IRIS plus
LEGAL OBSERVATIONS
OF THE EUROPEAN AUDIOVISUAL OBSERVATORY

The Legal Status of the Producer of Audiovisual Works in the Russian Federation

by Dmitry Golovanov

EDITORIAL

A year ago in this very same publication, Dmitry Golovanov reported on the "Transformation of Author's Rights and Neighbouring Rights in Russia" (see IRIS *plus* 2008-2) and created enormous interest in the topic throughout the audiovisual industry. The impact of Russian copyright law on the audiovisual industry and the industry's interest in the topic naturally exceeded what could be printed on eight pages. Therefore, we are pleased to take you on a second journey through important rules of Russian copyright law, this time focusing on the legal status of the producer of audiovisual works.

As for the 2008 IRIS *plus* issue, much of what applies under Russia's current legal framework to producers has to be seen in the context of what the rules were before the passing of several relevant statutes in the 1990ties and thereafter including the period up to the recent overhaul of the 1993 Copyright Statute. And as this IRIS *plus* indicates, even the new legislation leaves enough room for further development inasmuch as crucial questions such as what constitutes an audiovisual work have not yet been satisfactorily resolved. Likewise, the definition of authorship, highly relevant for the producer, needs clarification as do other issues concerning producers' relationships with rightsholders. Reading this IRIS *plus*, however, gives good guidance towards the light at the end of the tunnel.

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Introduction

The material, financial and organisational infrastructure of the Russian film production industry was formed in the Soviet era – the period when the state exercised total control over all material and financial resources.

In the mid-1980s an average of 300 motion pictures were produced each year in the USSR.[1] This figure (for Russia alone) fell in 1996 to 21, its lowest point.[2] The transition from state hegemony in the sphere of culture in the late 1980s was painful and uneasy. The government lacked sufficient resourses to finance motion picture production, and only a few cinematographic projects were financed from the state budget. The Government attempted to reverse this trend. This attempt is well illustrated by the Government's 1994 Ordinance[3] in which it agreed to provide financial support for the production and distribution of at least 50 motion pictures per year. Taking into account the economic recession of that period the first private producers in the country had to make great efforts at promotion as well as sharing potential profits or losses in exchange for making their film. They also had to deal with the prospect of sharing profits should the film be successful. Private companies refused to finance projects unless they received guarantees that financial benefits would be obtained. At the same time, movie directors had their own visions of how to produce, edit, and even distribute motion pictures. These visions were a reflection of the mentality of directors; most of whom had received their professional training in Soviet times when the film director was considered to be the key figure in the production process. The interests of investors and crew members were quite often in conflict with those of the director.

In the past, a producer carried out the functions of several persons at once: raising funds for the production of a complex work, mediating between the investor (the government or a private company) and the creators, in order to participate in the economic turnover, and ensuring the legality of the distribution of the audiovisual works of which he was the producer. The risks of losing potential profits because of the strong competition from Hollywood films, conflicts between crew members and managers, costly promotion and distribution of movies led producers to desire to have a maximum control over authors of and performers involved in audiovisual works. One obstacle to the realisation of this aspiration was the almost complete absence of legislation regulating the status of producers. Another difficulty resulted from the vague legal definition of the notion as well as the status of the audiovisual work, the object of producers' main interests.

When intellectual property law started to develop in modern-day Russia, the point of departure was the principle that legal entities were recognised as authors of cinematographic works and that the status of such works was not defined. On 9 July 1993, the Statute "On Author's Right and Neighbouring Rights"[4] (hereinafter "Copyright Statute") was passed. The Copyright Statute regulated intellectual property matters but included only a single provision on the status of the producer, and another on audiovisual works.[5] In 1996 the Statute "On State Support of Cinematography in the Russian Federation"[6] was enacted. It introduced a detailed definition of producer, as well as a number of other provisions on the concept, but it still said nothing about a principle matter – the rights and duties of the producer.

In 2006-2008 a complex and lengthy procedure of codification of intellectual property law took place. This process was overseen by the current President of the Russian Federation Mr. Dmitry Medvedev (who at that time held the office of first deputy prime minister). The issue of the status of producers was also touched upon during the codification process.

This research aims to define the basis of the legal status of a producer, to describe the ways in which the producer may receive the rights to use audiovisual works, and to examine the difficulties a producer faced before the recent overhaul of the intellectual property law in Russia, as well as those that he might face under the new legislation.

