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LEGAL OBSERVATIONS
OF THE EUROPEAN AUDIOVISUAL OBSERVATORY

Transformation of Authors' Rights and Neighbouring Rights in Russia

by Dmitry Golovanov

EDITORIAL

To turn intellectual property into gold is a key business for the creative audiovisual industry. The avalanche of national and world-wide copyright piracy claims concerning audiovisual works is further proof of this. International agreements such as the TRIPS of the WTO take into account the economic value of holding copyright and aim to ensure that copyrights are internationally respected and so does national legislation protecting authors' rights and neighbouring rights.

Whereas it is true that intellectual property can be turned into gold, Shakespeare also reminds us, through the trials and tribulations of a rather brilliant would-be-lawyer, that "all that glisters is not gold". In order to judge the financial value of intellectual property, we need to know how and with whom relevant rights originate, how to contract for ownership or use, how and what amount of money to collect for licences and, of course, how to fight legally against piracy.

Russia is a very important player in the economics of copyright and in addition, it is one of the countries that has recently revised its legal framework on authors' rights and neighbouring rights – not least with a view to possibly join the WTO. All in all this provides enough reason to offer you this IRIS *plus*, in which Dmitry Golovanov gives a clear albeit colourful picture of the problems, development and current situation of the institution of Russian copyright law.

I highly recommend that you read it!

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Transformation of Authors' Rights and Neighbouring Rights in Russia

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Introduction

In the course of the 20th century, the sphere of intellectual property law in Russia missed several chances to become well-established. The first detailed and balanced national Statute on copyright was enacted in 1911, although the urgent need for reform of the earlier legislation was proclaimed by the Emperor's State Council in 1897. Six years after the adoption of the quite progressive 1911 piece of law the Communist Revolution started a regime that challenged the whole economic system, including the then applicable intellectual property rights concept. The Soviet period was marked by a very long path from revocation of the tsarist law and complete negation of author's rights to a curtailed and limited admission of rightsholders rights and interests in the Civil Code adopted in 1964. The Code granted a lower level of protection than what was required by international treaties on copyright. The Soviet Union joined these treaties, but did not adapt its own legislation. In the late 1980s when the need for economic liberalisation and *perestroika* was acknowledged the drafting of new legislation started. The last Soviet law dealing with copyright issues was adopted in June 1991 just six months before the fall of the Soviet Union.

The years 1992-2007 constituted a transitional period. Legislation enacted in the very beginning of the 1990s was liberal enough and guided by the best examples of international practice, even though the existing system of copyright protection was still being criticized for its incompleteness and lack of effectiveness. In 2006 the government introduced a bill that codified all norms and institutions in the sphere of intellectual property law. Representatives of experts and the business community as well as government officials expressed diverging opinions regarding its content. While some said that the new law would destroy the whole sphere of intellectual property rights; others tried to convince the public that the new regulation would be a breakthrough towards achieving a new high level of protection of intellectual property in Russia. With the entry into law of the bill on 1 January 2008 the question is how profound these changes are and what kind of consequences they may give rise to.

Intellectual Property Legislation

At the end of the 1980s, Russian intellectual property law differed in crucial ways from European standards. The Civil Code of the Russian Soviet Federative Socialist Republic of 1964 (hereinafter the Civil Code 1964)[1] promoted in its section 4 a system of copyright protection based on detailed statutory regulation of rightsholders' activities, and consequently provided a very low level of contractual freedom. The practice of relevant governmental authorities of introducing model contracts was widespread. Furthermore, the Civil Code 1964 included a number of wide-reaching exceptions to authors' rights protection. For instance, Art. 492 para. 4 allowed the use of any art works in television and radio programmes without the author's permission or remuneration. In practice the use of this exception flourished.

As the state of economic affairs changed drastically, an urgent need for a revision of the intellectual property regulation emerged. On 31 May 1991 the Fundamentals of Civil Legislation of the USSR and [its] Republics[2] (hereinafter "Fundamentals"), a framework statutory act, was enacted. This act was to enter into force on 1 January 1992. As in December 1991 the Soviet Union ceased to exist, the Supreme Soviet (parliament) of the Russian Federation on 14 July 1992 passed a resolution[3] according to which the Fundamentals entered into force in the Russian Federation on 3 August 1992 complying in part with Russia's Constitution.

There and then an informal decision was made to draft a series of normative acts regulating step by step the different areas of intellectual property law, instead of codifying it in one single act. The only explanation for choosing to regulate the different IP areas in different acts could be the rapid change of the economic situation calling for a prompt modification of the existing legal system.

On 23 September 1992 the Statute "On legal protection of computer programmes and databases"[4] (hereinafter "Statute on Programmes Protection") was adopted. On 9 July 1993, the Statute "On Authors' Right and Neighbouring Rights"[5] (hereinafter "Copyright Statute") was passed. Although these two acts included mostly similar rules, some essential collisions occurred. For instance, both statutes granted a person whose rights were violated the right to demand compensation. However, the amount of compensation differed in the two acts; and what is more important, according to the Statute on Programmes Protection the sanctions were to be applied only in cases of commercial use of programmes by a wrongdoer, while the Copyright Statute rendered lawful the imposition of compensation in any case of violation of a rightsholder's rights. Both Statutes had equal legal force and different courts took different positions as to which statute would take priority. Their positions were often diametrically opposed to each other.

