in fact it just means the transfer of a monopoly within a certain cultural sub sector from the state to a private owner. At the same time, all these enterprises are obliged to register or have a permit at a local or central level so that a certain degree of control over the contents of the culture expressions distributed by these exploiters remains possible, and this in the name of the struggle against the abuse of the freedom of speech. There is, thus, a danger that the government could indirectly force its own priorities upon the exploiters, and thus also the authors, which should be considered unacceptable under the rule of law.[28] There are, however, (as yet?)

27. In a number of economically and ideologically important sectors, the state enterprises were immediately granted the original copyright to the works produced by them, *supra*, No.114 and Nos.972 ff.

no indications that the administrative authorities use this possibility to suppress the expression of opposition opinions.[29] The mere existence of the possibility that a certificate of registration could be cancelled naturally might encourage a degree of self-censorship. It is certain that Russian legal opinion only sees the state's duty to abstain from interference as extending to the process of creation itself, not to the distribution of works of art, art mediation. A different approach to the creation of culture on the one hand and the distribution of culture on the other hand therefore remains, in which—in my opinion—the influence of the state on the distribution of culture remains great, at least in theory and for the duration of the transitional period.

§ 3. The End User's Legal Position

1022. According to Marxist-Leninist ideology, the end user of the products of culture (the cultural consumer) can only be interested in learning the *objective* truth about reality. For this purpose, he had to gain as broad and unimpeded an access as possible to the cultural heritage of czarist Russia. The nationalization and subsequent opening to the public of private museums and private art galleries immediately after the Revolution were a definite step in that direction.[30] The refusal to grant protection to foreign works until 1973 also has to be seen in that perspective.

But the assimilation of bourgeois culture by the Soviet citizen naturally did not suffice to turn him into a communist human being: he had to be educated with works of art which "were a truthful, historic-concrete representation of truth in its revolutionary development".[31] This, in turn, required easy access to the results of current cultural production, and here a conflict with the author's interests was definitely conceivable. In any case, the demand of the end user was channeled and uniform; it did not at all express the plurality of the end users' subjective desires.

28. This does not, of course, exclude the state from giving financial support to certain art forms or genres (*e.g.*, children's literature) because these would otherwise have little chance in the marketplace. This leaves the author's individual freedom of creation and right to cultural development unimpeded. For an overview of such culture-specific measures, *supra*, Part II, Title IV, Chapter III.
29. There are known examples of the imposition of a (temporary) ban on publication of opposition newspapers in a period of emergency (*e.g.*, in September-October 1993). In these cases, the legally provided procedure was entirely ignored and the sanction was determined by a simple presidential *ukazy*, *i.e.*, without the intervention of the competent administrative organs, nor of the law courts: Hübner 1994. And through the gaining of a majority share by a state enterprise (*Gazprom*) in opposition private media outlets (*NTV*, *Ekho Moskvy*, etc.), the central authorities succeeded in putting the media to a large extent under indirect state control.
30. *Supra*, No.26.
31. On this definition of "socialist realism", *supra*, No.62.

1023. The system transformation has gradually brought about a consumer who determines his own priorities in the consumption of culture, just as the author does in the creation of works and the exploiter in their selection, production, and marketing. The consumer of culture can now choose from a varied range, not only of contemporary cultural products but, also, of forbidden, "dissident" cultural products of the past which have, since 1985, gradually become more accessible to the public as a result of the recognition of the freedom of art.

In their pursuit of the satisfaction of their cultural and intellectual needs, these end users rely on their constitutionally acknowledged rights to participate in cultural life, to make use of the cultural institutions, and to have access to cultural treasures.[32] By their demand, they stimulate the creation of cultural goods, but in their desire to organize the access to these cultural goods as cheaply as possible their interests are directly opposed to those of the creators of those goods, the authors.

Section 2. System Transformation and the Trichotomy: Author–Exploiter–End User

§ 1. General

1024. In the Soviet period, the axiom of the harmonious reconciliation of interests applied as a logical result of the disappearance of the antagonistic class oppositions thanks to the abolition of the private ownership of the means of production. This reconciliation was upheld by a common goal, which author, exploiter, and end user were supposed to pursue: the realization of communism. By accepting *a priori* that a Soviet artist did not create for himself but for society, the very possibility of the existence of a conflict of interest was denied.

It was in this *a priori* that the contradiction of the whole Soviet system lay hidden. The ideal man who did not work for himself but for society would only be realized in the communist society. And yet this portrayal of man also dominated in the pre-communist era of developed socialism, not as a reflection of reality, but as a model for the Soviet citizen who had to be educated via law. The communist view of man would only be realized in the final phase of history, and yet it was already enforced on the Soviet citizen in the preparatory phase. This is how the proclaimed harmony of interests hid the actual subordination of the interest of the author to that of the state and its enterprises and society. The theory which considered the harmonious reconciliation of interests

32. Art. 44 (2) Const. 1993. See, also, art. 12 Fundamentals on culture:
"Every person has the right to be introduced to the cultural treasures, the right of access to the holdings of state libraries, museums and archives, to other collections in all areas of cultural activity. Limitations upon the accessibility of cultural treasures for reasons of security or of a particular regulation of use are provided by the legislation of the Russian Federation."

between author, user organization, and society as a real given in Soviet society had no link whatsoever with reality and was, hence, a myth.

1025. Now that the common goal has disappeared, private interests and priorities again emerge. The author no longer wants to demonstrate his loyalty to the regime but, rather, wishes to compete for the favor and appreciation of the public. The exploiter strives to create his own market profile and to make a profit. The consumer seeks access to those works of literature and art which arouse his subjective interest. The key to the transformation is that the three actors acquire freedom of choice.

The relationships between these three actors are no longer embedded in an administrative planned economy but are, now, built up in a market economy in construction. Hence, two conflicts of interest appear, with the author a concerned party in both, and the exploiter and the public respectively in the one and the other.[33]

1026. The rejection of the *a priori* nature of the harmony of interests meant a thorough rethinking of the function of copyright from a merely descriptive—and thus relatively unimportant—legal instrument, to a normative, market-regulating legal instrument. Copyright creates the framework within which the fundamentally opposed interests of the author, exploiter, and end user can be reconciled, with on the one hand respect for the market-economic principles of the economic system of the Russian Federation at the beginning of the 2000s, and on the other hand corrections to support the interests of the weakest, but at the same time most important party concerned, the author. Indeed, without an author, there is no author's work to exploit, distribute, or consume.

§ 2. *Author* versus *Exploiters*

2.1. Socialist Copyright

1027. According to Soviet legal doctrine, the publishers—and not the author—were the key figures in Western copyright law. They could buy the author's rights at a price, which they, due to their actual monopoly position, set themselves. Only a few Western authors managed to free themselves from the strangling grip of the capitalists. "Only the fearlessness, unselfishness and perseverance of the progressive powers have allowed inroads to be in the curious legal blockade which surrounds intellectual creation in the countries of capitalism."[34]

This was not the case in the USSR. The goal formulated by the CPSU ("the construction of communism") was the guideline for the activities of both the author and the user organization. The nationalization of the means of production had already put Soviet society on the right track, the artists

33. See, *e.g.*, Dietz 1976, 161.
34. Ioffe 1969, 8.

as a class were freed from exploitation by capitalist enterprises. But now, the Soviet citizen *as an individual* had to be brought to a full understanding of the consequences of the communist revolution, and in this the tasks of artist and user organization ran parallel: together they were responsible for the creation, publication, and distribution of works of cultural and ideological value for the enrichment of society and the education of the Soviet person as a disciplined communist.

It is not hard to understand what all this meant to the actual relationships between the author and the user organization. If an author wanted to make his work public, he needed the mediation of the authorized state enterprise. At that moment it transpired that the author could only exercise his right to publication insofar as the content of his work justified and allowed publication. Its evaluation was not left to the author but was entrusted to the socialist user organizations,[35] assisted in this by the censors and the party cells that guarded over the non-distribution of (broadly interpreted) state secrets and the ideological correctness of the works produced.

Only by accepting the myth of the harmonious reconciliation of interests could Soviet legal theory maintain that this mediative function of the socialist user organizations was also useful to the author: it helped the author "to be forward-looking with regard to the social usefulness of the works created by him".[36]

1028. In Soviet law, the mutual rights and duties of author and user organization were specified in the contract itself, in accordance with the law *and* with the so-called model contracts.[37] Indeed, the four great cultural administrations (the Ministry of Culture, *Goskomizdat*, *Goskino*, and *Gosteleradio*) had the right to establish models of author's contracts within their sphere of activity.[38] No deviation could be made from these model contracts which was

35. Loeber 1980, 23-24 and 26-27.
36. Chertkov 1977, 125.
37. The model author's contracts were, however, not applicable to the licensing agreements.
38. This could happen at the level of the Union Republics (see, for example, art.506 para.1 CC RSFSR), but in practice such model agreements were only ratified at the level of the Union. The most important model authors' contracts approved within the spheres of competence of the respective cultural administrations were: by the Minister of Culture USSR: 1 September 1976, Model contract for the creation of a dramatic work (*BNA SSSR*, 1977, No.5, 42-45); 18 April 1976, Model contract for the creation and production of staged musical works (*BNA SSSR*, 1977, No.11, 44-47); by the Chairman of *Goskino* USSR: 21 February 1978, Model contract for scripts for fiction films (*BNA SSSR*, 1978, No.12, 37-40); by the Chairman of *Goskomizdat* USSR: 24 February 1975, model contracts for the publication of literary works (*BNA SSSR*, 1975, No.7, 34-37), works in the visual arts (*BNA SSSR*, 1975, No.7, 37-40), works of music (*BNA SSSR*, 1975, No.7, 40-42) and non-binding examples of contracts for publication in translation in the USSR of a published work by a foreign author (*BNA SSSR*, 1975, No.7, 43-44) and for the publication in translation of a published literary work (*BNA SSSR*, 1975, No.7, 42-43); by the Chairman of *Gosteleradio* USSR: 4 July 1975, Model script contracts for different kinds of television films (quoted Chernysheva 1984, 145).

to the disadvantage of the author.[39] The stipulations of the model contracts therefore offered a minimum, but no maximum level of protection.[40] From a theoretical point of view, Soviet copyright clearly had an author-friendly character in this regard.[41] However, the contents of the model contracts themselves contained some negative elements, such as the possibility for the state enterprise to refuse the exploitation of a work if it was considered not being in conformity with official ideology and the protection of state secrets,[42] or the clause by which the author transferred to the first user organization all rights for use of his work (including for exploitation methods falling *outside* this user organization's statutory goals) for any country outside the USSR and for the whole of the term of copyright on that work.[43] This far-reaching clause was at cross-purposes with two important mechanisms of protection in the law on author's contracts: the duty of specification (and the limited described statutory goal of the first user organization with which the author signed a contract) and the limited duration of the author's contract. The author had, in theory, the possibility of improving his position in his author's contract in comparison to the model agreement, for example by limiting this transfer for foreign use in scope or in time, or by simply deleting it. However, given the reality of the monopolistic state enterprises, the possibility to negotiate better conditions was merely theoretical.

For the Soviet legislator and the government administration, the general law of contracts had to be supplemented by model contracts to give the relationship between the private person (the author) and the state enterprise the predictability which is necessary for a plan economy.

1029. In addition to the technique of model contracts, the author's remuneration could not be determined in full freedom by the contracting parties. In very detailed decrees, the Council of Ministers determined the tariffs for authors' contracts for the different manners of exploitation of a work,[44] sometimes according to a fixed calculation, more often, however, in the form of a minimum and maximum fixed sum. Within this range, the contracting parties kept their freedom to determine the author's remuneration,[45] but on no account could they go outside these limits.[46] Also, when no fixed sums were determined for certain manners of exploitation, both parties' contracting freedom was of

39. Art.101 para.3 Fundamentals 1961 and art.506 para.2 CC RSFSR.
40. V. Dozortsev, "Avtorskii dogovor i ego tipy", *Sots. Zak.*, 1984, No.5, 23-24.
41. Dietz 1977, 114-115.
42. Arts.6 and 19 MPubC. In art.7 MScrC, this is called "unsuitability on the basis of idea-artistic reasons".
43. Art.24 a) MPubC.
44. Art.479 para.2 CC RSFSR.
45. Art.507 CC RSFSR.
46. See, *e.g.*, the decision of the people's court of the Leningrad district in Moscow, quoted by A. Vakman, "Rabota advokata po zashchite prav avtorov", *Sov. Iust.*, 1963, No.10, 12.

importance,[47] but fixed sums for analogous works and exploitation methods were applied as much as possible.