Legislation

Russia is a party to the most important international treaties concerning intellectual property, including the Berne Convention for the Protection of Literary and Artistic Works of 9 September 1886 (which entered into legal force in Russia on 13 March 1995, hereinafter "Berne Conven-

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tion")[7] and the Universal Copyright Convention of 6 September 1952.[8] This year Russia also signed up to the Copyright Treaty of the World Intellectual Property Organization (WIPO).[9] On 24 July 2008, the Prime-Minister Vladimir Putin signed the ordinance confirming this accession.[10] On 5 November 2008, the Director General of WIPO notified the Minister for Foreign Affairs of the Russian Federation of the deposit by the Director General of the Government's instrument of accession. According to Article 21 of the Treaty, it will enter into force, with respect to the Russian Federation, on 5 February 2009.

The Constitution of the Russian Federation of 1993 provides guarantees that are important for the status of producers. According to Article 44 of the Constitution, everyone shall be guaranteed literary, artistic, scientific, technical and other types of creative freedom, freedom applicable to both creative activities and teaching. Intellectual property shall be protected by law. Article 34 of the Constitution stipulates that everyone shall have the right to make free use of one's abilities and property in order to pursue entrepreneurial and economic activities not prohibited by law. Article 29 of the Constitution guarantees freedom of thought, expression and information, and bans censorship in the sphere of mass communications. It is noteworthy that the Constitution does not contain any direct prohibition of the censorship of creative activities. In addition, unlike the Statute on Mass Media 1991, legislation concerning the area of culture does not even provide for a legal definition of censorship. So far there are no regulatory guidelines that could help to define under what conditions actions of a producer may constitute censorship. Censorship might be an issue if a producer asks a director to revise his work in order to comply with the wishes of the producer, or if he in other ways infringes upon the director's freedom of artistic activities.

Very few legislative acts deal with the rights and duties of a producer of audiovisual works. Indeed only two major acts address these issues, namely Part Four of the Civil Code and the Statute "On State Support of Cinematography in the Russian Federation". Some implicit rules can also be found in the statute titled "Fundamentals of Legislation on Culture of the Russian Federation".

The first of the acts mentioned above was signed into law by President Vladimir Putin on 18 December 2006.[11] According to the "Consummation Statute",[12] the Code (except for some provisions) entered into legal force on 1 January 2008.[13] Part Four of the Civil Code regulates all possible intellectual property relationships, including authors' rights and neighbouring rights. From 1 January 2008 onwards, 56 normative acts of the Soviet Union and Russia (including the above-mentioned Copyright Statute of 1993, and what was left of the Soviet Civil Code of 1964) became invalid.

Part Four of the Civil Code has a complicated structure. It includes a chapter (Number 69) on General Provisions that contains basic rules to be applied to the whole system of intellectual property rights, and chapters on specific sections of intellectual property law (including Chapter 60 devoted to authors' rights). All provisions of Part Four shall be applied in accordance with both the General Provisions Chapter of Part Four and Part One of the Civil Code which enumerates the general provisions of the entire civil law system in Russia. At the same time Part Four includes some exceptions to these general civil law rules.

Part Four of the Civil Code describes the audiovisual work as an object of authors' rights; it regulates intellectual rights of the authors of an audiovisual work and stipulates interrelations between the producer and the crew members.

The Federal Statute of 22 August 1996 "On State Support of Cinematography in the Russian Federation" (hereinafter "Statute on State Support") determines the State's main responsibilities in support and "cultivation" of cinematography. It provides rules and procedures for governmental support and financing. It makes producers the key figures in the production and distribution of national motion pictures.

As regards the 1992 "Fundamentals of Legislation on Culture of the Russian Federation",[14] it is important to stress that this act provides only the right to establish legal persons in the sphere of culture. It neither deals with the status of such legal persons nor assigns them any privileges. At the same time the act contains a number of guarantees for artists and crew members, as well as for unions of cinematography and other workers.

Notions of Producer and Audiovisual Work

Producers are not considered to be among the authors of an audiovisual work. According to Article 1263 of the Civil Code, an audiovisual work to be protected by law shall have three authors: a director, a script writer, and a composer (in the case of the music being created specifically for the audiovisual work). The Civil Code defines the producer as a person (a natural person or a legal entity) that "organises the creation of an audiovisual work" (Article 1263 para. 4). According to the Statute on State Support, the producer of a motion picture is the person who "takes the initiative and responsibility for the financing, production and distribution of a motion picture". A similar definition was previously provided in the Copyright Statute.

The Civil Code's definition seems to be adequately practical and general. It is important for the legal status of the

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producer that the audiovisual work be completed ("created") with the participation of the producer in his function as a coordinator or an organiser of the process. It is not sufficient for the producer to have only started or initiated the production of an audiovisual work. In order to be recognised as producer a person must demonstrate certain results from his activities, not merely that he engaged in activities.