The Copyright Statute entered into force on 3 August 1993, the day of its publication. At the same time, the Fundamentals' provisions devoted to authors' rights became invalid. However, the Copyright Statute did not annul the Civil Code 1964.

It is important to mention that the Russian Constitution and the Civil Code of the Russian Federation (Part 1, Part 2, Part 3 adopted in 1994, 1996, 2001 *pro tanta*) were adopted after the Copyright Statute had entered into force. The Constitution guarantees the freedom to create literary, artistic, scientific, technical works as well as other types of works; and declares that intellectual property shall be protected by law (Art. 44). Another important rule is to be found in Art. 71, establishing the Federation's exclusive competence over copyright issues. According to this rule only federative acts may regulate intellectual property issues. On this point, the Constitution and the Copyright Statute came into conflict: the Copyright Statute assumed that subjects (constituencies) of the Russian Federation (republics) were allowed to pass acts regulating authors' and neighbouring rights matters. This conflict was removed in 2004 with an amendment to the Copyright Statute.

In 2006 the Russian Federation accomplished its planned introduction of new legislation regulating intellectual property protection. On 18 December 2006, President Vladimir Putin signed into law Part 4 of the Civil Code.[6] According to its Consummation Statute the Code (except for some provisions) entered into legal force on 1 January 2008. Part 4 regulates all possible intellectual property relations, including authors' rights and neighbouring rights, industrial property (patent law, know-how, trademark, firm name, commercial name, selective breeding results, topography of integral circuits, use of results of intellectual activities as part of technology). From 1 January 2008 on, 56 normative acts of the Soviet Union and Russia (including the Statute on Programmes Protection, the Copyright Statute, and what was left of the Civil Code 1964) became invalid.

Part 4 of the Civil Code has a very complicated structure. It includes a chapter on General Provisions (Number 69) that provides for the basic rules applicable to the system of intellectual property rights in general. In addition, all provisions of Part 4 shall be applied in

accordance with Part 1 of the Civil Code that sets out the general provisions of the whole civil law system. At the same time Part 4 includes some exceptions from this rule.

Eight other chapters of Part 4 are devoted to the different institutions of intellectual property law. Chapters 70 and 71 regulate authors' rights and neighbouring rights *pro tanto*. It is noteworthy that Chapter 71 includes also a part on general provisions. The complex structure of Part 4 was justified by the goal to fully codify a non-contradictory intellectual property law.[7]

Opponents of the adoption of Part 4 insisted that integration of all intellectual property law rules into one act would destabilize the Civil Code, as the need for amendments and changes of concrete rules shall arise always. (Traditionally, civil legislation in Russia includes two levels: a set of firm general issues regulation provided by the Civil Code *per se* and a detailed regulation of concrete institutions provided by statutory acts.) Another argument against the codification was that a lot of the regulations contained in Part 4 are administrative and should not have been included in the Civil Code.[8] However, the interests of systematisation prevailed.

Despite the fact that Part 4 of the Civil Code aims at a complete consolidation of intellectual property rules into one act, subordinate acts shall also regulate certain matters. According to Art. 3 of Part 1 of the Civil Code, civil law regulations shall include presidential decrees and resolutions of the Government. These acts must comply with the Civil Code. This Article also states in general that government authorities adopt acts containing civil law provisions in the cases prescribed by the legislative acts.

Part 4 of the Civil Code elaborates upon this competence of government authorities in intellectual property matters. Its Art. 1246 para. 1 stipulates that a body authorised to exercise normative regulation in the sphere of authors' rights and neighbouring rights shall adopt normative acts in cases directly specified in the Civil Code. At present the problem for the executive powers is to define which body shall obtain such a competence. In the course of the past four years these functions were transferred repeatedly from one authority to another. At the moment there are two bodies authorised to pass normative acts concerning authors' rights and neighbouring rights: the Ministry of Culture and Mass Communication and the Federal Service on Supervision in the Sphere of Mass Communications, Telecommunications and Protection of Cultural Heritage under the Prime Minister.

Finally, some experts consider the decisions of the higher courts of the Russian Federation to be another source of law. This concerns decisions of the Constitutional Court, the Supreme Court, and the Supreme Arbitration Court which interpret legal provisions that influence the practice of other courts and law-enforcement authorities. All of the higher courts have issued a number of rulings dealing with authors' rights and neighbouring rights issues.

The adoption of Part 4 of the Civil Code was to a high degree justified by the need to bring national legislation into line with those international treaties which Russia has joined or plans to participate in in the near future. Today Russia is a party to the following most important international treaties concerning intellectual property: the Berne Convention for the Protection of Literary and Artistic Works of 9 September 1886 (entered into legal force for Russia 13 March 1995);[9] the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations of 1961[10] (26 May 2003); the Universal Copyright Convention of 6 September 1952 (27 May 1973);[11] the Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms[12] (13 March 1995).

Russia is not a contracting party to the World Intellectual Property Organization's WCT, WPPT, or the Treaty on the International Registration of Audiovisual Works. It is not a member of the WTO, and, hence, so far is not bound by the TRIPS Agreement. However, in the course of drafting Part 4 the authors of the bill pledged that compliance with the aforementioned treaties would be provided. It is supposed that EC Directives regulating intellectual property issues were also taken into consideration.