It is obvious that the legally determined minimum for an author's remuneration was an important measure of protection for the author. It is, however, at least as obvious that the author was rarely in a position to demand more than this minimum. The factual inequality between the contracting parties—which on the eve of *perestroika* was openly acknowledged in the Soviet legal doctrine[48]—turned the authors' agreements into accession contracts: the author had to accept the tariffs proposed by the user organization.[49]

The fact that maximums were also laid down demonstrates that this measure was not devised to protect the author in his position of the weaker party. The maximum fee was, in fact, the quantified application to copyright law of the theory that income should be earned by labor. By enforcing maximum limits to an author's remuneration, there was no need for the legal conception of the abuse of rights to be applied in the field of copyright in the fight against an author's income unearned by labor.[50] The same idea was to be found in the regulation of remuneration in the case of a second or subsequent edition of a work, for which only a percentage of the fee for the first edition was due, and this according to a decreasing scale. Thus, the author could not improperly enrich himself by earning more and more without undertaking additional labor.[51] Possibly also the wish to distribute works widely which were deemed ideologically important played a role in this. In such a system, market demand—the success of a work—had no influence on the author's remuneration.[52] The final sale of a work was irrelevant to the fixing of the author's remuneration: only the genre[53] and the size of the work, and its print run, were determining factors. The author's remuneration could, then, in no way be made dependent on the profitability of an edition[54] even though on

47. Art.479 para.3 CC RSFSR.
48. Chertkov 1985, 89.
49. A.P. Vileita, "Obespechenie imushchestvennykh interesov avtora proizvedenii nauki, literatury i iskusstva", in *Rol' prava v dele povysheniia blagosostoianiia sovetskikh grazhdan v svete reshenii XXVII s"ezda KPSS*, Tartu, 1987, 124.
50. Only in case there were no fees legally fixed, and there appeared an excessive disproportion between the labor done and the author's remuneration, could the author's payment demand be rejected by the court on the grounds of "enrichment without cause": USSR Supreme Court of Law, 31 March 1951, *Sudebnaia praktika*, 1951, No.8, 35, English translation in *SSD*, 1978, 389.
51. Ficsor 93.
52. This was different only with regard to the tariffs for the public performance of works in theaters: besides a fixed sum the author's remuneration was determined as a percentage of the takings from ticket sales, so that the success of the work played at least some part in determining the sum which was received by the author.
53. Numerous arguments between authors and user organizations concerned the question under which genre a particular work was to be catalogued: Gavrilov 1987, 231-232.
54. V.A. Dozortsev, in Bratus'/Sadikov 567; Serda 110.

the eve of *perestroika* arguments tending in that direction could be heard.[55] The planned economy also meant that the user organization could not pass the author's remuneration on to the consumer, as the retail prices of the end product were also fixed by the authorities.

In socialist society, the author's remuneration was not an expression of the success of a certain work as merchandize on the market[56] but, rather, was considered the reward which the author was granted through society via the state organizations for "the result of his creativity which had turned into a social value",[57] *i.e.*, for his contribution to the cultural growth of socialist society.[58]

Moreover, according to socialist labor ethics, the Soviet laborer, as well as the Soviet artist, did not yet apply his labor or creative capacities to the construction of communism voluntarily, with complete disregard for private, subjective interests. This is why he had to be urged with material (and moral) stimuli.[59] Socialist labor ethics were summed up in the constitutional principle: "From each according to his means, to each according to his work".[60] For the achieving of this, "the amount of the labor" could only be determined by the state,[61] not by citizens or private organizations. The authors' remunera-

55. Chertkov 1985, 90.
56. "Das Autorenhonorar ist ein Entgelt, das nur dem Autor selbst oder seinen Erben gezahlt wird. Es ist keine Form der Teilhaberschaft des Urhebers an dem Gewinn aus der Verbreitung des Werkes." (Gringol'ts 1969, 437); "[...] an author's fees cannot depend on the sale of his work as a commodity" (Benard/Boytha 51).
57. Chertkov 1985, 87.
58. "[...W]hen it comes to the author's monetary remuneration under the socialist copyright concept, society's interests justify such a remuneration, and not the author's interests in a rightful reward. Author's remuneration is more a reward for creating a work that contributes to the cultural growth of socialist society, than a financial compensation for his efforts." (Prins 1991a, 162). Compare Benard/Boytha 73:
    > "The exclusive author's right] provides *the formal basis of the author's pecuniary reward*—but the formal basis only, for the substantive basis is not the authorization to utilize the work but the show of appreciation of the fact that the author has created a work of value for society and is therefore entitled to a share in the surplus value that has been produced."
59. With regard to the *material* stimuli, this was the expression in the copyright law of the principle of the "material interestedness" (*material'naia zainteresovannost'*), a principle already accepted under Stalin and full of ambivalence: "according to the ideology, Soviet citizens would contribute to their society freely, enthusiastically, generously. In fact, they have to be motivated by the fear of sanctions and by small rewards, and the leaders know this. The elite itself is motivated by self-interest, and of course the leaders know that. But although this is clear to almost everyone, it cannot be admitted because this would be tantamount to admitting the uselessness of the system itself." (F.J.M. Feldbrugge, "'Does Soviet Law Make Sense?' Rationality and Functionality in Soviet Law: An Epilogue", in *Soviet Law after Stalin*, III, *Soviet Institutions and the Administration of Law*, D.B. Barry, *et al.* (ed.), Alphen aan den Rijn, Sijthoff and Noordhoff, 1979, 406).
60. Art.14 para.2 Const.1977.
61. Art.14 para.2 Const.1977.

tions were, like a laborer's wages, relative to "the amount of the labor" and depended on the quality and the quantity of the labor supplied, as judged by the socialist user organization at the moment of the use of the work.[62] The author's remuneration could, therefore, not depend on the extent of the sale of the work as merchandize.[63]

2.2. Post-Socialist Copyright

2.2.1. General Remarks

1030. In an emerging market economy, with the state gradually giving up its role of active art mediator, the horizontalism in the relations between authors and publishers becomes much more apparent. Author and exploiter join combat with equal civil-law arms. This judicial equality is, however, tested severely in socio-economic reality as it does not sufficiently recognize the structurally weak economic position of the author in his reliance on the exploiter. The author creates, except in the case of creation by commission, completely at his own risk, without any certainty as to whether a user organization would want to exploit his work. At the moment at which he transfers that work to an exploiter its value is not yet estimable. Moreover, there is often very little demand for very valuable works (*e.g.*, scientific studies or collections of poetry). The competition between the authors (living and dead) is very strong, the supply of works for the exploiter is much greater than is the exploiter's demand for authors.[64]

In the Russian context, these different elements interact even more strongly to the disadvantage of the Russian author: he is suddenly confronted with a flood of foreign competitors[65] and works of old dissidents which have become accessible to the general public in a short space of time.[66] In the current crisis, his economic situation is very unstable. Moreover, monopolization remains something of the rule in various cultural sectors. The number of participants to the cultural mediation market is thus *de facto* limited, which can only increase

62. Gringol'ts 1969, 437; Loeber 1985, 304-305. Authors were paid for their end product, and not, like laborers, for the process of labor. Copyright law and labor law, thus, regulated two different kinds of legal relationship.
63. Benard/Boytha 49-51; Ficsor 49-51.
64. H. Hubmann, *Urheber- und Verlagsrecht*, Verlag C.H. Beck, Munich, 1987, 44-46.
65. Works of foreign authors are for the first time freely available on the Russian market, so that it is not surprising that there is great demand for them. By rejecting the retroactivity of the BC the Russian authorities have missed a chance to limit this foreign competition, as older foreign works can be brought onto the Russian market without payment of an author's fee—and thus at lower production costs.
66. The retroactivity of the Russian Copyright Law 1993 (*supra*, Nos.882 ff.) and provisions for the extension of the term of protection ensured that the works of these authors also enjoy copyright protection, so that they at least in this regard—and in contrast to older foreign works (see previous note)—do not present unfair competition to the current creative generation.

the author's economic dependency. In any case, the earlier judicial-administrative verticalism, thus, threatens to be replaced by a socio-economic hierarchy.

This socio-economic reality is a challenge for the government to act correctively without, however, questioning freedom and judicial equality.[67] This occurs by inserting in the copyright law particular provisions concerning the author's contract and the author's fee.

2.2.2. The System Transformation and Contract Law

1031. The civil-law contract as a source of rights and duties for the contracting parties becomes the basic instrument to give a juridical form to the conditions under which the author's co-contracting party may undertake activities of exploitation with regard to a work of literature or art. However, the general contract law was (and is) not considered to express the specificity of the relationships between the author and the user organization.

In the Fundamentals 1991, the contractual freedom and the autonomy of will of the contracting parties were freed from their administrative-law straitjacket. The parties themselves were to determine the nature of the work to be created, the term within which the work had to be transferred, the modalities of the user's duty to exploit (manner, size, period), and the author's remuneration (amount, manner of calculation, terms and method of payment).[68] To protect the author, further legislation was announced including the fixing of a maximum duration for contractually allowed activities of exploitation and for the term of the author's contract itself[69] as well as a legally fixed minimum author's fee.[70] There was no longer any mention of a legal maximum for the author's remuneration, nor of administrative model contracts.

In current copyright legislation, as well, the basic principles of contract law are the autonomy of will, freedom of contract, and the juridical equality of the parties.[71] The Copyright Law 1993 itself does, however, contain a number of provisions aimed at the protection of the author, and this by means of legal

67. Dietz 1994b, 171:

> "Il est tout à fait clair que, comme résultat de la transition vers une économie du marché, les principes de la liberté des contrats et de la libre négociation doivent jouer un rôle beaucoup plus grand qu'avant. Mais comme dans les autres pays d'économie de marché, les législateurs des pays de transition se trouvent ici en face d'un dilemme, étant donné que les auteurs se voient souvent dans une situation d'inégalité et de faiblesse structurelles envers les entreprises de l'industrie culturelle. Quand les législateurs mettent donc un peu trop l'accent sur cette liberté des contrats [...], ils risquent de sous-protéger les auteurs au sens économique et de leur reprendre, pour ainsi dire, par la voie économique ce qu'ils leur avaient promis et accordé par la voie dogmatique."

68. Art.139 Fundamentals 1991.
69. Art.139 (1) para.3 Fundamentals 1991.
70. Art.139 (1) para.4 Fundamentals 1991.
71. Compare art.1 (1) and (2), and art.421 (1) CC R.F. See, *e.g.*, Gavrilov 1993b, 13 and 1995c, 19; Grishaev 1994, 93.

presumptions, provisions of supplementary law, the obligation to include certain clauses in a contract, legally fixed minimum fees (*no* maximums), conditions as to the form of the contract, etc. From a social perspective, these provisions with regard to the author's contract have to be seen as an unmitigatedly good thing.[72] In the CL 1993, the provisions with regard to authors' contracts are given a clear market-correcting character as social protection for the economically weaker party to the contract: the author.

1032. The question now is whether the series of measures on the protection of the author's contract rights in the Copyright Law of 1993 not only differs in form from the earlier model contracts, but, also, with regard to contents. To this purpose, we will compare the provisions of the Copyright Law 1993 with the CC RSFSR and, by way of an example, the Model Publishing Contract for Literary Works of 24 February 1975 (hereinafter: MPC):[73]

— the requirement of a written document as proof of contract in the CL 1993[74] also existed in the CC RSFSR.[75]
— the obligation to specify which concrete rights are being transferred,[76] the interpretative rule that any rights not explicitly listed in the author's contract are to be considered reserved to the author[77] and that prohibits the transfer of rights unknown at the moment of the signing of the contract,[78] as provided by the CL 1993, implicitly also followed from, on the one hand, the CC RSFSR and the model contracts in which the author gives the other party permission to undertake concrete actions of exploitation,[79] a provision from which could only be deviated in the author's favor, and, on the other hand, the prohibition of state enterprises from acquiring the rights (at least for use within the USSR) to exploitation in forms beyond these enterprises' statutory aims, which were very closely specified by the authorities.[80]

72. "Es ist sicherlich richtig, dass ein ausgewogenes Verhältnis zwischen zwingenden und dispositiven Regelungen im Urhebervertragsrecht vorhanden sein muss. Eine völlige Aufhebung zwingender Regelungen würde von vornherein die ökonomisch schwächere Position des Urhebers und ausübenden Künstlers zementieren." (Wandtke 570)
73. Prikaz Predsedatelia Goskomizdata SSSR, 24 February 1975, "Tipovoi izdatel'skii dogovor na literaturnye proizvedeniia", in Voronkova *et al.* 184-191.
74. Art.32 (1) CL 1993 (exception: agreement on the use of a work in the periodical press). See, also, art.11 (1) para.2 and art.14 (2) Computer Law; Gavrilov 1993a, XXXI; Sergeev 221-222.
75. Arts.46 and 505 CC RSFSR (exception: agreement on the publication of a work in periodical publications and encyclopedic dictionaries).
76. Art.31 (1) CL 1993.
77. Art.31 (2) para.1 CL 1993.
78. Art.31 (2) para.2 CL 1993.
79. Art.503 para.3 CC RSFSR.