It is also important to mention that the Civil Code, as well as the earlier legislation, emphasise that the activities of a producer are not of a creative character but of an organisational nature. According to Article 1228 para. 1 of the Civil Code, persons who give organisational support (including the producer) shall not be considered as authors of the work and, therefore, do not hold their own authors' rights.

As well as the Copyright Statute, Part Four of the Civil Code in its Article 1263 defines audiovisual works as a series of fixed related images (with or without accompanying sound), susceptible to be made visible and audible (where accompanied by sound) via suitable technical means. The term "audiovisual works" embraces cinematographic works and any other works expressed via means that are analogous to cinema exhibition (television and video films etc.).

The Civil Code categorises audiovisual work as being "complex" works. According to Article 1240 of the Civil Code, a complex work comprises results that stem from different intellectual activities. The person who organises the creation of such a work needs to obtain the right of use to each object that he wants to insert in the complex work.

It seems that the Civil Code establishes two different legal regimes for an audiovisual work:

The first one supposes that, legally speaking, there is no single exclusive right to use a motion picture because no single author created the whole work. In order to use a complex work the producer of the work needs to enter into an agreement with every single person that contributed to the work.

According to the second approach there are initially three (or less) persons (a director, a script writer, and a composer) that jointly hold the exclusive right to use an audiovisual work. It is enough for a producer to enter into an agreement with them in order to obtain the exclusive right or a licence, as the case may be.

Rights of Producers

Despite the fact that the producer takes part in the production of a motion picture by organising the creation of the audiovisual work, the producer initially has very few rights. In fact, he completely lacks economic rights. According to Article 1240 of the Civil Code a person who organises the creation of "a complex work" (including an audiovisual work) shall obtain the right to use "results of intellectual activities integrated into such work" by means of entering into agreements with the authors of the various "results of the intellectual activities".[15] Article 1263 stipulates that the producer shall have to comply with the requirements of Article 1240 in order to obtain relevant rights. Consequently he needs to obtain economic rights in an audiovisual work from the authors of the work and the holders of the rights concerning works that are integrated into the audiovisual work (visual artists, photographers, designers etc). To this end, the law assists the producer only by providing some specific rules in the Civil Code on the contractual relations between a producer and the persons considered as authors of an audiovisual work.

This approach of lawmakers is in conflict with the point of view of one of the drafters of the Civil Code – Professor Viktor Dozortsev. According to Dozortsev, a category of "producers' rights" on complex objects should have been introduced in the law. These rights were supposed to be of an economic nature. During the production of an audiovisual work, the producer *coordinates* the efforts made by the artists and thus contributes himself to the work. For that reason the producer shall have the right to use the whole complex object.[16] However, Prof. Dozortsev's idea was not incorporated into the final edition of the bill of Part Four of the Civil Code.

An alternative point of view concerning the regulation of the status of producers may be found in Professor Stanislav Sudarikov's work on the nature of rights in relation to audiovisual works. In his opinion an audiovisual work is an object of neighbouring rights, but not of authors' rights. This academic basis his argument on provisions of the Berne Convention pointing out that the term of protection for an audiovisual work is 50 years and usually applies to subject matters of neighbouring rights. For that reason, according to Prof. Sudarikov, it is possible to assert that an audiovisual work is a subject matter of neighbouring rights.[17] It virtually means that a person (*inter alia* producer) may hold the right to use an audiovisual work as a single rightsholder. This right could be considered as independent, economic and neighbouring in relation to the rights of the initial authors.

It seems that the concept proposed by Prof. Sudarikov is in contradiction with the actual legal framework. Article 2 para. 1 of the Berne Convention as well as Article 1 of the Universal Copyright Convention unambiguously point out that an audiovisual work shall be a subject-matter of authors' rights. This provision is debated by Russian academics. For instance, in this regard, Professor Dozortsev

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called the Conventions "excessively conservative instruments". However, he admitted that at present there is no legal framework for justifying the existence of specific producer's rights on the basis of existing national and international law.

The approaches of both writers aim to solve a very complicated problem. The problem consists in balancing the interests of a person who organises the creation of a work, absorbing creative contributions of a large number of persons in order to release this work and profit from this release, on the one hand, with the interests of every single contributor to this work, no matter what the amount of the contribution is, on the other hand. In other words, the producer's use of results of a work, to which a very large group of people contributed, may not be subject to the arbitrariness of one person from this group. At the same time, there is a pressing need for providing guarantees that the freedom of creative activities of any person who contributed to the creation – including the freedom to decide upon the use of the result of the individual contribution – shall not be infringed.