Objects of Authors' Rights and Neighbouring Rights. Emergence of "Intellectual Rights"

The General Provisions Chapter 69 of Part 4 of the Civil Code includes a closed list of results of intellectual activities that shall be protected by law. Art. 1225 specifies the objects (subject matters) that shall be protected under authors' rights and neighbouring rights law. They are: works of science, literature and art; computer programmes, performances, phonograms, databases, broadcasting and cablecasting of television (radio) programmes. Chapter 70 of Part 4 of the Civil Code devoted to authors' rights extends the list of objects of authors' rights, and makes it exemplary. Any works expressed on a material carrier shall enjoy the protection of authors' rights. Chapter 70, on the one hand, establishes a general regime for all objects protected by authors' rights and, on the other hand, provides for specific regulation for certain objects, namely derived works (translations, adaptations, screen versions, etc.), composite works (encyclopaedias, databases, etc.), audiovisual works, and computer programmes.

Concerning composite works, Art. 1260 para. 2 contains the important rule that its compiler (author) shall have authors' rights in his or her contribution to this kind of work, namely the way in which the composed materials were selected and ordered. Exclusive right to use some of the composite works is conferred upon other subjects. In particular, the publisher of encyclopaedias, newspapers or other periodicals shall have the exclusive right to use such periodicals. The producer of a database shall have the exclusive right to use it. The scope of the rights of authors of these works is unclear.

Both the Copyright Statute and Part 4 of the Civil Code define audiovisual works as a series of fixed related images (with or without accompanying sound), susceptible of being made visible and audible (where accompanied by sound) via suitable technical equipment.

In order to establish and materialise authors' rights and neighbouring rights no registration or other formalities are required. At the wish of its rightsholder, computer programmes and databases may be registered with the federal executive body on intellectual property (Art. 1262 para. 1). An analogous approach was followed by the Statute on Programmes Protection and the Copyright Statute. Part 4 of the Civil Code introduced a new duty of the rightsholder to obtain the registration of the transfer of the exclusive right for a computer programme or a database for each object that has already been entered into the register. Until then a rightsholder had the right, but not the duty, to register the transfer of his exclusive right. Non-observance of this rule will result in the nullity of the transfer (Art. 1232 para. 6 of Part 4 of the Civil Code).

Objects that shall not be considered as objects of author's rights are the following: official documents of state bodies and municipal authorities, official documents of international organizations as well as official translations of such documents; state symbols and signs, as well as municipal symbols; works of folklore; pieces of information of solely informative nature (including reports on facts of the day, public transportation and television schedules, etc.).

The legal protection does not extend to ideas, concepts, principles, methods, processes, systems, means, discoveries, facts and programming languages. This list is quite innovative as it names a number of categories that were not named in earlier legislative acts.

Subjects of Authors' Rights and Neighbouring Rights

The author is traditionally a key subject in the concept of intellectual property. Both the Copyright Statute and Part 4 of the Civil

Code name only natural persons as original rightsholders. An author is always the person who generates the creative part of the work (Art. 4 of the Copyright Statute, Art. 1228 para. 1 of Part 4 of the Civil Code). Different from previous legislation, Part 4 stipulates that persons providing technical, advisory, or financial assistance to an author, as well as those supervising an author's work shall not be considered as authors (Art. 1228 para. 1 of the Code). This norm may be applied to some cases concerning works of art. For instance, consultants and technical staff participating in an audiovisual work production may not claim authorship. A person whose name is contained in the original work or its copy shall be considered as the author of such a work unless proven otherwise.

In contrast, a legal entity (organisation) shall not have the status of an author. As a result, material rights to any object of copyright law are always limited in time by a term that correlates with the duration of an author's life.

A different situation existed under the Soviet system: organisations could be considered as original authors. That approach caused a variety of problems concerning rights in television films produced by Soviet studios. The latter were treated as holders of authors' rights according to Art. 486 of the Code 1964. The authors' rights of organisations had unlimited protection (Art. 498). These rights could be passed on either to a party in an agreement, or to the studio's successor in cases where the movie (film) producing studio was reorganised, or to the State if a studio was liquidated. Often, however, rights to intellectual property objects had not been recorded on the company's balance sheet of intangible assets. The reason for this was the fact that movies were produced on the basis of governmental orders. Production of works was funded from the state budget. Government authorities expected to hold all rights to the products of these studios, although according to the civil law they were not allowed to hold any proprietary (economic) rights (including intellectual property rights). Besides, according to the Code 1964 script writers, composers, directors, producers, directors of photography and other authors that contributed to the movie-making process had the rights to separate use of their works: that is, to parts of the whole product.

At the beginning of the 1990s major state-owned production companies were restructured, privatised or liquidated: a number of new production companies emerged. The new companies were as a general rule associates of the "majors" that provided umbrellas for the actual producers. However, often the new companies did not obtain any rights, while the old majors in the course of time disappeared. Parallel with this development, the Government passed a number of resolutions by which all rights in movies and original copies of the works were transferred to the governmental archives organisations (foundations). At the same time, some authors that had participated in a movie-making process claimed to be the proper rightsholders. They referred to the Copyright Statute as the act to confirm their rights. As a result of related lawsuits, a very tangled jurisprudence emerged. Unfortunately the Supreme Court as well as the Supreme Arbitration Court did not propose any solutions to resolve these collisions of interests. Neither the Fundamentals, nor the Copyright Statute, nor Part 4 of the Civil Code include any provisions that would clarify the principles for identifying "proper" rightsholders of exclusive rights. However, starting from the date of entry into force of the Fundamentals the organisations' right to be considered authors of audiovisual works was abolished. As of 3 August 1992 no organisation held authors' rights. In 2004 an amendment to the Copyright Statute was introduced providing a limited term of protection of authors' rights for organisations. Its duration is 70 years starting from the date when a work was published or when it was created if it was never published. The Consummation Statute of Part 4 of the Civil Code confirmed this rule.