— the non-exclusivity of the granting of rights of use is presumed in the Copyright Law 1993.[81] Under the MPC, the author undertook not to convey the work to other organizations for publication without prior written consent of the co-contracting publishing house for a period of three years (the maximum term permitted by law[82]) from the approval of the work by the publisher.[83] This provision could be deviated from in favor of the author so that this was a rebuttable presumption of (temporary) exclusivity.
— the period for which a right of use is granted should, according to the Copyright Law 1993, be made explicit in the author's contract. If the contract is silent on this point, the author has the right to cancel the agreement at six months' notice once five years have passed since the signing of the contract.[84] Article 1 MPC provided that the author transferred his right to publish the work in a given language for three years—a provision which could again be altered in the author's favor but not to his disadvantage. Agreements in which an author transferred his right to publish his work in the USSR for a longer period or even for the whole duration of the copyright to a Soviet publishing house were thus, in the Soviet period, invalid, but are not under the current CL 1993.
— the territory for which the copyrights were to be transferred had, by virtue of the Copyright Law 1993, to be specified in the author's contract. In the absence of such a clause, the transfer by virtue of the law itself is limited to the territory of the Russian Federation.[85] The MPC concerned the right to publication in the Soviet Union, but, also, contained the provision that the author transferred to the Soviet publishing house his rights with regard to (any) use of the work concerned abroad for the complete duration of the copyright on that work.[86] This determination too could in theory be deviated from in favor of the author including by its cancellation.
— with regard to the author's fee the Copyright Law 1993 provides that the author's contract has to state the amount and/or the manner of calculation of the author's fee for every means of exploitation separately as well as

80. Concretely this meant, *e.g.*, that a film studio could not possibly acquire the rights to the publication of a novelized film script in the Soviet Union. Only a publishing house could do this.
81. Art.30 (4) CL 1993.
82. Art.509 CC RSFSR.
83. Art.4 MPC. The publication of the work in question in newspapers, periodicals, almanacs and the "Novel-newspaper" in the USSR was allowed within this period as long as the publishing enterprise was informed.
84. Art.31 (1) para.2 CL 1993.
85. Art.31 (1) para.3 CL 1993.
86. Art.24 (a) MPC.

the method and period of payment.[87] This author's fee cannot be lower than the minimums fixed by the Council of Ministers.[88] If an author's contract provides a lump sum for the publication or reproduction of a work, the maximum print-run must also be specified.[89] As in the Soviet period, in each model contract the right to only one manner of exploitation could be transferred, the author's remuneration was only for this manner of exploitation. In the MPC, the publisher was granted the right to determine the print-run of a work completely autonomously.[90] The remuneration—which was expressed as a lump sum—had to be situated between the legally fixed minimums and maximums[91] and was paid in two or three installments.[92]

— by virtue of the Copyright Law 1993, an author cannot contract rights to the use of works which the author can create in future.[93] This was already accepted in the legal doctrine of the Soviet period although without a clear legislative foundation.[94]

— the Copyright Law 1993 prohibits the selling-on of rights unless provided for in the contract.[95] In the MPC, the publishing enterprise was given the right to complete or partial transfer of the rights *and* duties provided by the agreement,[96] but a contractual regulation which would improve the author's position in this regard was possible.

— the Copyright Law 1993 does not enforce a duty to publish on the author's co-contracting party[97] whereas the CC RSFSR[98] and the MPC[99] did so within a strict time schedule.

1033. In summary, we can say that the comparison between the Soviet legislation and the new Copyright Law 1993 does not give an unequivocal image of the contract law.

On a number of points, there is clearly great continuity, mainly with regard to the conditions of form, the duty to specify the rights transferred, the non-transferability of rights to future works or of exploitation rights unknown at the moment of the signing of the contract, and the specification

87. Art.31 (1) CL 1993.
88. Art.31 (3) para.2 CL 1993.
89. Art.31 (3) para.3 CL 1993.
90. Art.11 MPC.
91. Arts.479 para.2 and 3 and 507 CC RSFSR.
92. Art.14 MPC.
93. Art.31 (5) CL 1993.
94. Dozortsev 1984c, 12; Serda 109.
95. Art.31 (4) CL 1993.
96. Art.25 MPC.
97. Sergeev 232. Contractually, such a duty to publish can be enforced.
98. Art.503 para.3 and art.510 CC RSFSR.
99. Art.7 MPC.

of a remuneration per manner of exploitation which cannot be lower than a legally fixed minimum.

On a number of other points, the Copyright Law seems—from the perspective of the protection of the author as the weaker party—an important improvement on the judicial regime of the Soviet Union: the legally fixed maximum for an author's remuneration was abolished, the other party to the contract can no longer transfer the rights granted to a third party without the permission of the author, a presumption of non-exclusivity is introduced, and the presumption of transfer to the other party of all rights for exploitation of the work abroad was cancelled.

Nevertheless, on other points, the author seems to come out worse than under the Soviet copyright law. If in the Soviet period the maximum duration of the granting of the right of use was three years, the new Copyright Law only obliges the contracting parties to fix *a* term. It is, thus, quite conceivable that the author grant the other party to the contract a right to use a work for the complete duration of the copyright.[100] The complete freedom of contract could thus be to the author's disadvantage. Indeed, he could be forced to relinquish his rights for a very long period.[101] Moreover, the duty to publish was abolished. An author can perfectly validly transfer a number of explicitly listed rights for the complete duration of the copyright of the work concerned, but the other party is not obliged actually to publish the work in the ways listed. This is, especially in the case of an exclusive license, problematic.

Still, it remains, in our view, justified to call the new Copyright Law an improvement on earlier regulations of the author's contract and to applaud its basically author-friendly nature.[102] Indeed, one has to take into account that

100. Gavrilov 1995c, 19; Sergeev 217-218.

101. The possibility of canceling the author's contract after 5 years is only open to the author if this contract is silent on the duration of the transfer, and does not exist when the contract explicitly states its duration.

102. In the same sense: Dietz 1994b (175), who—with regard to the copyright situation in Central and Eastern European countries—writes:

> "Compte tenu de l'âge tout à fait jeune de la plupart de ces textes et du manque presque total de jurisprudence interprétative, il faut certainement éviter des conclusions trop téméraires sur le sens de la portée de ces textes, parfois vagues et nécessitant une interprétation. D'une manière générale, ces nouvelles lois doivent encore faire la preuve de leur viabilité pratique. Mais une tendance forte de protéger les auteurs est cependant nettement visible, ne serait-ce qu'en ce qui concerne les règles générales appartenant à la partie générale du droit des contrats d'auteur."

We regret the negative tone in which Newcity 1993b (8) describes the provisions on author's contract law as a hangover from the old regime:

> "By including such elaborate provisions specifying the form and content of authors' agreements, the Law on Copyright has followed the paternalistic Soviet tradition of hedging authors' freedom of contract in the interest of protecting them from exploitation."

many of the positive points we have mentioned in the Soviet author's contract rights were merely theoretical (such as the possibility to deviate from the model contracts in favor of the author) or did not have to be interpreted as a social measure of protection but, rather, as the simple consequence of the extreme division of labor between the state enterprises within the planned economy.

1034. The measures in the Copyright Law to protect the author from his own carelessness and structural weakness largely leave the freedom of contract, characteristic for the free market, intact. Thus, under Russian copyright law, it would be perfectly valid to conclude an author's contract, fixed in a written document in which all property rights mentioned in article 16 CL 1993 are explicitly listed and are ceded in exclusive license to the other contracting party for the entire duration of the copyright and for all countries of the world, in which the author's fee is specified at the fixed legal minimum for every method of exploitation[103] (with *e.g.*, payment in installments spread over a long period of time and paid long after the other party's income from the exploitation of the work has been obtained), and in which the other party is given the authority to sell on these rights. Also with regard to any other clause which the parties consider essential, the parties may contract freely[104] (*e.g.*, an obligation for the author to read the proofs within a certain period or an obligation for the author to help promote his book by participating in book fairs, press conferences, etc.). Only the contracting of future works and future rights of use is prohibited by law in absolute terms, so that at least a hard core of property rights remain the author's.

In short, the regulations of the Copyright Law 1993 protect the author only from unclear and over-general contractual clauses and only at a lower level from a too extensive transfer of rights. The autonomy of will and the judicial equality of the contracting parties are prime. If this causes socially unjust situations to arise, the law of author's contracts can only offer first-aid. Copyright law protects the author on the market but does not shield him from the market. For thorough operations such as the recuperation of those excluded from the market, only social rights can help, not copyright.

2.2.3. The System Transformation and the Author's Remuneration

1035. In the Soviet period, the author's remuneration was not a barometer of the author's market success: minimums and maximums were fixed, and only within these parameters was there room for free negotiations. The legal rates were linked to the size, genre, and print-run of a work, not to sales or profits. They were considered a reward from society, paid through the mediation of

103. Or even with an author's remuneration of the amount of 0 rubles, if no legal minimums were fixed, as is still the case at the present time for most of the manners of use.

104. Art.31 (1) para.1 CL 1993.

the state enterprises, for the contribution, which the author had made to the planned cultural growth of socialist society. The legal maximum of the remunerations was to prevent the author from gaining too high an income without additional labor.

1036. When at the beginning of the nineties the political decision to introduce a free market economy was made, the Fundamentals 1991 for the first time provided the possibility of linking the author's remuneration to the income from the exploitation of the work.[105] There was no longer to be a legally fixed maximum for author's remunerations, but minimums were kept[106] so that the regulation of remuneration had an unequivocally author-friendly, and social nature. Beyond these legally fixed minimums, however, the market had free play. For successful and well-known authors, the road was open to demand much higher fees, linked to the success of their work; for beginners and less successful authors, the amounts fixed by the government had to offer a social guarantee as a kind of minimum wage.

1037. This situation remained basically unaltered under the Copyright Law of 9 July 1993. The basic premise is the exclusive right of the author, who in exchange for the permission to exploit his work, can demand remuneration.[107] Remarkable is the desire of the Russian legislator to link the author's remuneration in as far as possible to the economic benefit accruing to the user from the exploitation of the work. The Copyright Law expresses this by making it a general rule that the remuneration be expressed as a percentage of the income for the respective method of use of the work.[108] A fixed sum or another manner of calculation is only allowed if the aforesaid link is impossible to realize because of the nature of the work or the characteristics of its use.[109] This is the case every time the financial advantages are difficult to calculate due to the absence of immediate returns (*e.g.*, background music in shops, shopping streets, etc.).

As was already the case under the Fundamentals 1991, the Copyright Law 1993 also gives the Council of Ministers the possibility of enforcing minimum rates (no maximums) which if they relate to fixed remunerations, are indexed to minimum wages.[110] The only Governmental Decree yet approved, which

105. Art.139 (1) para.4 *in fine* Fundamentals 1991.
106. Art.139 (1) para.4 Fundamentals 1991.
107. Art.16 CL 1993. Only with regard to the remuneration for home copying, the author is granted a right to remuneration without this remuneration showing a direct link with the exploitation of his work (art.26 CL 1993).
108. Art.31 (3) para.1 CL 1993. In art.139 (1) para.4 Fundamentals 1991, this was still formulated as a mere possibility.
109. Art.31 (3) para.1 CL 1993.
110. Art.31 (3) para.2 CL 1993. This provision was only introduced during the third reading of the text, *i.e.*, after the presidential veto, see Savel'eva 1993b, 41.

states the minimum rates for the author's remuneration for the public performance of works, for the reproduction of works by means of audio recordings and the rental of copies of audio recordings and of audio-visual works, and for the reproduction of works of visual art and the multiplication of works of applied decorative art in industry,[111] describes these minimum remunerations solely in terms of percentages of the income from the exploitation of the work even when the exploitation of these works is not the main activity of the person from whom payment is due (*e.g.*, performance of musical works on phonograms in a restaurant).[112]

1038. It is clear that the current regulation has to be placed against the background of the economic system transformation. On the one hand, the introduction of the market economy presupposes that the negotiations between author and user may be conducted freely, independent of any administrative governmental planning. On the other hand, the system transformation has led to the emergence of barely regulated, privatized monopolies within specific domains, which puts the author in a doubly unfavorable position: he is not only subjected to a structural economic weakness in the marketplace, he is—at least partially—limited in his choice of exploiter by the survival of earlier monopolies in art mediation. Moreover, the authors in Russia are poorly organized. In these circumstances, extra protection for the authors does not seem an unnecessary luxury.

The possibility for the government to prescribe minimum rates for different manners of exploitation hence has the indubitably social function[113] of protecting the weakest actor on the market of cultural goods without, however, completely eliminating the market mechanisms.