Russian legislation specifies only one right of the producer, namely his right to indicate or to demand the indication of his name (or the name of his company) on the copies of an audiovisual work (Art. 1240 para. 4 and Art. 1263 para. 4 of the Civil Code). Earlier this right was stipulated in the Copyright Statute 1993, but this act did not grant any protection to the producer in cases where this right was violated. The essence of this right, however, is still not sufficiently clear – even under the rules of the Civil Code. It is important to analyse the scope of the right to determine the kind of measures needed to protect it and to introduce the possibility of transferring the right to another person on the basis of a contract.

Some researchers believe that the right of the producer to have his name indicated is a moral right and, as such, is close, though not identical, to the authors' right to claim authorship. For instance, Elena Sherstoboeva of the Moscow State University calls this one of the moral rights.[18] Others, including for example, one of the drafters of Part Four of the Civil Code, the former dean of the Law School of the Moscow State University, Eugenie Sukhanov, take the view that this right is a specific one, and shall be considered as neither an exclusive right (or economic right) nor a moral right.[19]

The Civil Code introduced a special category for such rights – named "other." These rights blend together economic and personal (moral) elements. According to the Civil Code, the right of a producer to indicate his name (or commercial name) on copies of the work he produced belongs to the category of "others". This conclusion can be derived from the content of Article 1251 of the Civil Code. In its first paragraph, the Article sets out rules for the protection of authors' moral rights. An author shall have the right to demand, from an offender, acknowledgment of his moral rights, to stop actions violating this right, to re-establish the *status quo ex ante* and to receive compensation for moral damages. The second paragraph of the Article makes a special reservation stating that rights mentioned in this paragraph, including the right of a producer of an audiovisual work, shall be protected in the same way as moral rights. This includes the right of producers' to use general means for the protection of civil rights, including compensation for damages (Article 12 of the Civil Code).

However, producers shall not have the right to claim the compensation which the law would grant in the range of ten thousand to five million RUB[20] (Article 1252 para. 3, Article 1301 of the Civil Code). This right to claim compensation is the preferred avenue of most rightsholders because, as plaintiffs, it saves them from proving any damages during trial; it suffices that they provide evidence that their economic rights have been infringed in order to receive compensation, which the judge will fix within the range of compensation provided for by the Civil Code.

The interpretation of the producer's right to have his name indicated as a moral right seems appropriate for the protection of the interests of a natural person. It appears less adequate for the violation of a company's right to use its name. It is important to note in this context that, according to Article 1474 para. 1 of the Civil Code, a legal person shall have the exclusive (economic) right to use its name. This implies *inter alia* the possibility to disseminate material carriers of the audiovisual work with a company name on them. A breach of this right will obviously cause economic damages to a production company, even though it could be difficult to prove them. So far the level of protection granted to a producer by Article 1251 of the Civil Code seems insufficient.

Contractual Regulation of Relations between the Producer and the Authors of an Audiovisual Work

Part Four of the Civil Code introduced two rules that are important for the creation of audiovisual works. First, unlike the Copyright Statute 1993, the Code allows contractors to enter into agreements about the future creation of artistic works. Second, under Part Four of the Civil Code the parties may use the basic requirements of this Part as a framework for the creation of audiovisual works, blending them together with different elements of contract law. In contrast, the Copyright Statute 1993 obliged the parties to enter into agreements, as specified by the act, in order to pass intellectual property rights from one person to another.

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The basic system for contractual relations under the provisions of the Civil Code allows for a variety of contracts. It introduces two main models for agreements: an agreement for alienation[21] of the exclusive right and a licence agreement. According to the first model, a rightsholder passes on his exclusive right (scope of all economic rights to use a work)[22] to the next rightsholder. The right shall be transferred at the moment of conclusion of the agreement, unless another moment of transfer is provided in the agreement. At the moment of the transfer of the exclusive right, the initial rightsholder loses forever all rights to use the work.

The only condition to be fulfilled in order for the agreement to be valid (in addition to the need to specify the concrete work of art to which the right shall be transferred) is the establishment of the amount of the copyright fee or the mechanism for its calculation. Alternatively, a contract may stipulate that the transfer is *gratuitous*. A lack of respective considerations results in the nullity of an agreement.

A general rule of Part Four of the Civil Code (Article 1233 para. 3) is that the alienation of exclusive rights shall be agreed upon by contract, otherwise an agreement concerning economic rights to use a work shall be considered as a licence agreement. Article 1240 of the Civil Code contains a presumption that any contract between a producer and an author of an art work created specifically to be integrated into an audiovisual work (for instance, soundtrack provided by a composer) shall be considered as an agreement for transferring the exclusive right. This is an important provision because it allows the producer to claim that, via the transfer, he obtained a maximum of exclusive rights without carrying the burden of proof.