Concept of "Intellectual Rights"

Part 4 of the Civil Code adopted a new vision of authors' rights and neighbouring rights. One of the principal provisions of the new model was introduced in Part 1 of the Civil Code. Art. 129 para. 4 of the Civil Code stipulates that the results of intellectual activities as such may not be alienated or transferred. Only economic rights to such results as well as property rights to the material carriers of such results shall circulate on the market. Art. 1227 of Part 4 of the Civil Code stipulates that "intellectual rights" shall not interrelate with ownership rights concerning material carriers. Thus so far the concept of proprietary nature of intellectual property is definitively rejected by the Russian lawmakers.

The Code stipulates that an author shall have "intellectual rights" in works (incorporating authors' rights and neighbouring rights). This complex institution includes three types of rights: a) moral rights, related to the individuality of an author that may not be alienated; b) exclusive right (economic rights), implying that a person may use a work at his own discretion, and also allow or prohibit other persons to use a work; c) other rights blending together both economic and personal elements. The Copyright Statute provided for a system similar to that under the Civil Code; however some important distinctions may be found.

Moral rights: The Copyright Statute in its Article 15 adopted the category of moral rights ("personal non-property rights") of an author that included: the right to be recognised as the author of a work; the right either to use his or her name, or to use a pseudonym, or not to use any name (the right to name); the right to publish a work (including the right to recall a work); the right to protection of a work from any distortions that may harm the honour and reputation of an author. The latter provision lowered the level of protection of authors' interests because it prohibits the violation of a work's integrity only to the extent that an act infringes on an author's honour and reputation. Apparently, the wording was caused by an incorrect translation of Art. 6*bis* of the Berne Convention. Professor Eduard Gavrilov referred to the exclusive right to adaptation of a work as giving an author a guarantee of integrity of a work.[13] However, as the right in question is an economic one, it may be transferred. In that case, an author shall lose the right to demand the suspension of the unauthorised adaptation of a work.

Part 4 of the Civil Code brought the concept of moral rights into line with international principles. According to its Article 1266 any adaptation of a work including accompaniment with illustrations, commentaries, forewords, afterwords, and remarks, without the author's permission shall be banned. After the author's death any holder of the exclusive right shall be allowed to sanction changes, modifications and abridgements of a work provided that such actions do not: a) distort the basic idea of the author; b) affect the integrity of the perception of a work; c) lead to contradictions with the author's wishes expressed in written form.

The Copyright Statute did not deal with the category of moral rights with respect to holders of the neighbouring rights. It only stipulated that performers had two exclusive rights: the right to publish their name and the right to have their work protected against any distortions that may harm their honour and dignity. Chapter 71 on neighbouring rights of Part 4 of the Civil Code also avoids naming categories of rights. However, according to Chapter 71 some rightsholders shall have specific privileges, which are logically similar to moral rights.

Exclusive right (economic rights): The author has the exclusive right to use his or her work in any form and any manner that is not prohibited by law. The author has the right to alienate the exclusive right. Part 4 of the Civil Code provides a list of examples of ways of using works protected by authors' rights (unlike the Copyright Statute that contained a conclusive list). It includes: reproduction; distribution; public display; import; rental; public performance; broadcasting; cablecasting; adaptation; translation; making available to the public of works in such a way that members of the public may access these works at their individual choice from any place and at any time (i.e. via telecommunication networks like the Internet).

As a general rule economic rights of holders of neighbouring rights are based on the same principle as the exclusive right of

authors. Holders of neighbouring rights are allowed to use the work in any way that is not prohibited by law. Art. 1316 of the Code provides a list of examples of uses by performers, Art. 1324 for uses by phonograms producers, and Art. 1330 for uses by broadcasting and cable companies. Unlike other rightsholders, producers of databases and publishers have limited specific rights. A producer of databases shall have the exclusive right to extract materials from databases and to use these materials in any ways not prohibited by law. A publisher shall have the exclusive right to use the published work. The term of this specific right is 25 years starting on 1 January of the year following the one when the first publication of the work took place. Another specific feature of this new institution is that alienation of the original copy of a work triggers an automatic transfer of the exclusive right to the buyer unless otherwise agreed upon between the contracting parties.

Other rights: The category of "other rights" is an innovation of Part 4 of the Civil Code. It includes rights that are either of dual nature conjoining elements of moral and economic rights or are peculiar to some specific subjects. Two important rights belong to this category. The first is the right to publish a work. Each author has the right to publish by himself or to consent to the publication of his work by any means. The same rule existed under the Copyright Statute, but treated the right to publish a work as a moral right. It could not be exercised by anyone except the author. Part 4 of the Civil Code provides for another construction. According to its provisions, an author who enters into an agreement concerning the use of his work shall be considered as having granted the permission to publish his work. After an author's death his or her heirs as well as the publisher (after the work entered the public domain) shall have the right to publish the works unless the author clearly expressed his wish to the contrary (Art. 1268 paras. 2, 3). The second right is the right to withdraw. Both Part 4 of the Civil Code and the Copyright Statute guarantee the author the right to withdraw the publication of his or her work on condition that the author pays damages to the person who was to publish the works or who had obtained the exclusive rights. The Copyright Statute made one exception to this rule: authors of works for hire did not enjoy the said right. Part 4 of the Civil Code introduces two additional exceptions. Authors of computer programmes and of works integrated into complex works (including audiovisual ones) shall not have the right to withdraw.