§ 3. *Author* versus *End User*

3.1. General

1039. Whereas a specific regulation of the author's contract is a relatively new phenomenon in the copyright law of most countries,[114] the conflict of interests between the author and the public were, from the very beginning of copyright law, one of the basic problems of this branch of the law.[115]

According to Soviet law, the reconciliation of the interests of the individual and of society was one of the basic principles of socialist copyright. This harmony became obvious in the Constitution of 1977 as the rights of the author

111. PP RF "O minimal'nykh stavkakh avtorskogo voznagrazhdeniia za nekotorye vidy ispol'zovaniia proizvedenii literatury i iskusstva", 21 March 1994, *SAPP RF*, 1994, No.13, item 994.
112. For a critical discussion, see *supra*, Nos.761 ff.
113. Sergeev 25.
114. Not, however, in Russia, which with its Copyright Law of 1911 blazed a trail in the regulation of author's contracts, see *supra*, No.98.
115. Dietz 1976, 161.

and the right of the citizens to the enjoyment of the acquisitions of culture were given equal weight.[116]

The idea that the interests of the author and end user are *a priori* in harmony with one another can no longer be maintained in a market context. The author desires to gain moral as well as material advantage from the creation and distribution of original works, and this is impossible if his own rights are described in a limited fashion and access to the use of this work is made possible for the cultural consumer without well-founded reasons and without any involvement of or remuneration for the author. The acknowledgement of the existence of this conflict of interests on the one hand, and the realization that taking into account the legitimate grounds to provide exceptions to copyright, cannot lead to denying copyright its stimulating effect on creation and distribution on the other hand, has brought the Russian legislation to a regulation which in comparison with the Soviet law is markedly more favorable to the author. The difference should be sought in the area of principles as well as at the level of limitations upon copyright.

3.2. On the Level of Principles

1040. The Soviet copyright law only protected the form of a work—not the contents, the ideas. Only works "in an objective form", which allowed reproduction of the result of the author's creative activity,[117] enjoyed copyright protection even where ephemeral forms, which were not captured on a material medium, were concerned.[118]

Works molded into a shape, which was not the result of a creative activity, but of mere technical or organizational labor, were not protected by copyright[119] and could, therefore, also be freely copied, reproduced, and distributed by third parties.

1041. Copyright only protects the original form of a work; it does not protect the underlying ideas, methods, processes, systems, concepts, principles,

116. Art.47 para.2 and art.46 para.1 Const.1977.

117. Art.96 para.2 Fundamentals 1961; art.475 para.2 CC RSFSR. Only for choreographic and pantomime the law specified *which* objective form they had to have, namely written or in any other way fixed instructions for the performance of these works: art.475 para.3 CC RSFSR. Chernysheva 1979, 84-86; O. Ionasco, "La protection du droit d'auteur dans les pays socialistes", *RIDA*, vol.75, 1973, 91-93; B.V. Kaitmazova, "Proizvedenie khoreografii—ob"ekt avtorskogo prava", *SGiP*, 1983, No.11, 57-58.

118. Art.96 para.2 Fundamentals 1961; art.475 para.2 CC RSFSR. Art.475 para.3 CC RSFSR also called oral works possible subject matter of copyright protection. On the equation of the "reproducible objective form" with the requirement of material fixation, see Dozortseva 37; H. Püschel, "Urheberrecht in den sozialistischen Staaten des RGW—Einige rechtsvergleichende Betrachtungen", in *Law in East and West—Recht in Ost und West*, Institute of Comparative Law Waseda University (ed.), Tokyo, Waseda University Press, 1988, 1015; Savel'eva 1986, 24-26.

119. *Supra*, No.965.

discoveries, or facts expressed therein. This was accepted by Soviet legal doctrine,[120] but is now also mentioned explicitly for the first time in the Russian copyright legislation.[121] It is, thus, impossible for the author to acquire a legal monopoly on ideas, which may circulate freely.

1042. Its temporary nature is one of the essential characteristics of copyright. After a certain period, the work falls into the public domain (*obshchestvennoe dostoianie*), which means that from that moment onwards it can be exploited freely.[122] In this regard, the Soviet legislator's benevolence towards society was rather extensive since the author's subjective right expired already 25 years after his death (since 1973),[123] *i.e.*, the minimum required by the UCC,[124] and 25 years less than was required under the Berne Convention,[125] and 25 years less than the term which was common in most Western countries at that time, and which was in force under the Czars in Russia itself from 1857 until 1917.[126] The Fundamentals 1991 have brought the term to the level of the Berne Convention, *i.e.*, 50 years *p.m.a.*, and the CL 1993 has provided even longer terms of protection for circumstances of war or repression and posthumous rehabilitation of the author.

Works in the public domain can, moreover, be re-privatized either by application of the regulation for the posthumous publication of works or the posthumous rehabilitation of the author, when these take place after the expiry of the original duration of protection or (and most prominently) by virtue of the rule of the retroactive application of the duration of protection.

The Russian CL 1993, finally, also gives the Government the possibility to establish a system of *a paying* public domain in the form of a levy of up to 1% of the profit made from the exploitation of a work in the public domain. This levy is not to the advantage of the individual author of the exploited work or his heirs, but of the community of authors as a whole through the professional funds of the authors and the collective management organizations.[127] With these moneys, social programs and programs to support young talent can be financed. The Government has, however, not yet made use of this legal possibility. In fact, the Soviet copyright law also knew in embryo a form of *paying* public domain in the case of public performance of not (or no longer)

120. See, *e.g.*, Chernysheva 1979, 76; Dozortsev 1980, 137; Savel'eva 1986, 25.
121. Art.6 (4) CL 1993; art.3 (5) Computer Law.
122. Art.28 CL 1993. In socialist copyright, the state could declare the work part of the state's property in accordance with art.502 CC RSFSR. This established for the state a new original title of unlimited duration to the work which had come into the public domain (Levitsky 1980b, 145-147).
123. Art.105 para.1 Fundamentals 1961; art.496 para.1 CC RSFSR.
124. Art.4 (2) UCC.
125. Art.7 (1) BC.
126. *Supra*, Nos.93 and 98.
127. Art.28 (3) CL 1993. *Supra*, No.748.

protected works, which benefited partly the Music Fund, *i.e.*, a social fund of the Composers' Union, and partly the state budget (by which the remuneration was given, at least in part, the character of an ordinary tax).[128]

3.3. On the Level of Exceptions to Copyright

1043. The CL 1993 strengthens the author's position not only by an extension of the duration of protection but, also, by an increase in the bundle of the author's exclusive rights[129] and, especially, by a limitation of the exceptions to copyright.

We do not refer here to the exclusion of a number of intellectual creations from the status of subject matter of copyright in the interests of the swift distribution of information (such as communications of events and facts which are of an informative nature) or because of their official nature (such as laws, judicial rulings, state symbols, and signs)[130]—as here, except for some details, there is great continuity with the past[131]— but to the so-called free uses and compulsory licenses. Here, we do see some important reformulations, omissions, and additions which led to a considerable strengthening of the author's position in the Copyright Law 1993, and the acknowledgment of the legitimate interests of consumers and the community but, rather, under strict conditions which guarantee the safeguard of the author's interests.[132]

1044. In Soviet copyright law, non-voluntary licenses made their appearance with regard to, *inter alia*, the public performance of published works;[133] recording on film, record, magnetic tape, or another mechanism[134] for the purpose of the public reproduction or distribution of published works:[135] and

128. Dietz 1981, 183 note 123.
129. Remember that, until 1973, no translation right was acknowledged in the Soviet Union, and even afterwards certain "more modern" rights were not acknowledged, such as the resale right or the lending and rental rights.
130. Art.8 CL 1993. This article also excludes works of folk creativity (folklore). *Supra*, Nos.655-656.
131. Art.487 para.1 CC RSFSR. Works of folk creation, old enactments and memorials were also excluded from copyright protection, either because they were *ab ovo* not eligible for copyright protection due to a lack of originality, or because the period of protection had expired. On the protection of folklore, see A.M. Garibian, "Avtorskoe pravo i fol'klor", *SGiP*, 1986, No.5, 87-94; E.P. Gavrilov, "O pravovoi okhrane proizvedenii fol'klora", *Pravovedenie*, 1983, No.3, 51-55.
132. See, *e.g.*, also Gavrilov 1995c, 20.
133. Art.104 point 1 Fundamentals 1961; art.495 point 1 CC RSFSR.
134. According to Gavrilov, this only applied to audio recordings, not video recordings which at the moment of approval of the law did not yet exist and could thus not fall under this restriction of the copyright law (Gavrilov 1982, 7). *Contra*: M.M. Boguslavskii, "The Soviet Union", in Stewart 462 (compulsory license also applies to videograms).
135. Art.104 point 2 Fundamentals 1961; art.495 point 2 CC RSFSR. The use of works in the cinema, on the radio or television was, however, completely free: art.103 point 4 Fundamentals 1961 and art.492 point 4 CC RSFSR.

the use by the composer of published literary works for the creation of musical works with text.[136]

The justification for such involuntary licenses (a term not used in Soviet law[137]) as proposed in legal theory was of a pragmatic nature: the author was in these cases not deemed capable of judging the use to which his work was being put[138] or conversely, it was considered impractical for the user organization to have to ask the author's permission on every occasion of the public performance of a work.[139]

It was, however, especially in the area of the pure exceptions to the economic authors' rights that Soviet copyright law compared badly with Western copyright laws.

A number of these exceptions had only a limited bearing (for example the Braille edition of a published work,[140] the right of quotation,[141] or the reproduction of works of visual art in freely accessible places[142]), but others entailed a serious limitation of the copyright's economic value. The reprographic reproduction of printed matter for scientific and educational ends without the purpose of gain, for example, was not limited in any way[143] nor was the private use of works linked to any condition.[144]

Much more influential was the right of the user to reproduce publicly delivered speeches and published works in mass media (newspaper, cinema, radio, television), including the live broadcasting of publicly performed works without the permission or remuneration of the author.[145] The free use of *speeches* was justified by political motives: the news media were said to be interested only in those speeches, which had a social meaning. The free use of this was a means to let the citizens participate in political life.[146] The justification for the free

136. Art.104 point 3 Fundamentals 1961; art.495 point 3 CC RSFSR.
137. Loeber 1980, 29-30.
138. Gerassimov 29-30.
139. Dozortsev 1980, 137-138.
140. Art.103 point 8 Fundamentals 1961; art.492 point 8 CC RSFSR.
141. Art.103 point 2 Fundamentals 1961; art.492 point 2 CC RSFSR.
142. Art.103 point 6 Fundamentals 1961; art.492 point 6 CC RSFSR.
143. Art.103 point 7 Fundamentals 1961; art.492 point 7 CC RSFSR. For critical comments on this far-reaching limitation of copyright on mainly scientific works, see Dietz 1973, 60-61.
144. Art.493 CC RSFSR. This did include home copying, but not the ordering of musical recordings at audio-recording points, or the ordering of copies by readers in a library (but see the previous exception with number 6). The copies thus made could not be put into circulation (Gavrilov 1984b, 25).
145. Art.103 points 4 and 5 Fundamentals 1961; art.492 points 4 and 5 CC RSFSR. Only the reproduction of the work in an unaltered version was free (for example the use of already existing music in a film); for the reproduction in altered form the approval of the author was still required (*e.g.*, the adaptation of a novel as a film script): R. Gorelik, "Etude générale: le droit d'auteur en URSS", *Bulletin du droit d'auteur*, 1969, No.4, 36.
146. Dozortsev 1980, 138.

reproduction of *other works* had to be sought in the government's responsibility to accelerate society's intellectual development. Large layers of the populace had to be able to learn about the latest scientific and literary achievements. It would—in Dozortsev's words—"not be efficient to make access to intellectual riches dependent on the benevolence of the author"![147] Gringol'ts saw it even more positively: according to him, the absence of broadcasting rights in published works conformed to both the author's and society's interests: although the author was not remunerated for such a broadcast, the broadcast song was afterwards performed by other stage artists, its score was published, the song was recorded on phonogram. In short, the author's remuneration for these exploitation methods would actually increase more rapidly than would have been the case without the help of radio and television.[148] According to this reasoning, the granting as much as the denial of a subjective copyright could stimulate the creativity of authors! But how should one then choose between these two methods?