The Civil Code does not include any prohibitions on a producer as regards entering into agreements for alienation of the exclusive right with authors who did not create their works specifically for integration into the audiovisual work. Some researchers, for instance Elena Sherstoboeva, however, believe that in such cases a producer shall only have the right to enter into licence agreements.[23] This controversy gives rise to a more fundamental question: is it possible to transfer an exclusive right to which the rights of third parties are attached? For instance, may a composer transfer his exclusive right in a music work that is used by a third party on the basis of a licence agreement? What are the consequences if a rightsholder conceals information concerning the rights of third parties?

Answers to these questions may not be found in Part Four of the Civil Code. Some analogies may be drawn between a standard purchase agreement and an agreement for alienation of the exclusive right. According to Article 460 of the Civil Code, an owner of property shall be obliged to transfer the title of ownership to his property without any encumbrances, except where a buyer gives his consent to buy the property to which the right of a third party is attached. If a seller fails to comply with this rule, a buyer shall have the right to claim nullity of agreement. The Russian civil law (Art. 6 of the Civil Code) provides for the use of civil law principles in situations where the applicable statutory act lacks direct provisions regulating the relationships in question. In order to resolve a dispute between a rightsholder and a producer a court may apply Article 460 of the Code in an analogous fashion. According to this article, the situation caused by uncleared property rights must pose sufficient risks for the producer as the rightsholder. Using the right to claim annulment of the contract, however, is not an attractive solution to the conflict from the point of view of the producer because he would lose the right to use the individual contributions that he needs for the whole audiovisual work. It is highly important for the producer that his product be legally protected, therefore, in order to achieve that a producer needs to run a full check for information on the potential rights of others he is about to acquire.

Under a licence agreement the licensor grants the licensee either an exclusive or a non-exclusive licence to use an object of authors' rights. The exclusive licence may be granted only to one person. A non-exclusive licence may be granted to an unlimited number of users. Unless otherwise provided for in the agreement, a licence shall be considered as non-exclusive (Art. 1236 of the Civil Code). Under both types of licence agreements the granting of sub-licences shall be allowed if so agreed between the parties.

A licensee has the right to use a work only in the ways listed in the agreement. Any agreement shall contain essential information about which work a licensee may use and the scope of the rights that he has been granted (Art. 1235 para. 6 of the Civil Code). A licence agreement shall also specify the territory for which the rights are granted, the nature of rights, and the conditions for remuneration (amount of fee or the mechanism of its calculation). If the territory is not specified, it shall be the Russian Federation. If the term of agreement is not provided the contract shall be concluded for five years (Art. 1235 para. 3, 4 of the Civil Code).

These rules are similar to those contained in the Copyright Statute of 1993. The innovation lies in the fact that the Civil Code permits the conclusion of *gratis* agreements. Potentially this new rule eases the promotion of first works.

In addition, the regulation concerning how agreements are executed is also new. 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 prevent the licensee from exercising his rights (Art. 1237). The first part of this pro-

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vision seems to be bode ill for producers, because the amount of works integrated into an audiovisual work may be enormous. Preparing and rendering reports to licensors may consume a lot of time and, in order to avoid this problem, a producer should insert into agreements with rightsholders a provision confirming that he does not need to provide licensors with reports.

The Civil Code in Art. 1240 para. 1 establishes a certain number of reservations with regards to licence agreements concluded between producers and authors. The first presumption provided by this article is that by general rule a licence agreement shall have effect both for the whole term of protection of an exclusive right and for the whole territory of protection of an exclusive right. Parties to the agreement shall have the right to overcome these presumptions by making corresponding arrangements in the contract. At the same time Art. 1240 para. 2 determines that a licence agreement introducing restrictions on the use of a work being a part of a complex object shall have no legal force. The literal sense of these two provisions seems to be quite problematic. While the first provision grants parties the right to include into their licence agreement rules that limit the ways of using objects integrated in an audiovisual work, the second provision totally prohibits the imposition of any restrictions.

An interesting way to overcome the above said dilemma was offered by Dr. Eduard Gavrilov in his canonical commentary on Part Four of the Civil Code. He believes that it is *reductio ad absurdum* to consider the two provisions of Art. 1240 as conflicting. The way to avoid such interpretation is to construe Art. 1240 para. 1 as regulating relations concerning the use of a work of art as a part of a motion picture and, at the same time, separately from the audiovisual work.[24] Parties in an agreement shall be allowed to make reservations concerning the independent use of the part of an audiovisual work, but not the use of the work as a whole. It seems that despite the logic of Prof. Gavrilov's argument, the proposed conclusion does not have sufficient legal grounding. There is no direct or indirect mention of any differentiation between the use of a work inside the structure of audiovisual work or as a separate work. At the same time, it is important to mention that authors of the draft of Part Four of the Civil Code have refrained from explaining the meaning and correlation between paragraphs 1 and 2 of Article 1240.