Term of Protection

The term of protection for exclusive rights (economic rights) granted by the Russian law is the life of the author plus seventy years after his death. In the case of a work of joint authorship the 70 years term shall be calculated from the death of the last surviving author. This term was extended from fifty to seventy years when the statute of 20 July 2004 amending the Copyright Statute was passed.[14] Part 4 of the Civil Code does not change the term of protection of economic rights.

The regulation of the term of protection for neighbouring rights differs slightly in the Copyright Statute and the Code. The former provides that neighbouring rights shall be protected for fifty years starting from 1 January of the year following either: a) the first staging or performance (in case of performer's rights); b) the publication or recording of a phonogram (producer rights); or c) the first broadcasting or cablecasting of a television programme (Art. 43 of the Statute). Part 4 of the Civil Code introduces an additional rule: a performer's right shall be protected during the life of the performer but not less than 50 years.

After expiry of the protection term the works fall into the public domain. Any person is then allowed to use such works on condition that moral rights are respected. These rules are common for both the Copyright Statute and Part 4 of the Civil Code. The only difference in the regulation of the public domain regime is that the Civil Code does not include the rule providing the Government with the power to establish royalties for the use of objects from within the public domain as the Copyright Statute did (Art. 28 para. 3).

Contractual Regulation

The Copyright Statute imposed requirements concerning form and content of copyright agreements. According to Art. 30 of the Statute economic rights could *only* be transferred by entering into an author agreement. Under an author agreement either exclusive or non-exclusive economic rights could be transferred. The difference was that the holder of the exclusive rights was authorised to prohibit the use of a work by anybody else. An author's agreement had to include a number of essential conditions such as the territory (country) for which the rights were granted, the exact rights that were transferred, the amount of the copyright fee or method of its calculation, and the time limit for the use of the rights. The wording of the Statute became a reason for one of the most far-reaching problems in the sphere of copyright. Part 1 of the Civil Code proclaims the principle of freedom of contract, which implies that parties are free to insert into their agreement elements from different types of contracts regulated by law (mixed agreement) and even to conclude a contract that is not foreseen by law (Art. 421). The scantiness of the Copyright Statute regulation on contractual relations often forces parties to make mixed agreements. Courts refused to grant remedies to parties who would invoke such contracts.

Part 4 of the Civil Code provides for sufficient variety in its system of contractual relations. It introduces two main models for major agreement: the agreement for alienation of the exclusive right and the licence agreement. According to the first model, the rightsholder passes his exclusive right to the buyer. The right shall be transferred at the moment of conclusion of their agreement. The only essential condition for the agreement is that the amount of the copyright fee or the mechanism for its calculation must be established. A lack of respective considerations results in nullity of the agreement. Experts say that this model for agreement that provides for the complete alienation of economic rights – even without specification of the scope, the territory and the assignment period – is an unprecedented statuary norm in Europe.

Under a licence agreement the licensor grants the licensee either an exclusive or a non-exclusive licence. The exclusive licence may be granted only to one user. A non-exclusive licence may be granted to an unlimited number of users. Unless otherwise provided in the agreement, a licence shall be considered as non-exclusive (Art. 1236). Under both types of agreements the granting of sub-licences shall be allowed if so agreed between the parties. A licensee has the right to use the work only in the ways listed in the agreement. Any agreement shall contain the essential information about which work a licensee may use and what the scope of rights is that he has been granted (Art. 1235 para. 6). A licence agreement shall also specify the territory for which the rights are granted, the kind of rights, and the conditions for payment (amount of fee or the mechanism for its calculation). If the territory is not specified, it shall be the Russian Federation. If the term of agreement is not determined the contract shall be concluded for 5 years (Art. 1235 paras. 3, 4). These rules are similar to those of the Copyright Statute. The innovation lies in the fact that the Code permits the conclusion of *gratis* agreements which potentially opens up the way to promote non-commercial and social projects. A contract which neither establishes the amount of the copyright fee (or the mechanism for its calculation), nor directly points at its gratis essence shall be considered as frustrated (Art. 1235 para. 5).

Also new is the regulation of how agreements are executed. A licensee shall be obliged to provide a licensor with a report on the use of the work; while the latter shall be obliged not to bar the enjoyment of rights by the licensee (Art. 1237).

Status of Collective Rights Management Societies

The regulation of collective rights management institutions presents the most radical reform in the course of codification of intellectual property legislation. Obviously, such a reform will take time; so far it is important to analyse the current situation and its perspective.

According to the Copyright Statute collective management of authors' rights and neighboring rights was admissible in situations where the use of rights by a rightsholder himself was not convenient. Collective rights management societies were to be established by holders of authors' and neighbouring rights as non profit institutions only. The antimonopoly law was not applicable to the activities of such societies. The Statute admitted an unrestricted number of collective rights management societies that were each allowed to represent the interests of all holders of authors' and neighbouring rights. The functions of the collective management were to grant licences to users; collect royalties for the use of works; distribute the collected money among rightsholders and protect their interests otherwise.