Gerassimov indicated the importance of radio and television in the field of education and the propagation of culture,[149] but, also, added that all broadcasters were public organizations exclusively financed by the state.[150] In this way, the legal scholar suggested that free use was in fact introduced for purely economic reasons: it was the state, which would have to pay for broadcasting published works on radio and television.[151]

Finally, as a curiosity in the limitations of copyright as a whole, mention must be made of the possibility of obliging the author to sell individual rights in his work, published or not, to the state.[152]

1045. From the middle of the seventies, attempts were made in Soviet legal theory to minimize the limitations on copyright as much as possible.[153] Dozortsev, for example, pointed out that the cases of free use only concerned *published* works, and the right to decide on publication remained in any case an inalienable right of the author;[154] that in each case of free use the author's moral rights to a name, authorship, and the integrity of the work had to be respected,[155] and that the list of exceptions to copyright was exhaustive, could

147. *Ibid.*
148. Gringol'ts 1969, 439.
149. Gerassimov 30. Shatrov 111 even sees the '*Aufklärung*' and '*Erziehung*' of the Soviet people as the reason for all free uses.
150. Gerassimov 30. Sergeev 161 also refers to the non-commercial character of the Soviet media and their educational function.
151. Sergeev 161.
152. Art. 106 Fundamentals 1961; art. 501 CC RSFSR. For a discussion of this point, see Levitsky 1980b, 141-144 and 146-149.
153. Thus Sergeev wrote in 1994: "In the last two decades almost no practical attempts have been made in the Soviet literature to give a basis to the effectiveness and necessity of such a large number of cases of free use of works" (Sergeev 177).
154. Dozortsev 1980, 137.

not be interpreted broadly, and could only be fixed by the federal government.[156]

Some even argued for the abolition of a series of free uses, such as the free use of published works on radio, television, and in films[157] as well as for the restoration of the exclusivity of the public performance right[158] and the fixation right.[159] Gavrilov, then, asked whether the free use of works for personal purposes did not need revision, considering the great accessibility of photocopy machines to individuals and the possession of recording equipment by many citizens. He even suggests the introduction of a levy on photocopying equipment, tape recorders, blank cassettes, etc.[160]

1046. Under the present Copyright Law of 1993, the exceptions to copyright only concern the author's exploitation rights: his moral rights remain unchanged.[161] This mainly means that the work when used in a way permitted directly by law cannot be altered in a fashion, which would damage the honor and dignity of the author[162] and that the limitations only concern works which were lawfully[163] published by the author.[164] All exceptions to the

155. *Ibid.* In one case (the use of works of visual arts and photos in industrial products), the indication of the name of the author was not obligatory (art.104 point 4 Fundamentals 1961; art.495 point 4 CC RSFSR).
156. Dozortsev 1980, 137 and Dozortsev 1979, 194. Nonetheless, the Union republics themselves introduced an important limitation to copyright in the free use of a work for personal purposes (art.493 CC RSFSR).
157. Dozortsev 1980, 141-143 and Dozortsev 1984a, 172-173; Gavrilov 1984a, 32-34, 45-46 and 175 and Gavrilov 1988, 75; Savel'eva 1986, 100. Gerassimov 31 writes:
    "Ajoutons que la disposition relative à la libre utilization des oeuvres sous leur forme originale à la radio, à la télévision et au cinéma n'a pas un caractère rigide, définitif. La législation soviétique sur le droit d'auteur évolue constamment et ses modifications visent à élargir la portée des droits des auteurs. Il est permis d'affirmer qu'à un certain stade du développement de la société soviétique et de sa culture, les auteurs soviétiques jouiront pleinement de leurs droits aussi en ce qui concerne l'utilization de leurs oeuvres à la radio, à la télévision et au cinéma."
    And, in the same style, Ficsor (81) writes:
    "[...] if we take into account the spectacular development of Soviet copyright protection in the last decade, we can be sure that those obstacles [to the USSR's accession to the Paris Act of the UCC and the BC, namely the free use of published works in the mass media] will be eliminated in the near future."
158. Gavrilov 1984a, 44-45 and 180-183.
159. Dozortsev 1980, 143.
160. Gavrilov 1988, 75 and Gavrilov 1984a, 34-36.
161. With the free uses summed up in arts.19 and 20 CL 1993, the user was explicitly obliged to indicate the name of the author with the use of the work, as well as the source. Such a duty has—obviously—no sense with the use of a work for personal purposes.
162. Art.15 (1) CL 1993.
163. The mention that the publication must occur in a lawful manner, is—in our opinion—superfluous, as this is already implied in the definition of publication itself (art.4 CL 1993).

author's property rights can only be called upon as far as their application does not cause unjust damage to the normal use of the work or infringes upon the author's legitimate interests in an unfounded manner.[165]

In a comparison of the exceptions in the CC RSFSR and the CL 1993, it is remarkable that a number of the exceptions provided for earlier (some of which were very important) to the author's property rights or to their exclusive nature have disappeared. This concerns the free use of other people's published work for the creation of a new, creatively independent work; the publication in the periodical press, in the cinema, on radio, and television of information about published works of literature, science, and art; free use for private ends, free transfer to third parties, or free reproduction in the press, by the commissioning organization, of technical plans made to order; and the legal licenses concerning the public performance of a published work, the recording on film, record, magnetic strip, or another mechanism with the intention of reproducing or distributing published works with the exception of the use of the works in the cinema, on the radio, or television (which were completely free); the use of published literary works by a composer for the creation of a musical work with text; and the use of works of visual art and photos in industrial products.[166] The possibility of the compulsory purchase of copyrights[167] was also abolished.

A number of limitations appear in the CC RSFSR as well as in the CL 1993 but in an altered, and usually more restrictive, formulation in which often the exception is only acknowledged to the extent that it serves a particular purpose. This is namely the case for the right of quotation,[168] the reprographic reproduction of printed matter for, *inter alia*, scientific and educational purposes,[169] the reproduction of works in Braille,[170] the reproduction of works for personal goals[171] (now with the acknowledgement of a right of remuneration for home copying of audio and audio-visual works[172]), the reproduction of public speeches or articles or broadcast works on current issues,[173] the reproduction of works in publicly accessible places.[174]

164. Exceptions to this are the public performance of musical works during official and religious ceremonies and funerals (art.22 CL 1993) and the reproduction of works for legal procedures (art.23 CL 1993). See, also, Sergeev 178.
165. Art.16 (5), 25 (3) and art.42 (4) CL 1993.
166. Art.492 (1), (3) and (4); art.495 (1) to (4); art.515 CC RSFSR.
167. Art.501 CC RSFSR. See, also, Kostiuk 107.
168. Compare art.492 point 2 CC RSFSR and art.19 point 1 CL 1993.
169. Compare art.492 point 7 CC RSFSR and art.20 CL 1993.
170. Compare art.492 point 8 CC RSFSR and art.19 point 6 CL 1993.
171. Compare art.493 CC RSFSR and art.18 (1) CL 1993.
172. Art.26 CL 1993.
173. Compare art.492 points 4 and 5 CC RSFSR and art.19 points 3 and 4 CL 1993.
174. Compare art.492 point 6 CC RSFSR and art.21 CL 1993.

The Copyright Law also contains a number of completely new limitations of copyright, in each instance, however, of very limited scope and for a specific purpose. These relate to the free public performance of works during official and religious ceremonies, and at funerals, the free reproduction of a work for use in judicial process, the informative quotation, ephemeral recordings of broadcast works, reprographic reproduction by libraries and archives for the maintenance or replacement of their holdings, and the free use of reproduction typical of computer programs, to ensure the functioning of the program and for archival reasons, as well as the special case of the de-compilation of a program. Each of these free uses is linked to very precise conditions or a particular aim.[175]

1047. In conclusion, the renunciation of the theory of the harmony of interests has led, with regard to exceptions to the property rights of the author, to a clear improvement in his legal position. The exceptions always have a clear purpose, namely the protection of a public or private interest, and are limited to that goal. Only with regard to reprography has the Russian legislator unnecessarily limited the author's rights by not providing for any right to remuneration. Nevertheless one can, in general, say that the Russian Law, by taking the conflict of interests of author and end user as its point of departure, has adopted a much more realistic view of the social position of the author and of the necessity of only limiting the author's control over the use of his creation to the extent that other public or even private interests demand.

§ 4. Conclusion

1048. From our analysis of Soviet copyright law, it appeared that this law was, with regard to content, on a number of points clearly distinguishable from what an ideal-typical law of copyright in Western Europe provided.

1049. In the relationship between author and exploiter, the far-reaching state interference by means of (quasi-normative) model contracts and enforced minimums and maximums for the author's remuneration for each method of exploitation stood out. In this way, the legal relationship between the author and socialist user organization was linked into the administrative command economy. A side effect, rather than a purpose in itself, was their function of protecting the author, but this was largely frustrated by a number of stipulations in the model contracts which were negative for the author as well as by the legal limit of the author's remuneration.

Any ambiguity about the provisions concerning authors' contracts and authors' remuneration has been nullified in the Copyright Law 1993: these provisions have a clear social function in favor of the author. The legislator clearly intended to protect the author on the market against his own haste, inattention, and structural weakness. To this end, the Russian legislator adopts instruments in the law of authors' contracts which will sound familiar to a continental

175. Art.19 point 5, art.20 point 1, arts.22 to 25 CL 1993.

European lawyer: rules of interpretation, obligatory specifications, and rules of supplementary law advantageous to the author, prohibition of the transfer of rights to future works or manners of exploitation, etc. Only the possibility for the government to prescribe minimum authors' fees for separate manners of exploitation can be considered a relic of the past even though this—entirely in line with the other provisions—is an author-friendly measure.

The provisions in the CL 1993 concerning contract law and author's fees no longer have the paternalistic and monitoring nature of earlier times, but are clearly intended as a social improvement of the market principles, with the autonomy of will and the freedom of contract as points of departure. The author now holds his fate in his own hands; the law of author's contracts and the legal minimum remunerations are instruments of first aid to protect the weaker contracting party. It is exactly in the same sense that—ideally-typically spoken—continental European copyright laws also contain special regulations with regard to contract law.

1050. In the relationship between the author and the community of end users, Soviet copyright was distinguished by its low level of protection, namely by the short duration of protection and a whole series of economically very significant exceptions to the author's rights. In the Copyright Law 1993, the level of protection for authors was brought up to the level, and in some cases above the level, demanded by the Berne Convention.

1051. Whereas in the previous chapter we came to the conclusion that in *formal* legal terms Soviet copyright was not constructed differently than it was in the West, namely as a subjective claim to an immaterial good which gives expression to the personal and enduring bond between the author and his work, we must conclude now that with regard to *contents*, *i.e.*, in *material* terms, there *was* a real difference. It is through these provisions in the objective copyright law, possibly supplemented by the few provisions—strongly criticized in Soviet legal theory—which differ from the personal law nature of copyright (for example, the cases of original ownership of legal persons), that Soviet copyright could be distinguished from continental European copyright law. This is what we would call the *internal specificity of the Soviet copyright law*.

Russian copyright law has done away with all, or at least most, of these specific characteristics of Soviet copyright law. In the way it delineates the extent of and the exceptions to the author's rights, and in the way in which the author is protected by contract law from his own carelessness and from excessive demands by exploiters, Russian copyright law resembles at the present day, not only as a formal construction, but, also, in material, terms western, continental European copyright laws. One can, moreover, assume that this connection will in future be tightened, now that Russia has undertaken, in the Partnership and Cooperation Agreement with the EU and its member states,

to bring the level of protection of its national copyright law into convergence with the EU.[176]

The reason for these alterations concerning contents in the objective copyright have, in our opinion, to be sought in the demythologization of the theory of the harmonious reconciliation of interests. Under the influence of the system transformation, copyright is no longer considered the reflection of a previously held axiom of the harmony of interests; it is now considered an instrument to reconcile by means of the law the antagonistic interests which exist in a society ordered according to market mechanisms. The legislator's role is no longer merely descriptive but normative: copyright is to correct the power relationship between authors and primary exploiters, and to balance the interests of cultural production and cultural consumption.

From this, it becomes clearer and clearer that the abolition of the specific internal characteristics of socialist copyright is closely linked with the new environment within which copyright has to function: that of the construction of a market and the rule of law. Or to put it differently: the internal specificity of socialist, Soviet copyright did not describe its uniqueness in an exhaustive way. Which brings us, in the next section, to the question of the external specificity of socialist copyright law, and the fate thereof in present-day Russia.

Section 3. The Author and the Public Interest, or the Changing Role of Copyright

§ 1. In Socialist Copyright Law

1052. Savel'eva did not designate the trichotomy author/user organization/end user but, rather, the dichotomy author/society as *the* main relationship, which needs to be regulated by the copyright law. According to this lawyer, copyright fulfilled a double task, which presented itself as a unity: "the assurance of the cultural needs of the whole of society, combined harmoniously with the safeguarding of the rights of the individual person, the creator".[177]

1053. Soviet legal theory did not probe deeper into the issue of the determination of the interests of the author and society, but in a comment on socialist copyright law the Hungarians Benard and Boytha wrote that the author has two interests: receiving a remuneration, and the assurance that his work effectively reaches the public, and this in the form which he himself gave to the work.[178] According to these lawyers, society has a double interest

176. *Supra*, Nos.552 ff.

177. Savel'eva 1986, 10. See, *e.g.*, M. Boguslavskii, "The Soviet Union" in Stewart 457: "The aim of legal regulation of copyright in the USSR is to ensure the most favorable material and legal conditions for creating scientific, literary and artistic works and at the same time to promote the broadest possible publication, performance and other dissemination of these works. The principle of harmony between the interests of the author and society is essential to Soviet copyright law."