Another important aspect of the contractual relations between producers and authors of audiovisual works concerns the possibility that a producer intervene in the creative process. Producers often insist on inserting into their agreements with authors the right to edit motion pictures without the director's consent, as well as the right to rewrite scripts without permission from the author. A number of conflicts resulted from different opinions of producers and authors of audiovisual works about the means of producing such works. Most of these conflicts were latent: they were not open to the public and were not brought before a court. However, some examples of disputes between creators and producers in the area of cinematographic production can be found.

For instance in 2001 a scandal took place between "NTV Profit" – the producer of the motion picture "Favour me with moonlight" ("Подари мне лунный свет"), on one hand, and the director of the film, Dmitry Astrakhan, on the other. The production company concerned refused to approve the director's final edit. It referred to provisions of a contract according to which the obligations of the director were to be considered as fulfilled only upon the producer's acceptance of the final version of the motion picture. As a compromise "NTV Profit" proposed to prepare both the director's and the producer's versions of the film and to show them under anonymity to a group of independent experts. Astrakhan rejected this suggestion as he suspected that the expertise would not be independent, and demanded the removal of his name from the title of the movie.[25] The director did not sue the producer admitting that he had no chance of winning the case. Indeed, according to the contract, the producer had the right to produce his own edited version. However, Mr. Astrakhan decided not to conceal the problem, but to comment on the situation in public.

It is important to note that by demanding the removal of his name the director used means provided by law. Article 15 of the Copyright Statute of 1993 (that was still in force at the time of the dispute) guaranteed the author the right to either use, or allow to use a work under his or her name, or not to use any name with a work (the right to claim authorship). An analogous right is now proclaimed in Art. 1265 of the Civil Code.

It is obvious that, in the above scenario, the absence of an author's name in the film credits was not a very effective measure to protect the interests of the director. The name of the director was not kept secret in the course of production process; furthermore, the artistic style of Dmitry Astrakhan is very well known. Still, as no recognised right of the author was infringed, the director had no legal grounds to sue the producer.

The Copyright Statute of 1993 had recognised the right to protect a work from any distortions that *may harm the honour and reputation of an author*. This second part of the Statute's provision lowered the level of protection of authors' interests because it prohibited violation of a work's integrity only to the extent that an act infringes upon an author's good name. Apparently, this wording was the result of an incorrect translation of Art. 6*bis* of the Berne Con-

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vention. Professor Eduard Gavrilov referred to the right to adaptation of a work as giving an author a guarantee of the integrity of a work.[26] However, as the right in question was an economic one, it could be – and had been – transferred from the author to the producer. Therefore, in this case, the author had lost the right to demand the suspension of the unauthorised adaptation of a work.

According to Article 1266 of Part Four of the Civil Code any modification, shortening or addendum of a work *without the author's permission* shall be banned. Where this provision is not respected, an author shall have the right to claim the protection granted by Article 1251 of the Civil Code (see above). As with any moral right, the right to inviolability of an artistic work is not transferable. However, taking into consideration the wording of Article 1266, it seems that the protection of the interest of authors will not be adequately effective, even under this new provision. A producer, who wants to produce his own version of a film without the consent of the author may "neutralise" the gurantee provided by the law if he obtains the author's permission to adapt his work, including modifying, shortening or supplementing it.

In order to balance the interests of creators and managers it is "a must" to introduce in the law guarantees that may not be overcome by making an agreement between the author and the producer. One way to introduce them is to change the wording of Article 1266 of the Civil Code. A prohibition on carrying out any modification, shortening or addendum of a work seems to be a more adequate formula for the protection of rights of authors. An even more preferable option might be to introduce a definition of censorship (as a form of intervention into the creative process) with regard to artistic works in the statutory law, for instance, in the "Fundamentals of Legislation on Culture of the Russian Federation" and to establish liability for the performance of censorship.

Authors' Rights on Audiovisual Works Produced in the Soviet Union

As mentioned above, according to Soviet law, legal persons could be considered as original authors. This approach caused a number of problems concerning rights in films produced by Soviet studios. The Soviet studios were treated as holders of authors' rights according to Article 486 of the Civil Code of the Russian Soviet Federative Socialist Republic of 11 June 1964 (hereinafter the Civil Code 1964).[27] The authors' rights of legal persons had an eternal term of protection (Article 498). The rights could be transferred by an agreement to a party or to the studio's successor in the case of the motion picture producing studio being reorganised, or to the State if the studio was liquidated. Often, however, intellectual property rights had not been recorded on a company's balance sheet of intangible assets. The reason for this was the fact that movies were produced on the basis of governmental orders and with State funding. Governmental authorities expected that they held 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 Civil Code 1964 a script writer, a composer, a director, a producer, a director of photography and other authors who contributed to the movie-making process had the rights to separate use of their works – that is, rights to use their parts of the whole product.