The regulation of collective rights management caused a number of problems and conflicts. One of the most disputed provisions of the Copyright Statute was the right of collective management societies to represent *all* rightsholders, including those who had not entered into agreements with the societies (Art. 45 para. 3). This rule was misused for unfair practices. The traditional scheme for such misuse was unsophisticated: the users themselves established a collective rights management society representing "all rightsholders" or used the facilities of existing societies. These societies fixed a minimal amount of royalties for the use of works and granted licenses for any works existing in the world including those of foreign authors under the protection of international treaties. Such practice did not formally conflict with the law; however, it infringed upon the interests of the rightsholders. The most well-known case of using collective rights management societies for unfair practice was that of the *allofmp3.com* web portal. Beginning in 2001 this web-site functioned as an Internet-shop selling musical works in mp3 and other formats. The prices for downloading content were significantly lower than those offered by competitors. The approximate annual turnover of *allofmp3.com* was 10-14 million dollars.[15]

The company Mediaservices running *allofmp3.com* obtained licences from two Russian collective management organizations – the Russian Organisation on Collective Management of Rights of Authors and Other Rightsholders in Multimedia, Digital Networks & Visual Arts (the ROMS) and the Federation of Rightsholders on Collective Management of Authors' Rights in Cases of Interactive Use (FAIR). In 2004 the International Federation of Phonographic Industries (IFPI) and Recording Industry Association of America (RIAA) initiated criminal proceedings against the top managers of Mediaservices. The IFPI and RIIA argued that rightsholders did not obtain any royalties from Mediaservices or the mentioned collective rights management societies. The prosecution charged Denis Kvasov, the owner of *allofmp3.com,* with illegal use of the objects of authors' and neighbouring rights (Art. 146 of the Criminal Code). On 15 August 2007 the Moscow Cheremushkinskiy Court (criminal court of first instance) acquitted Mr. Kvasov in the absence of *corpus delicti*.

Another problem concerned the relationship between the different collective rights management societies. They were allowed to represent the interests of the same authors be it on the basis of licence agreements with the rightsholders or be it by virtue of direct statutory rules. This collision became a matter of court proceedings when the largest Russian collective rights management society "Russian Authors Society" (RAO) brought an action against the non-profit partnership "Society of Authors and Other Rightsholders for Collective Management of Their Rights" (ROAP) in 2004. The case arose because ROAP had granted a licence to the State-owned national TV and radio broadcasting company VGTRK for the use of existing works of all authors; as a result the broadcaster did not extend its licence agreement with RAO. In its turn, RAO claimed that the ROAP had no right to represent the interests of those rightsholders who had agreements with RAO. The plaintiff referred to international treaties, the Constitution and the Civil Code provisions guaranteeing the inadmissibility of use of intellectual property without the rightsholders' consent and sought to annul the agreement between ROAP and VGTR, and to prohibit ROAP from exercising collective rights management of rightsholders who did not enter into an agreement with ROAP. The Moscow Arbitration Court (court of first instance) dismissed RAO's claim. The court of appeals overturned this decision and annulled the agreement between ROAP and VGTRK. Finally, the court of cassation overturned the decision of the court of appeal and confirmed the judgment of the court of first instance.[16] According to the court of cassation's view, RAO was not authorised to protect the interests of authors and rightsholders because this was not provided for by licence agreements concluded between RAO and rightsholders. For that reason RAO had not been authorised to request the annulment of the agreement between ROAP and VGTRK. Even more important is, however, that the courts of all instances refused to prohibit ROAP from exercising collective management activities in general.

Finally, the low degree of transparency of collective rights management societies was under criticism. Except for the provision stipulating the duty to report to rightsholders on its activities, the Copyright Statute did not provide for any procedures concerning accountability. In addition, the system of supervision and control over the activities of collective rights management societies is very vague. As was mentioned before, antimonopoly law is not applicable to them. The governmental bodies authorised to supervise bodies acting in the area of intellectual property law do not have any specific powers to control the activities of collective rights management societies. Furthermore, no special procedures for controlling the access of societies to collective rights management activities is provided, even though experts have more than once suggested the introduction of either licensing or other specific procedures providing government supervision in the area of collective rights management.[17]

Part 4 of the Civil Code introduced a new system of collective rights management that seems to be effective enough to counterbalance the aforementioned problems. It divides collective rights management societies into two groups:

- Societies accredited by the government that shall be authorised to represent the interests of authors and rightsholders both on the basis of agreements and without them (on the basis of statutory law). The (misnamed) accreditation procedure shall be used in six spheres of collective management, including public performance, broadcasting and cablecasting of musical works. The accredited societies shall also obtain the exclusive right to collect royalties from manufacturers and importers of equipment and tangible media for the free use of phonograms and audiovisual works (Art. 1245);
- Other societies that shall be authorised to represent interests of authors and rightsholders only on the basis of agreements.

Part 4 of the Civil Code emphasizes that the existence of an accredited society shall not preclude the right to establish other societies (Art. 1244 para 3). Rightsholders that did not conclude agreements with the accredited society shall have the right to withdraw from the services of this society (Art. 1244 para 4). The analogous right was granted to authors by the Copyright Statute. From now on there is only one accredited society in a particular sphere instead of an unlimited number of them; thus the author shall not face problems in exercising his right to withdraw.