178. Benard/Boytha 69. Comp. Ficsor 37.

in copyright: on the one hand, increasing the level of culture requires that the broadest layers of the populace be given access, as unhindered as possible, to the cultural products available (a requirement which could be compensated by a simple right to remuneration for the author); on the other hand, society has an interest in the enrichment of the existing cultural treasures with new creations, and the laws (with a prominent role for the copyright law) are the instruments by which society can encourage creative activity.[179] And Benard and Boytha conclude: "[...] the purpose and the content of copyright protection are *determined essentially by the dialectical unity of the respective interest of the author and of society*. *Both* the interests of the author and the preservation and enrichment of the cultural values of society necessitate the protection of literary, artistic, and scientific creations as well respect for the author's personality."[180]

1054. The interests of society and of authors were, thus, said to be reconciled in a harmonious manner.[181] To the extent that the "public interest" (to be distinguished from the interest of the public, *i.e.*, the end users) justifies the existence of copyright, the reconciliation of interests between author and society was also a basic assumption in the Western part of the European continent.[182] However, it is of crucial importance to understand who was meant by "the author" and by "society" in the Soviet context.[183]

179. Benard/Boytha 69-71. Comp. Ficsor 37: "[...] it goes without saying that no such stimulation [of creative activity] exists without an efficient protection of authors' moral and pecuniary rights."

180. Benard/Boytha 71. The Czech writer Knap also emphasizes the fundamental unity of the interests of the author and those of the community, albeit on the basis of a different line of reasoning:

> "Die Gesellschaft wird im gesamtgesellschaftlichen Sinne aufgefasst. Die so verstandene Gesellschaft schafft Bedingungen für eine ständige Entfaltung der Persönlichkeit eines Einzelnen; durch die Entfaltung der Persönlichkeit ihrer Mitglieder wird die Entfaltung der ganzen Gesellschaft gewährleistet. Daraus ergibt sich eine grundsätzliche Übereinstimmung der Interessen des Einzelnen mit denjenigen der Gesellschaft."

(Knap 101). Compare art. 20 Const. 1977: "In accordance with the communist ideal: "The free development of each is the condition for the free development of all", the state has as its goal the expansion of the actual possibilities for citizens to apply their creative forces, abilities, and talents, and for the all-round development of the individual."

181. "[...T]here is no conflict, but rather a harmonious and dialectic concordance between the interests of society and those of authors. [...] From this concordance of interests it follows that the socialist approach goes beyond the static and defensive elements of copyright; it is of more dynamic nature. It concentrates not only on the appropriate protection of authors' rights but, also, tries to ensure that this protection is realized in relation to a wide utilization of works which corresponds to both the authors' intentions and the educational and cultural needs of society."

(Ficsor 35-39)

182. "L'intérêt public peut […] requérir l'instauration d'un régime de protection des oeuvres, dans la mesure où diverses finalités (culturelle, économique, sociale) d'intérêt général sont remplies par le droit d'auteur" (Strowel 274). See, also, S. Strömholm, *Le droit moral de l'auteur en droit allemand, français et scandinave avec un aperçu de l'évolution internationale*, II-1, Stockholm, P.A. Norstedt & Söners, 1973, 9-35, esp. 33.

Under Soviet copyright law, the writer or artist was not one who expressed in his creations his most individual emotions, and who wanted to sell these works on the market, but a person who knew himself to be part of a great collective movement towards communism and who put his art at the service of the fulfillment of this ultimate historic goal.

Society was not the independently functioning civil society in which a plurality of interests and ideas could be articulated; rather, it was a community dominated by the state in which only one interest was pursued: the objective interest, which was comprised in the laws of history and into which only the Communist Party had gained complete insight. Consequently, there was an identification of the interests of society, the state, and the party.

From this, it followed that the objective interests of collectivist man and society, of the state, and ultimately of the Communist Party were one and inseparable. The subjective interests of the author and of the end user were naturally completely subordinate to this one objective interest.[184]

1055. The interests of the author, the end user, and society as a whole merged in the central instance in the process of cultural creation and cultural consumption: the socialist user organization. In the user organization the horizontal, civil legal relationships between author, user organization, and end user crossed the vertical, administrative-law relationships between Party and State on the one hand and private persons (author, but, also, end user) on the other hand. The purpose of the socialist user organization in the great communist plan was to maintain the myth of the reconciliation of interests between formal equals by fulfilling a public-law function as a private-law person. Because of its economic monopoly and its artistic power to select, it became the obligatory link between author and public[185] and ensured that works, which did not conform with the objective interest of society, were removed from social circulation. In the end it was the state, which, via "its" user organizations, determined whether a work would be published, and that was the most significant limitation to the realization of copyright.[186]

1056. A change of the internal specificity of the Soviet law of copyright would, therefore, only go part-way towards justifying the removal of the epithet "socialist" from the term "copyright law". As long as the social order of the

183. Knap (100) warns in connection with the concepts "Individuum" and "Gesellschaft": "Eine terminologische Übereinstimmung darf dabei nicht irreführen, der Inhalt der Begriffe ist oft in den einzelnen Gesellschaftssystemen unterschiedlich."

184. Gusev (17) did not hesitate to warn the judges who were confronted with the problem of copyright not only to consider the legal rights of the authors, but, also, the protection of the social interests relating to the use of works of literature, science and the arts.

185. Levitsky 1989, 210.

186. B.R. Burrus, "The Soviet Law of Inventions and Copyright", *Fordham L. Rev.*, 1962, 721-722.

Soviet Union was not altered, the author would remain subordinate to the political and economic monopoly, which was exercised by State and Party via the user organizations.

The Soviet author's position in society was determined far more by this double monopoly than by the rights accorded to him in his relations with his *abstract* (because imagined in isolation from the economic and political system) protagonists: the user organization and the end user.

1057. It was not without reason that Loeber called the quasi-monopoly[187] of the socialist user organizations "a distinctive and perhaps the most important novelty in Soviet copyright law".[188] Benard and Boytha emphasized that "it is *precisely the economic system based on social ownership* that permits copyright law to fulfill its avowed social purpose, by preventing the cultural product from acquiring a predominantly commodity character and the satisfying of cultural needs from degenerating into mere business".[189] And Hazard wrote:

> The critical difference [between pre-socialist and socialist copyright] arises not from details of the law, but from the substantive situation. At the risk of unnecessary repetition, a fundamental element of difference bears restatement—the absence of an open market in which an author can shop for a publisher. This situation influences not only his monetary returns but the scope of his presentation. Since there can be only one client—the state—represented by publishing enterprises offering a form contract and tied to realization of the same aims, there is a narrowing of the types of artistic taste to which artists, musicians, and authors may cater.[190]

According to this legal scholar, the effect of socialization on copyright law is not only to be seen "in the superior rights of the community established by statute—socialization colors the circumstances in which an author can enjoy the right".[191]

Dozortsev[192] also considered *a posteriori* the absence of market relations to be the fundamental element in the situation of copyright law in the Soviet Union. The results of intellectual activity were—in his words—everybody's property (*vseobshchee dostoianie*). In all rights to immaterial objects—wrote Dozortsev—the fundamental was lost, *i.e.*, that for which they exist, namely the monopoly of the entitled person, his exclusive right. Copyright and patent lost their function as institutes of the market economy, and they began to assume a different role. Where in patent law the monopoly established through the

187. "Quasi", because the *samizdat* phenomenon was in strictly juridical terms not illegal: *supra*, Nos.49-50.
188. Loeber 1985, 302.
189. Benard/Boytha 71. See, also, Ficsor 39.
190. J.N. Hazard, *Communists and Their Law*, The University of Chicago Press, Chicago, 1969, 266-267.
191. *Ibid.*, 261.
192. Dozortsev 1993b, 40 and 1994, 45-47.

system of patents was simply liquidated, in copyright law the formal exclusive rights of the author were retained. Copyright legislation did, however, provide a whole series of limitations upon the author's rights in the form of free use and obligatory licenses, and in those areas where the monopoly was formally retained, the situation for various reasons (social, legal, economic) developed in such a way that the author could not fully exercise his rights.

1058. Summarizing, the characteristic which distinguished Soviet copyright law most from Continental European copyright systems was the subordination of copyright as a civil-law regulation of the legal relationships—which arise in relation to the creation and the use of works of art and literature—to the political-constitutional regulation of intellectual activity and to the economic-administrative regulation of entrepreneurship. This is what we would call the *external specificity of Soviet copyright law*. External, because it retained a perspective on the entirety of political, economic, social, and cultural measures relating to creation and enterprise in the cultural sector as the extrinsic context of the law of copyright as a legal institution.

It is more than an epigram to state that great part of the uniqueness of Soviet copyright law lay *outside* objective copyright or that the uniqueness of Soviet copyright law was its relative *insignificance* in determining the position of the author in Soviet society.[193]

It is precisely the relative *unimportance* of the copyright law in balancing the interests of the author and of society[194] which explains why the Soviet copyright law as a technical legal construction so closely resembles Western and pre-revolutionary models.[195] Benard and Boytha write:

> [...] *all that was considered worth preserving in the traditional copyright law has been retained and has, in fact been enriched by addition of several new features to the conventional system*. The legal mechanism so developed is made to operate in a social environment which has *institutionally freed the utilization of creative work*, *i.e.*, their transmission to the members of society, *from the predominance of the business aspect* and from the inhuman pressure of an 'industry' disseminating the cultural product.[196]

193. Of course, this was denied by the copyright specialists in the Soviet Union. Boguslavskii, for example, claimed that with "the realization of the tasks of cultural construction and completion of the idea-educational activities" an important role had to be given to copyright (M.M. Boguslavskii, "Teoriia avtorskogo prava: sostoianie i zadachi", in Boguslavskii/Krasavchikov 3).
194. Levitsky 1989, 210; Prins 1991a, 174.
195. The Hungarians Benard/Boytha 71 write:
> "The ultimate identity of interests [of author and society] described or, alternatively, the two opposing contradictions explain why it is acceptable to the socialist State based on social ownership and intent on 'socializing' creative activity to maintain the seemingly traditional concept of copyright which grants the author of a creative work an exclusive right, *i.e.*, a monopoly situation in respect of his creation."
196. Benard/Boytha 75.

The strategy was thus not legal iconoclasm but, rather, the assimilation of the bourgeois law, "enriching" it internally with socialist characteristics and placing the entirety in a social order in which the artist is completely "emancipated" from the straightjacket into which he was forced by the money-pursuing capitalist entrepreneurs.

1059. Although the *external specificity of the socialist copyright law* refers to a social, political, and economic situation beyond the copyright law itself, one could find a trace of it in the objective copyright law, as the right of publication, reproduction, and distribution were only vested in the author *in all legally permitted manners*.[197] This provision made the author's rights, including the fundamental right of publication, immediately subordinate to the economic and political order of the Soviet system, in which State and Party determined what was permitted (and "everything which is not permitted, is forbidden").

Only the abolition of the above phrase from the copyright law, together with a system transformation which would make individual liberty a basic principle, and which would formulate the prohibition as an exception to liberty ("everything which is not forbidden, is permitted"), could eliminate the external specificity of the Soviet copyright law and tighten the links with West-European opinions on copyright law.

§ 2. In Post-Socialist Copyright Law

2.1. Introduction

1060. The system transformation deeply changed the position of copyright law within the dichotomy between the individual interests of the author and of the public. The definition of the public interest as the interests of the state or the party was set aside. In the new Russia, the multinational people is the only source of power, which is exercised by the people directly or through free elections[198] in a system of philosophical and political pluralism.[199] In the civil society, which is gradually arising in Russia, a plurality of interests—including those of the authors themselves—are articulated and structured. The economic and political transformations have accepted the interests of the individual, the rights and competence of the individual, as basic precepts for the new social model.

2.2. Copyright and Freedom of Artistic Creation

1061. *Politically and constitutionally*, this means the recognition of inalienable human rights, including the right freely to hold, express, and disseminate opinions, the right to develop artistically in a creative fashion without a form of art being imposed by the authorities. These rights and liberties are defensive rights against an all too intrusive state. It is certainly true that the Russian authorities

197. Art.98 para.1 Fundamentals 1961; art.479 para.1 CC RSFSR.
198. Art.3 Const.1993.
199. Art.13 Const.1993.

have at present retained a relatively strong grip on cultural mediation, through the delay in mass privatization of the state enterprises in the cultural sector on the one hand, and the establishment of a system of registration and licensing for the cultural industries on the other. This does not, however, take away the fact that the basic principles of the political system were radically altered.