At the beginning of the 1990s all major state-owned production companies were restructured, privatised or liquidated: a number of new production companies have since emerged. The new companies were generally subsidies of the major state-owned production companies (see above) that functioned as umbrella companies for the actual producers. However, the new companies often did not obtain any rights, while the old majors disappeared in the course of time. In parallel to this development, the Government passed a number of resolutions through which all rights to movies and original copies of the works were transferred to the governmental archives organisations (foundations). At the same time, some authors who had participated in a movie-making process claimed to be the proper rightsholders. They referred to the Copyright Statute 1993 as the basis of their claim.

Resultantly, a very tangled jurisprudence emerged. Unfortunately the Supreme Court as well as the Supreme Arbitration Court of the Russian Federation did not propose a way of resolving these collisions of interests. Neither the "Fundamentals of Civil Legislation of the USSR and Republics" of 31 May 1991,[28] nor the Copyright Statute 1993, nor Part Four of the Civil Code include any provisions clarifying the principles for identification of "proper" rightsholders having the exclusive rights to audiovisual works. However, beginning with the entry into force of the "Fundamentals of Civil Legislation of the USSR and Republics", the right of organisations to be considered as authors of audiovisual works was abolished. From 3 August 1992 onwards, no organisation had had the authors' rights to its works. In 2004 an amendment to the Copyright Statute 1993 was introduced, providing a limited term of protection of authors' rights belonging to legal persons. Its duration is 70 years, starting from the date of publication of a work or its creation if it had never been published. The Consummation Statute of Part Four of the Civil Code confirmed this rule.

It seems to be a good solution to allow the use of intellectual property accumulated by the state and state owned

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companies during former years by way of transferring the rights to use motion pictures to production companies via competition mechanisms. The Government already had experience in the allocation of financial resources in order to support Russian culture and heritage. The practical experience gained during the implementation of the Statute on State Support may be useful for starting and advancing on the idea of allowing the use of existing intellectual rights by producers.

Governmental Support of Cinematography

Principles of Governmental Policy on Cinematography

In 2005 the Government of the Russian Federation approved the Federal Special Programme "Culture of Russia (2006 – 2010)"[29] (hereinafter "the Programme"). This document details the governmental point of view on problems existing in the sphere of culture. It also contains a "road map" for governmental actions aimed at resolving existing problems in the area of promoting culture. It also sets practical (including quantitative) criteria for evaluating the status quo of cultural policies and their success and establishes a plan for financing cultural budgets for the period from 2006 to 2010.

The Programme stated that, in general, the crisis in the sphere of culture had been overcome; however, culture still needed support provided by the State in order to adapt organisations active in the field of culture to the free market economy. The aim of the Government was to provide a balance between freedom of economic activities and preservation of cultural heritage.

Part of the document is devoted to cinematography. One of the undertakings of the Government, according to the Programme, shall be to support national producers of cultural products and to promote such products abroad. An important factor in the attainment of this goal shall be governmental support of the production of Russian motion pictures. According to the Programme, in the course of five years more than 80 fiction films, 1100 non-fiction movies and 30 animated pictures shall be produced. A quantitative criterion for evaluating the progress of the film production industry shall be the share that national motion pictures (see definition below) takes in the total amount of distribution of motion pictures. This share shall extend from 16 per cent in 2004 to 22 per cent in 2010.

The total amount of funding to be provided to support the production of national motion pictures, according to the Programme's five year plan, shall be RUB 14.5 billion. Of this sum, RUB 3.2 billion shall be directly funded by the state budget. In fact the amount of financing from the budget was significantly increased from the amounts outlined in the Programme. Governmental financing of production of national motion pictures is provided within limits defined in the budget statute of the respective year. State budget financing of the cinema industry in 2008 constituted a total sum of RUB 2.2 billion. The same amount of financing shall be provided in 2009 (the Programme proposed RUB 640 million for each of the remaining years until 2010). The Prime Minister of Russia, Vladimir Putin, announced that by 2010 the budget for industry support shall be doubled.

Governmental Financing

In order to obtain financial support a producer shall comply with the rules of the Statute on State Support. It states that cinematography will be partially financed by both the state and private companies. The available funds shall be allocated between producers, distributors and exhibitors of national motion pictures. Allocation of financing shall fall within the competence of the Ministry of Culture of the Russian Federation.