It seems obvious that an accredited society enjoys a dominant position in the sphere of its activity. However, as before no restrictions of antimonopoly law shall be applied to the activities of such entities (Art. 1244 para 2).

The problem of the domination of certain societies in the sphere of collective rights management seems to be a major one. Until 1993 this function was part of the competence of a public body created by authors, but managed and financed by the State – at first it was the All-Soviet Union Agency on Authors Rights (VAAP), then the Governmental Agency of the USSR on Authors and Neighbouring Rights, and finally the Russian Agency on Intellectual Property (RAIS). The latter was established as a non-governmental organisation and initially given legal basis by the Resolution of the Presidium of the Supreme Soviet of the Russian Federation of 3 February 1992. The Resolution approved the foundation of RAIS, and handed over the assets of the Governmental Agency of the USSR on Authors and Neighbouring Rights to the new organisation. The Act of the Presidium was ruled unconstitutional by the Resolution of the Constitutional Court of 28 April 1992.[18] The central argument of the Court's decision was that the adoption of the Act was not within the Presidium's competence.

In view of this position the Court analyzed the Charter of RAIS and found that it violated some constitutional principles. The main finding of the Court was that concentrating commercial and management functions in only one non-governmental organisation set special conditions for its activities. Consequently, any other organisation engaging in the same field would be deprived of the possibility to compete. This in turn would lead to inflation and loss of quality of services for authors. The Constitutional Court emphasized that a similar situation had existed under the Soviet system and had not been admissible.

However, RAIS had obtained special status after the adoption of the Presidential Decree of 24 February 1992 No. 184.[19] This Act stipulated that RAIS is an organisation under the President that implements the state policy on the protection of authors' rights. Several months later the Agency was disbanded according to the Presidential Decree of 7 October 1993 No. 1607.[20] The ownership of all its assets was transferred to RAO. RAO was proclaimed the legal successor of RAIS. The Decree also provided that RAO is under the protection of the President of the Russian Federation. Formally, the largest collective management society in Russia, RAO, retains this status today.

After Part 4 of the Civil Code entered into force it seems very likely that a new form of dominative collective rights management society with special privileges will emerge. Despite the fact that formally all collective management societies shall have equal opportunities to be accredited, it seems that RAO with its *primus inter pares* status will succeed in further strengthening its position in the market of collective management of authors' rights and neighboring rights.

The procedure by which Part 4 of the Code provides for the selection of accredited organisations could be a key issue in case the government seriously aims to achieve more competition in the collective management of rights sphere. However, the Code does not regulate even the basis of this procedure. Para. 1 of Art. 1244 states only that accreditation shall be transparent and consider the interests of rightsholders. Its rules shall be worked out and approved by the Government. The uncertainty of this rule is caused by the fact that the Code does not include any crucial requirements of the institution of accreditation (term of accreditation, basic criteria for selection of accredited organisations, etc.).

Protection of "Intellectual Rights" and Liability for their Violation

Civil law protection measures: According to Part 4 of the Civil Code an author or other holder of exclusive rights in addition to general means of protection shall have some special means to seek redress for the violation of his interests (Art. 1301). A holder of an exclusive licence also has the right to specific means of protection in cases where a violation of the rights of the author also interferes with his interests granted by the licence (Art. 1254). Hence, the adoption of the Code changed the circle of persons authorised to use specific protection measures.

Lawsuits seeking protection may be brought before the courts of general jurisdiction, arbitration courts, and in private mediation courts. A plaintiff shall have the right to either claim damages (protection measure common for civil jurisprudence), or demand compensation in the amount ranging from 10 thousand (approximately 280 EUR) to 5 million roubles (approximately 140.445 EUR); or demand compensation in the amount of twice the price of either the counterfeit copies of the work or the copyright fee for the right to use the work.

In the case of a demand for compensation a rightsholder shall not be obliged to prove damage. As this rule was not explicit in the Copyright Statute some courts refused to uphold rightsholders' claims which were based on it. The Presidium of the Supreme Arbitration Court in its Information Letter of 28 September 1999[21] made it clear that compensation is not in any way correlated with the amount of damage incurred. This provision is now integrated into Part 4 of the Civil Code (Art. 1252 para. 3). It also provides that a plaintiff shall have the right to claim compensation either for each instance of violation or for the violation as a whole.

Part 4 of the Civil Code introduces some additional measures aimed at the protection of rightsholders. The most powerful one is that in cases of repeated or gross violation of intellectual property rights a legal person committing such a violation may be liquidated (for an entrepreneur individually registered – his/her licence may be annulled) by court decision (Art. 1253).

Along with the civil law protection measures, measures based on administrative or criminal liability may be applied to a person transgressing rightsholders' interests.

Administrative liability: Art. 7.12 of the Code on Administrative Offences stipulates liability for any violation of authors' rights and neighboring rights committed for the purpose of deriving revenue, including import, sale, rent, illegal use of copies of works and phonograms if such copies are either counterfeit or contain false information concerning manufacturers, places of manufacturing, or rightsholders. If the offender is a natural person he shall be fined from 500 to 2000 roubles (approx. 14 – 55 EUR), legal entities shall be fined from 30 to 40 thousand roubles (approx. 830 – 1100 EUR). Counterfeit copies and equipment used to manufacture counterfeit copies shall be confiscated.