This means that copyright as a part of civil law is valued differently. Copyright is no longer a lonely private monopoly on the form of authors' works next to, or in reality under, the monopoly of the state and the party on the content of these works. In the new political context, the rejection of an axiological criterion of protection has gained real meaning: a work's ideological content is not only irrelevant for the question whether or not copyright arises, as was already the case in the past, but it is also irrelevant at the moment that the author decides to have his work exploited or to exploit it himself. The gradual, and definitely still incomplete, demonopolization of the economy grants the author a choice of exploiters, whose distinct profiles are fading, giving rise to mutual competition. Although the exploiters are organizationally often still subordinate to higher authorities, at the level of their daily artistic and literary policy they have become completely autonomous.

Although copyright hinders free speech by monopolizing a certain form of expression, this is now made legitimate because it is precisely what enables a plurality of expressions of opinion. This is symbolically expressed in the mention in a single paragraph of the Constitution 1993 of both the freedom of artistic creation and the protection of intellectual property rights.[200] Moreover, in objective copyright, precisely because of the freedom of speech and communication, exceptions are provided concerning actions which fall under the author's monopoly of exploitation on his work but which are, under certain circumstances and under certain conditions, allowed to third parties without his permission and without any remuneration.

2.3. Copyright and Openness and Fairness of Competition

1062. *Economically speaking*, copyright now has to function in a system in which open and fair competition was proclaimed a constitutional principle.[201] The relationship between copyright and open and fair competition as a motor of the market economy is clarified by the Law of 22 March 1991 on competition and the limitation of monopolistic activity on the goods market ("Anti-Monopoly Law").[202]

In the original version of the Anti-Monopoly Law, the relations regulated by the laws on the legal protection of inventions, industrial models, trademarks,

200. Art.44 (1) Const.1993. *Supra*, No.371.

201. Art.34 (2) Const.1993 provides: "The economic activity may not be aimed at monopolization and unfair competition." Compare art.10 (1) para.2 CC RF which prohibits the use of civil rights "with the intention of limiting competition, as well as the abuse of a dominant market position".

and copyrights were excluded from the area of application "with the exception of those cases in which these rights were used on purpose [*umyshlenno*] by their holders with the intention of the limitation of competition".[203] This provision was rewritten by a legal amendment of 25 May 1995 as follows: "This Law does not cover relations connected to subject matter of exclusive rights with the exception of cases in which agreements on their use are intended to limit competition".[204] License agreements which limit competition are, therefore, subject to the anti-monopoly legislation, but the Russian legislator gives no indication at all of the criteria to be used to determine which of these agreements are allowed and which are not. For lack of relevant findings, it is therefore impossible to estimate the precise scope of this provision. We can only remark that this text shows that the Russian legislator makes a difference between the existence of exclusive rights to certain objects, on the one hand, and their use, *i.e.*, the exercise of the exclusive rights, on the other hand. This exercise of the exclusive rights is subject to the anti-monopoly legislation solely if it is aimed at the limitation of competition.

Not only the openness of competition but, also, its fairness is regulated by the Anti-Monopoly Law. In the original version of this Law, one of the unacceptable forms of unfair competition was considered "the non-allowed use of a trademark, company name, or the branding of a product, as well as the copying of form, packaging, or external design of a competitor's products".[205] Literally, this meant that the slavish imitation of any form, packaging, or external design of a product without any additional circumstance was considered unacceptable. There was, therefore, no such thing as the "freedom to copy". Taking into account the absence of any limitation in time, one may wonder whether this did not make the protection of works of applied art by copyright or industrial design law completely irrelevant. A limitation of this much too broad prohibition of slavish imitation could only possibly be reached by reading this prohibition in conjunction with the general prohibition of unfair competition.[206]

The prohibition of slavish imitation, without any additional requirement, is in our opinion irreconcilable with the fundamentals of a free market. Part

202. Zakon RSFSR, "O konkurentsii i ogranichenii monopolisticheskoi deiatel'nosti na tovarnykh rynkakh", 22 March 1991, *VSND i VS RSFSR*, 1991, No.16, item 499, *SZ RF*, 1995, No.22, item 1977, coordinated translation in *SD*, 1995, No.2, 45-72. For a discussion of this Law, see *supra*, No.429.
203. Art.2 (2) Anti-Monopoly Law.
204. Art.1 (3) b) Federal'nyi Zakon RF, "O vnesenii izmenenii i dopolnenii v Zakon RSFSR 'O konkurentsii i ogranichenii monopolisticheskoi deiatel'nosti na tovarnykh rynkakh'", 25 May 1995, *SZ RF*, 1995, No.22, item 1977, *Rossiiskaia Gazeta*, 30 May 1995.
205. Art.10 Anti-Monopoly Law. On the importance of this provision for the possibility of granting legal protection to non-registered trademarks, see Dietz, A., "The New Law on Trademarks, Service Marks and Appellations of Origin of the Russian Federation. A modern regulation with some problem areas", in Elst/Malfliet 191.
206. Dietz 1994a, 660-661.

of the essence of the freedom of economic business and competition—which were constitutionally fixed in the Russian Federation[207]—is that the economic actors desire to lower costs in order to offer their products and services to the consumer more cheaply than can the competition for similar products and services. One way of lowering costs is to reducing investment in the development of new products. This is possible by, among other things, the slavish imitation of the competitors' products. In a free market the freedom to copy is guaranteed in principle as a logical corollary of the freedom of competition, insofar as the copied product is not protected thanks to a particular quality[208] by a temporary, exclusive right. A slavish copy of a product, which does not have such qualities, is in our opinion only to be considered "parasitic" or unjustifiable in special circumstances, such as "passing off", in which case the rules of unfair competition are applicable.

By the amendment of 25 May 1995,[209] the paragraph from article 10 Anti-Monopoly Law just discussed was reformulated as follows: "the sale of a product with illegal use of the results of intellectual activity and herewith equated means of individualization of a legal person, the individualization of products, the execution of works and services" is a form of unfair competition. One and the same action (to wit the sale of a product which is an imitation of another product without the permission of the creator of the latter) is, thus, a violation of the exclusive intellectual rights as well as of the prohibition of unfair competition. The exclusive rights are in this manner partly incorporated into the system of unfair competition.[210] The distribution of unauthorized copies of an author's work by sale (but by no other action) is, therefore, not only a violation of copyright but is also a form of unfair competition.[211] This gives the Anti-Monopoly Committee the power to act against the sale of pirated works—a competence which this Committee will be in no hurry to exercise, considering the subordination, which we have already mentioned, of the issue of unfair competition to the struggle against the formation of a monopolies.[212]

207. Art.8 (1) Const.1993.
208. Such as, for *inventions*: novelty, invention and industrial applicability (art.4 Patentnyi Zakon RF, 23 September 1992, *VSND i VS RF*, 1992, No.42, item 2319); for *users' models*: novelty and industrial applicability (art.5 Patentnyi Zakon RF); for *industrial models*: novelty, originality and industrial applicability (art.6 Patentnyi Zakon RF); for *author's works, including computer programs and databases*: creativity (art.6 (1) CL 1993; art.3 (2) CL); for *selections*: novelty, capacity of distinction, uniformity and stability (art.4 Zakon RF, "O selektsionnykh dostizheniiakh", 6 August 1993, *Rossiiskaia gazeta*, 3 September 1993); or for *chips*: originality (art.3 Zakon RF "O pravovoi okhrane topologii integral'nykh mikroskhem", 23 September 1992, *VSND i VS RF*, 1992, No.42, item 2328).
209. Art.1 (11) b) Federal'nyi Zakon RF, "O vnesenii izmenenii i dopolnenii v Zakon RSFSR 'O konkurentsii i ogranichenii monopolisticheskoi deiatel'nosti na tovarnykh rynkakh'", 25 May 1995, *Rossiiskaia gazeta*, 30 May 1995.

The reformulated article 10 Anti-Monopoly Law does not explicitly express itself on the acceptability of slavish imitation of creations which are not protected by an exclusive right, *i.e.*, the freedom to copy. This means that slavish imitation is only acceptable when it is misleading or falls under the general definition of unfair competition, *i.e.*, "any action whatsoever of an economic subject aimed at acquiring privileges in entrepreneurial activity, contrary to the provisions of the legislation in force, the customs of business, the requirements of good behavior, reasonableness and justice, and likely to cause or having caused loss to other economic competitors or damage to their business reputation".[213] Practice will have to show whether slavish imitation in itself can be qualified as "parasitic" or "unfair" under this definition.

2.4. The Rehabilitation of Post-Communist Copyright

1063. The political and economic system transformation has restored copyright to its market-ordering, social, and personal-law function. Even though this is an honor for this legal institution, it also means a greater responsibility. Now that freedom of enterprise on the basis of private property rights and freedom of creation have become the motors of the transformation process in Russia, the full weight of the social and economic protection of the author rests on copyright. When the state completely or partially withdrew from different spheres of life, the center of gravity of the Russian legal system moved from public law to private law. The horizontal legal relationships are no longer continuously crossed by the vertical legal relations, which implies a higher valuation and a growing relevance for civil rights in general, and, with regard

210. We find a comparable confusion between the system of copyright and that of unfair competition in the Recommendation of the Judicial Chamber for Informational Disputes with the President RF of 19 May 1994, in which is acknowledged for the first time that the broadcasting schedules of radio and television, intended for the printed press, are copyright protected works, but then the broadcasting corporations are allowed to use "the legal means of protection against the unfair competition ("piracy") with the distribution of broadcasting schedules, including the [demand for] compensation of the damage done by the one who violates the right to intellectual property": point 5 Rekomendatsiia Sudebnoi palaty po informatsionnym sporam pri Prezidente Rossiiskoi Federatsii, "O pravovoi prirode programm tele- i radioperedach, publikuemykh v periodicheskikh pechatnykh izdaniiakh", 19 May 1994, *Rossiiskaia gazeta*, 28 May 1994.
211. In this new version, the protection against unfair competition does no longer apply without limitation, as only the *illegal* use of the results of intellectual activity are mentioned, and the use of such results after the expiry of the term of protection without permission of the holders of rights is by definition not illegal.
212. Dillenz 21 quotes one decision of the Anti-Monopoly Committee (27 December 1995) concerning counterfeiting of computer programs.
213. Art.1 (5) Federal'nyi Zakon RF, "O vnesenii izmenenii i dopolnenii v Zakon RSFSR 'O konkurentsii i ogranichenii monopolisticheskoi deiatel'nosti na tovarnykh rynkakh'", 25 May 1995, *Rossiiskaia gazeta*, 30 May 1995. See also Dillenz 20.

to the legal relations surrounding the creation and exploitation of works of literature and art, copyright in particular. This rehabilitation of copyright as a legal institution within the entirety of legal norms which regulate creation and enterprise in the cultural sector, is a direct consequence of the system transformation and, in particular, of—generally speaking—the "privatization" of social life in Russian society at the end of the twentieth century.

1064. The author now controls his own destiny, which implies not only great liberty and autonomy but, also, responsibility for his own actions. Ultimately, the author and his negotiating position determine who will benefit economically from the exploitation of his work. He has to gain his position in the marketplace with economically strong exploiters as contractual partners, exploiters who can often use the advantage of a monopoly inherited from the period of the command economy against the author. The cultural consumers are also politically independent and use the freedom of choice they have gained. The author must now, in the first instance, try to obtain their favor rather than that of the state.

GENERAL CONCLUSION

1065. In this book our intention was to examine the influence of the all-engrossing transition in Russia with reference to the nature, contents, and function of copyright within the entirety of legal norms regulating creation and enterprise in the cultural sector.

Soviet Copyright

1066. With regard to the legal nature of copyright we have discovered, not without surprise, the "ordinariness" of Soviet copyright. As a formal legal construction, socialist copyright did indeed not distinguish itself from the Western-European, continental copyright. Merely by the creation of a work, a subjective claim on an immaterial good originated, sanctioned by the objective right and vested in its creator, and this without any formality or governmental mediation. Copyright was, in other words, a legal institute which everyone could enjoy who fulfilled the objective conditions of entry to the system: the ideological loyalty of the author was not a requirement for the work to be protected by copyright. In this subjective right, which was conceived as a unity of closely linked economic and moral rights, the enduring personal link of the author with his work was juridicially emphasized. The idea that copyright could be some sort of alienable intellectual property right was, however, considered a bourgeois concept at the service of capitalist entrepreneurs and, for that reason, was unanimously rejected by Soviet legal theory.

1067. With regard to the contents, the level of copyright protection was significantly lower than was the case in the same period in western Europe, mainly because of the short period of protection and the many exceptions to the author's property rights. The administrative model author's contracts and the legally fixed tariffs for author's remunerations—which were to give shape to the protection of the author against the user's greediness—were, however, markedly author-unfriendly in a number of their provisions.