The financial support of the production of a national motion picture provided by the Government shall generally not exceed 70 per cent of all costs of a movie production. An authorised governmental body shall have the right to provide 100 per cent of the financing of a national motion picture production. It shall exercise this right by taking into account the cultural significance of the project

In order to be recognised as "national" an audiovisual work shall satisfy the following requirements: (i) producer – Russian citizen or legal person registered in the Russian Federation, (ii) authors – citizens of the Russian Federation, (iii) the film's crew includes not more then 30 per cent of foreign citizens, (iv) the film's language is either Russian or in any other language of the peoples of the Russian Federation, (v) not less than 50 per cent of works carried out on the film is provided by production companies registered in the Russian Federation, (vi) foreign companies' investments shall not exceed 50 per cent of the estimated cost of movie production (Article 4 of the Statute on State Support).

In order to start the production of a national motion picture supported with State aid a producer shall enter a state contract to be concluded in accordance with the Federal Statute "On Distribution of Orders on Goods Supply, Performance of Works, Rendering Services for Governmental and Municipal Needs".[30] The Statute provides for a public tender to determine the producer with whom the Ministry of culture of the Russian Federation will enter into a contract.

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Tax, Financial and Other Privileges

During the period from 1996 to 2004 the Government of the Russian Federation granted producers and other participants in the production process leading to cinematographic works (including distributors, promoters etc.) a fair number of privileges.[31] All these privileges were mentioned in the Statute on State Support and regulated in special acts (for example, the Tax Code, Customs Code). According to the Statute on State Support (Article 12), the profits resulting from any activity directed at *inter alia* the production of audiovisual works were not subject to profit tax.

Article 13 of the Statute on State Support stipulated that persons that imported or exported cinematographic productions, materials and equipment were not obliged to pay customs taxes. Legal persons of cinematography[32] had a number of other tax and financial privileges. Some of the privileges were introduced initially with limited terms of action (for example, privileges for importers of cinematographic production) and were later annulled according to transitional provisions of the Statute on State Support of 2002; other privileges were abolished in 2004 when the reform of laws regulating the social sector took place. As part of this process of reform the State undertook obligations to increase its financing of the most important social areas, including cultural (and cinematography as its part), instead of providing privileges.

Today the legislation contains only a few privileges for the activities of producers. Article 149 (para. 2 point 21) of the Tax Code of the Russian Federation[33] exempts from all taxes the sale (and also transfer, performance, using for own needs) on the territory of the Russian Federation of (i) works (services) in the production of cinematographic products performed (rendered) by organisations of cinematography, (ii) rights to use (including renting and showing) cinematographic products which have received the national film certificate.

Conclusions

Despite the fact that Russia today possesses a very well-developed legislative system for the regulation of intellectual property, the problem of clarifying the status of the producer of a motion picture, as well as defining what constitutes an audiovisual work, remains important.

The intellectual property legislation does not define the relationship between producer and creative workers in an appropriate way. On the one hand, the producer initially lacks any rights of his own to use works which he is about to produce and before he can claim to have acquired the necessary rights he needs to provide as many documents as possible to prove that he is a proper rightsholder. What documents are required is unclear because several issues concerning the authorship in audiovisual works are not clearly resolved by law. This uncertainty leads the producer's to establish as many guarantees as possible for himself in his agreements with the authors, whose works he wants to incorporate into the final audiovisual work (i.e. the film). This may oblige the producer to make excessive use of contractual law instruments.

At the same time, the general legal framework does not protect the rights of creators in a satisfactory manner. Neither the integrity of authors' works, nor the freedom from censorship is guaranteed by law. The need of both sides to look after their own interests, in the absence of any possibility to base their respective positions on clear and transparent legislation, results in mutual distrust and potential controversies.

As a conclusion of this general analysis of the contractual regulation of intellectual property it is fair to state that Part Four of the Civil Code contains a number of loopholes which, in the future, may cause significant problems and legal disputes between producers, authors of (and contributors to) audiovisual works and third parties. One of the key issues is whether it is possible to transfer an exclusive right to which the right of a third party is attached. Until this question is answered, the potential rights of third parties may impede both the authors' and the producers' ability to use the whole audiovisual work

As regards the governmental support of the producer's activities it seems that the Russian system gains in transparency and orientation towards the principles of free market economy. The State has declared its readiness to provide financial support to a concrete category of audiovisual works without demanding any loyalty or introducing any requirements to the content of audiovisual works. In this regard the state provides freedom of creative activities. However, while progressing with the introduction of clear and transparent rules for today's situation, the Government doeis not making sufficient efforts in order to solve long-lasting problems such as how to use legally a great number of audiovisual works created during the Soviet era. The lack of certainty in this regard has a negative impact on the development and promotion of culture in the Russian Federation.

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