The Code on Administrative Offences (Art. 14.33 para. 2) also penalizes unfair competition if the market activity consists of selling goods produced in violation of intellectual property rights. The sanction for this misdemeanor for legal persons shall be a fine from 1% to 15% of the offender's revenue derived in the course of the sale of goods.

Criminal liability: The evolution of criminal law illustrates well the changes in how the government has approached the problem of preventing violations of intellectual property rights. The liability rule provided in the Russian Federation's Criminal Code of 1960[22] for breach of authors' rights was insignificant. Art. 141 of the Act penalized the following activities: plagiarism of scientific, literary, musical, or artistic works; illegal reproduction or distribution of these works; and exerting pressure to be included as co-author. There were two kinds of penalties for the crime: forced labour (maximum – two years) or fine. For the whole period during which the Criminal Code of 1960 was in force, Art. 141 was applied only few times. It was annulled on 1 January 1997 when the 1996 Criminal Code of the Russian Federation was adopted.[23]

Art. 146 of the 1996 Code introduced a different statutory definition of copyright offences. It penalizes the illegal use of the objects of authors' and neighbouring rights and plagiarism provided that the activity in question caused sufficient damage (para. 1). Punishment included the imposition of a fine or forced labour of 180 to 240 hours or prison for up to two years. A maximum of a five-year prison term was foreseen if the offences were committed repeatedly or by concerted action of a group of persons or by an organised group (para. 2). The application of the rule was problematic because the notion "sufficient damage" was very vague. For example, in the case where illegal sales of musical works and computer programmes on material carriers were detected the law-enforcing authorities, in order to estimate damages, undertook the following steps: they first estimated the approximate amount of the turnover [which is not further determined] of the party injured (generally major music labels and computer corporations), then calculated the cost of pirate copies of works sold by the offenders and then correlated the turnover of corporations with the profits of the offenders. As a result of this calculation damages to the injured party seemed insufficient and criminal procedures were not initiated.[24]

In 2003, Art. 146 of the 1996 Code was changed significantly. Its para. 2 made it a criminal offences to use unlawfully objects of copyright or neighbouring rights, as well as to acquire, store or carry counterfeited copies of works or phonograms for the purpose of sale if such actions were committed on *a large scale*. Penalties for these violations included a fine or forced labour or imprisonment for up to two years. Also, a para. 3 was introduced into the Code punishing actions specified in para. 2 if they were committed: a) repeatedly, b) by concerted

action of a group of persons or by an organised group, c) by a public official using his/her authority; d) if the specified actions were committed on a *substantial scale*. The only sanction for these violations was imprisonment from 2 to 5 years. The notions of large scale and substantial scale were defined as well.

The amendments of 2003 provided some initial steps toward the development of a law-enforcement practice. While in 2003, 1000 criminal offences had been registered and 2 offenders had been sentenced to imprisonment, in 2004 the number of registered offences had doubled and 10 persons were sentenced to imprisonment. However the law-enforcement bodies found these results inadequate in relation to the actual magnitude of crimes committed.[25]

The latest amendment was introduced in April 2007.[26] It modified the provisions concerning punitive measures.[27] The most important innovation is the raise of the maximum term of imprisonment for aggravated violations of intellectual property rights to six years for the offences listed in paras. 2 and 3 of Art. 146. Under the new rule, aggravated violations of intellectual property rights are considered as belonging to the category of "grave" crimes (as determined by Art. 15 of the Criminal Code). This implies that a number of additional sanctions apply to persons for planning or performing actions that are considered as grave crimes.

Conclusions

The new intellectual property legislation will undoubtedly shape a new system of intellectual law and law-enforcement practice in Russia. Despite the legislators' aspiration towards the stability of relevant legal institutions it seems clear that authors, rightsholders and users will reconsider their interrelationships. Obviously, the level of legislative protection of intellectual property rights is increasing. It seems that this increased protection and other modifications in the regulation of intellectual property will not have a chilling effect on marketing intellectual property rights. Part 4 of the Civil Code aims to boost the turnover made with the use of intellectual property rights. This may be derived from the development that regulation of contractual relations underwent in granting protection to the new objects of authors' rights and neighbouring rights, and providing new effective means of protection in the case of violated rights. The rise of a single and generally consistent structure of the pertinent legal instruments will clarify and harmonise the relations between subjects (authors, rightsholders, collective management societies, governmental bodies) and make them more transparent. It is admirable that Part 4 of the Civil Code now incorporates a number of arrangements that exist both in law (national and international) and - what is more important - in practice. This is an important factor in providing a gradual transfer from the current state of affairs to the new reality.

On the other hand, an analysis of the transformation model for intellectual property regulation advocated by the Civil Code shows that a number of significant problems of the Russian intellectual property law were not treated carefully enough or not resolved in the course of codification. Attempts to satisfy the need for an effective regulation of collective rights management are left unfinished. The status of newly-emerged subjects (such as producers of databases, publishers etc.) of intellectual property law is unclear, a number of innovative provisions seem to lack solid drafting, there are no transitional rules aimed at resolving some of the chronic conflicts that have persisted up to now. Most of these problems might be solved by changing the law once more. Unfortunately, by introducing such an overly complex and detailed act as Part 4 of the Civil Code, the legislators created a minefield of new disputes that makes all further changes difficult. Introducing a bulky system is much easier than amending the law that has set it up. The near future will show the degree to which the new regulation provides the stability sought for.

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