1068. This generally low level of protection, and the ambiguous regulation with regard to author's contracts and remunerations, *i.e.*, the *internal specificity of socialist copyright*, could only be explained from the Marxist-Leninist ideology which *a priori* posited the harmonious reconciliation of the interests of the author, the exploiter, and the end user. This harmony proceeded from the common goal which according to Marxism-Leninism these three actors sought: the construction of a communist society.

The image of man which was at the basis of this theory—namely that of the artist who does not create for himself but for the collectivity and who does not aim for his self-expression but for the expression of the objective truth as understood by the Communist Party—was an ideological construct with no link to reality. The theory of the harmonious reconciliation of interests was a myth, which had to legitimize the subordination of the author's interests to the interests of society.

Through a chain of identifications this common interest was equated to the interests of the state and, finally, of the party. This could only be understood because of the totalitarian claim of the Communist Party in every aspect of social life. In reality, the Communist Party's power rested on two pillars: political and economic monopoly. Therefore, all fundamental rights and freedoms, including the freedom of speech and artistic creativity, were made subordinate to the communist eschatology, and private persons were denied almost every possibility of independent enterprise.

In this political and economic context copyright—as a civil-law regulation of the legal relations which originate in connection with the creation and the use of works of art and literature—was completely subordinate to the political-constitutional regulation of the intellectual, creating activity, and to the economic-administrative legal regime for the entrepreneurial activity. If copyright contained *personal-law components*, this was not to protect the most individual expression of the most individual emotion but to support the development of the collectivistically conceived personality of the creative *homo sovieticus*. If copyright had an *economic function*, this was only as a right of remuneration to compensate the artist for his contribution to the extension of the socialist art heritage. If copyright had a *social role*, this was not to protect the author from the economically stronger exploiter but was one of the instruments to get the author involved in the great communist educational project. It was because of this subordination, this relative unimportance of copyright within the entirety of legal rules regulating creation and enterprise in the cultural sector, that the Soviet copyright distinguished itself—even more than by its contents—from Western copyright. We have called this the *external specificity of the Soviet copyright*.

1069. Our research has also shown that since the mid-seventies, and namely after the USSR had acceded to the most important international human rights treaties and the Universal Copyright Convention, the internal coherence of the legal system threatened to be lost both at the level of human rights and copyright.

How could one sign treaties in which a natural-law concept of human rights was proclaimed and, at the same time, maintain in the Constitution a strict positivist vision of fundamental rights? And for how long could one maintain a system in which foreign authors and (capitalist!) entrepreneurs were privileged over Soviet authors and Soviet exploiters, without undermining the theory of the harmonious reconciliation of interests? The somewhat clumsy adjustment of the national legislation to the UCC, moreover, made different copyright provisions multi-interpretable so that, on many parts of the legislation, great divisions of opinion arose within legal theory. Furthermore, in legal doctrine increasingly more often suggestions for amending the law could be heard, suggestions which threatened the internal specificity of the Soviet copyright.

The kernel for change was, therefore, present years before the great political and economic changes began.

The System Transformation

1070. Gorbachev's accession in 1985 had no immediate influence on Soviet copyright but it did, quite quickly and drastically, change the political and economic environment in which copyright had to function. Initially, the new party chairman seemed to strive for the improvement through reform of the stagnating system, but very soon it became clear that the system itself was the obstacle to progress. In 1990 the regime's ideological mainspring broke: at the same time, the monopoly of power of the Communist Party was struck from the Constitution, and the equality of the property of the citizen with socialist property was acknowledged. The political and economic system transformation at that moment became irreversible, and would aim at the construction of the rule of law and the introduction of a market economy. The Soviet state had by then eroded to such an extent, and was so strongly entwined with the Communist Party, that the abolition of the latter *en passant* also entailed the disappearance of the former USSR.

The idea that the state was subordinate to the law, and that also that the legislator himself was bound to respect the inalienable rights and freedoms of man, were completely revolutionary notions for Russia. A new Constitution and a flood of legislation gave shape to principles such as an enforceable hierarchy of standards, a constitutionally acknowledged political and philosophical pluralism, the separation of powers, the recognition of the independence of the judiciary power, and of course the unconditional acknowledgement of human rights.

All these political novelties in Russian history were not the result of a long, cultural-historical process. The rule of law is a concept which was introduced by the government itself. This is problematic because the social basis for the introduction of the concept of the rule of law is lacking: civil society, in which a plurality of values, ideas, interests, and opinions can be articulated and structured in a manner through which they can influence the decision-making process, and the legal consciousness of the Russian population are developed only weakly.

Moreover, the State itself, as the initiator of the introduction of the rule of law, determined the boundaries within which civil society could function freely. In the cultural sector, this was reflected in the firm grip, which the government holds on the distribution of cultural goods through the imposition of a registration or licensing duty on publishing houses, cinemas, etc. Moreover, the economic crisis causes the call for governmental support for the cultural workers and enterprises to increase rather than decrease. In its specific cultural policies, the Russian government reacts to this particularly with general, neu-

tral intersectoral or sectoral measures to support the cultural industries. Only with respect to the regional press—which, not incidentally, already plays an important role in the formation of public opinion—are there few guarantees against political arbitrariness in the granting of subsidies.

1071. The decision to dismantle the planned economy and to introduce a free market was also taken in the inner chambers of the highest organs of party and state. The freedom of enterprise and trade and the right to private property are acknowledged in principle, but the government keeps tight reins on this process of privatization (in the broadest sense). For a number of activities, private entrepreneurship is only permitted after the acquisition of a permit, the privatization of state enterprises is a painful process in a number of sectors, including the cultural, and even when the effective privatization of a company is achieved, the state often maintains a controlling stake in the privatized enterprise (or the state monopoly is simply replaced by a private monopoly). This naturally does not detract from the fact that the basic principles of a free market (private property, free and fair competition, free entrepreneurship and trade) *are* accepted and even constitutionally guaranteed. But the government itself retains its presence as an active cultural mediator on the market of cultural goods.

1072. At an economic as well as an intellectual level we have, therefore, been able to conclude that although the government accepts the complete legal capacity of the citizens, it maintains an important—and sometimes even dominant—position in society. There is probably no alternative to this continuing, albeit somewhat more distant, government interference in social and cultural life, taking into account, on the one hand, the fact that the dismantling of a totalitarian state presupposes a simultaneous transformation of the social, political, and economic system, and, on the other hand, that for cultural-historic reasons the seeds of the rule of law and the market economy fall on stony ground in Russia. This also means that state and law maintain their earlier, educational function. The purpose of this educational project is no longer the creation of a *homo sovieticus* who completely conforms his expressions and behavior to the objective, social interest known only to the Communist Party but, rather, the creation of a responsible, autonomous "legal subject".

1073. The transition in Russia has, for now at least, resulted in a much clearer division between the private and the public spheres, and the space for the individual free of state interference has become much greater. The Russian authorities have drawn the lines within which the mutual legal relations of the citizens, and their relations with the state, must adapt to the new rules. But at this stage of the transformation the Russian State does not limit itself to providing standards and adjudicating; it also remains an active participant in social affairs and retains—albeit at a greater distance than before—control of the other participants in the field of cultural mediation in a way which to

Western standards has to be seen as problematic in a democracy under the rule of law and with a market economy.

The System Transformation and Russian Copyright

1074. The transformation of the ideological, political, economic, and socio-cultural systems, combined with increasing pressure from the West, also left its marks in copyright law. This was first reformed by the Fundamentals of Civil Legislation of the USSR and the Republics of 31 May 1991, which in a summary regulation pushed through an important modernization of copyright. The copyright provisions of the Fundamentals 1991 were very quickly replaced by the Law of 23 September 1992 on the legal protection of computer programs and databases and a general Law of 9 July 1993 on copyright and neighboring rights. Furthermore, Russia acceded to the Berne Convention on the protection of works of literature and art. Besides a technical legal analysis of this legislation, we have investigated what influence the system transformation has had on legal matters, the content and the position of copyright within the entirety of norms concerning creation and entrepreneurship in the cultural sector.

1075. With regard to the juridical nature of copyright, its characterization as a subjective right is retained. The rejection of the concept of intellectual property is also maintained by the greater part of legal theory, no longer because it is a despicable capitalist bourgeois concept but because the concept of property gives insufficient expression to the complex character of copyright as a combination of strongly intertwined personal and economic rights, which gives the enduring bond between the author and his work a legal status. This personal right approach follows the earlier lines of thought in Soviet legislation and legal doctrine. In some ways it was even radicalized, *e.g.*, through the abolition of all earlier exceptions to the principle that only the natural person who created a work can be considered its author.

1076. The content of post-communist copyright was greatly changed in comparison with Soviet copyright in such a way that the legal confirmation of a pre-existing harmony of interests was no longer the legislator's rationale but, rather, the institution of a law to bring about a balancing of conflicting social interests. The greater systematization, the modernization, and the recognition of the exclusivity of the property rights, the recognition of a right to remuneration for the home copying of audio and audiovisual works, the strict linking of exceptions to copyright to specific purposes, the extension of the term of protection, with a special method of calculation for authors who were victims of Stalin's repressions, the broadly conceived category of neighboring rights, the regulations concerning collecting societies, and sanctions for infringements of copyright and neighboring rights are all evidence of the fact that—in the Copyright Law of 1993—Russia has joined in with the traditions and the level of protection provided by copyright legislation in Western Europe.

In the relationship between author and end users, whose interests in a market economy are undoubtedly opposed to one another, this means a clear strengthening of the legal position of the author: the legislator was well aware that account had to be taken of interests which legitimated exceptions to the property rights of the author, but that this should not lead to the loss of copyright's stimulating effect on creation and dissemination.

In the relations between author and exploiters the Russian legislator has taken an equally author-friendly course in which the basic principle of freedom of contract was corrected by provisions of imperative and supplementary law, including in particular the possibility of the authorities to fix legal minimums for author's fees. In this manner, post-communist copyright was given an unambiguously social function.

All this shows that the contents of post-communist copyright take the basic principles of the market as their foundation, but correct these in order to protect the author, without losing sight of the economic and cultural interests of other market actors.

1077. In our view, the removal of the internal specificity of socialist copyright cannot be seen apart from the new environment in which copyright has to function: that of the developing market and the rule of law, in which economic and personal liberty and the development of the individual are central. In this context, copyright—within the entirety of norms which regulate creation and entrepreneurship in the cultural sector—is as part of the civil law no longer subordinate to political-constitutional government intervention in artistic creation nor to the economic-administrative planning of entrepreneurship in this sector. The retreat of the state from various spheres of life has shifted the center of gravity of the Russian legal system from public to private law. With regard to the legal relationships concerning the creation and the exploitation of authors' works, the system transformation has greatly increased the gravity of copyright as a legal institute. The transformation of the political and economic systems has restored copyright to its market-ordering and, at the same time, social functions. The changes in Russian copyright legislation in the last decade are far more than a mere modernization. Against the background of the transformation of the political-economic system, they appear a Copernican revolution which places the interests of the individual artist striving for artistic self-development at the center of copyright's system, relegating the interests of the community and of the state to peripheral spheres.

1078. This rehabilitation of post-communist copyright immediately placed a great responsibility on the authors themselves. In future, they have to fight for their social and economic position in the market of cultural goods without state support. The state has almost entirely left the field of copyright to the private sphere. In this stage of the transition, such liberalism—which involves a radical break with former legal culture and tradition—is problematic since the State

may have recognized the intellectual and economic freedom of private persons but, nevertheless, retains an important role in the cultural sector in relation to economic initiative and control over the contents of the disseminated cultural products. This structural discrepancy between a copyright entirely submerged in private law, and the relatively strong influence of administrative measures in the legal regulation of the production and distribution of cultural goods, is one of the causes of the rampant piracy of copyrighted works in Russia. The lack of enforcement of copyright is, in our view, not only due to the passivity, or a lack of experience and material means, of the relevant judicial and police organs, or the Russian people's lack of legal consciousness, but, also, to the unequal rates at which various sub-processes of the system transformation take place. It seems that the State withdrew too hastily from the domain of copyright, leaving the author defenseless in an uncompleted market.

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References in Russian are transliterated according to the Library of Congress system. It is, however, not an easy task to apply this system consistently, when referring to the names of Slav (mostly Russian) authors who have published in a Western language. In order to reconcile the requirement of consistency in the transliteration (a single surname should always be given in the same form), and the necessity of making it possible to find the sources referred to (which requires that the author's name be spelt as it appears on the book or article cited), we have opted for the following system. In the abbreviated citations names which occur more than once and are spelt in different ways (*e.g.*, Savelyeva and Savel'eva), are consistently spelt according to the Library of Congress transliteration (thus, Savel'eva). In the complete references as given below, the author's name is spelt in the way it appears on the work concerned (thus, Savelyeva). If only one work by an author is cited and the author's name as given on or in that work is spelt in a manner other than the Library of Congress transliteration system, we have retained the spelling there used (*e.g.*, Stoyanovitch rather than Stoianovich).

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